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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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THE ANNUAL DIGEST OF DECISIONS OF THE UNITED STATES
COURT OF MILITARY APPEALS*

INTRODUCTION

The October 1972 to October 1973 Term of the United States Court of Military Appeals was not a particularly successful venture for military accused and defense counsel. While the right to a speedy trial in the military justice system was greatly fortified late in the term there was no other substantive area of uniform advances favorable to the defense bar. On the negative side the right to individual counsel, the freedom from unreasonable searches and seizures and the guilty plea requirements suffered setbacks. The tone of the Court's last term is perhaps best seen in the construction of the articles of the Uniform Code of Military Justice adverse to the accused in every case where new subject matter was broached. See United States v. Jordan, 46 CMR 194; United States v. Lallande, 46 CMR 170; United States v. Patterson, 46 CMR 157; Peebles v. Froehlke, 46 CMR 266.

Although this term was somewhat unsettling for the defense bar the future of military justice cannot be safely predicted. William H. Darden, the principal architect of the Court's work the past few years, resigned effective 29 December 1973. Judge Duncan has been named Chief Judge and during February Senior Judge Ferguson was recalled to active service. Considering that Judges Quinn and Duncan often find themselves on opposite sides of an issue, the trends of the 1972-1973 Term have an uncertain fate. Depending upon the longevity of Judge Ferguson's role as an active judge, defense counsel in preparing their cases should not let lie an issue on which Judges Duncan or Ferguson may have dissented. While overruling prior decisions is extremely difficult, erosion of decisions is quite possible under different factual circumstances. This year's term may prove very interesting.

* For administrative convenience case citations will only be to the CMR in this Digest. Some cases decided during the Term may not be included.

JURISDICTION

Personal

Three cases during the 1972-1973 Term involved questions of court-martial jurisdiction over the person. In United States v. Graham, 46 CMR 75, the Court found a lack of jurisdiction where the accused had enlisted in the Army at age 16 and the theory of constructive enlistment was unavailable because the evidence in no way showed that Private Graham had served voluntarily after his 17th birthday. The accused protested continually after orders were received assigning him to Vietnam and constructive enlistment was not established merely because he accepted some pay and food while in Korea after his 17th birthday.

A petition for extraordinary relief led to a signed opinion that jurisdiction to retry an accused depends solely on his status at the time court-martial proceedings were initiated. Peebles v. Froehle, 46 CMR 266. The petitioner had been court-martialed twice, receiving a punitive discharge in each instance. Owing to the vagaries of appellate review the second adjudged dishonorable discharge was executed before completion of appellate review of the first court-martial. Peebles' first conviction was then reversed by the Court of Military Appeals (45 CMR 240) and he sought a writ of prohibition and injunction against the decision to retry him for the first offenses. Although unstated, a combination of Articles 2(7), 3(a) and 63 led the Court to continue its history of sustaining court-martial jurisdiction.

Finally, in United States v. Kilbreth, 47 CMR 327, the Court held that the evidence adduced at trial indicated the Army had not followed its own regulations in calling the accused to active duty; therefore, the order to active duty was invalid. The defense claim was sustained even though Private Kilbreth had apparently failed to challenge his callup for alleged unsatisfactory participation in the National Guard at an earlier court-martial for a prior AWOL.

Subject matter

Accepting the defense suggested analogy to carrying a concealed weapon, the Court determined that a charge alleging the wrongful possession of narcotics paraphernalia off post was not service connected as a syringe does not have independent service significance. United States v. Teasley, 46 CMR 131. Judge Quinn in dictum reaffirmed the Court's opinion that the possession and use of marijuana and narcotics off base is service connected while noting that federal courts have challenged this view.

See "Article 134 and Military Defense Counsel--What can you Do?" THE ADVOCATE, Vol. 5, No. 2, at 22 (1973). Also in reaction to federal circuit decisions declaring Article 134 unconstitutional the Court issued an order in United States v. Unrue, USCMA (April 2, 1973) rejecting an attack on the general article citing the Supreme Court's decision in Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). The Supreme Court heard argument on Levy v. Parker, 478 F.2d 772 (3d Cir. 1973) and Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973) and its decision is anxiously awaited.

Authority to Convene Courts-Martial

In a case of great confusion the Court sustained the general court-martial jurisdiction of Brigadier General Wear who was simultaneously the Commanding General, U.S. Army Forces, Military Region 2 and the Commanding General, Second Regional Assistance Group, U.S. Army Forces, Military Region 2. United States v. Masterman and Charleston, 46 CMR 250. Although he purported to act as commander of the latter in approving Masterman's conviction and in referring Charleston's case to trial (a command that never possessed GCM authority) the Court nevertheless concluded General Wear was correct in acting since as commander of the former unit (a unit reduced to zero strength at the time of the action and referral) he had GCM authority and his authority to act in that capacity continued. Confused? That's all right for hopefully the case will be confined to its facts which few, if anybody, understand. In United States v. Wilson, 47 CMR 353, the Court held that U.S. Army Element, I Corps (ROK/US) Group, at Camp Casey, Korea, was the functional equivalent of an Army Corps and properly possessed general court-martial jurisdiction under Article 22(a)(3).

Composition of the Court-Martial

The decision in United States v. White, 45 CMR 357, holding that a court-martial including enlisted members must be requested personally in writing by the accused was held retroactive in United States v. Asher, 46 CMR 6. In Asher only the sentence was affected since the accused had pleaded guilty. One of the most litigious of all military accused received the benefit of the White decision in a petition for extraordinary relief. Gallagher v. United States, 46 CMR 191. (See 35 CMR 363). A blank military judge form slipped through the Court of Military Review to be promptly reversed in an adherence to United States v. Dean, 43 CMR 52. United States v. Montanez-Carrion, 47 CMR 355 (1973).

TRIAL PROCEDURE AND MOTIONS

Speedy trial

The impact of the guidelines promulgated in United States v. Burton, 44 CMR 166, were finally felt near the end of this term with resounding force favorable to military accused. See "Speedy Trial: Burton and Its Aftermath," THE ADVOCATE, Vol. 5, No. 3, 39 (July-Oct 1973). Despite suffering 122 days of pretrial confinement an accused whose offenses occurred prior to the effective date of the Burton rules (17 December 1971) obtained no relief. United States v. Gray, 47 CMR 484. In contrast, accused enjoying the benefit of the Burton presumption of an Article 10 violation when pretrial confinement exceeded three months or 90 days had their charges dismissed in the face of normal delays caused by mistakes in drafting, manpower shortages, illnesses, and leave. United States v. Marshall, 47 CMR 409 (126 days); United States v. Stevenson, 47 CMR 495 (107 days); United States v. Smith, 47 CMR 564 (109 days). The government may no longer rely on a stipulated chronology but must demonstrate really extraordinary circumstances to overcome the Burton presumption. United States v. Marshall, supra.

Former Jeopardy

In a curious case the Court held that an individual may not be later convicted of offenses for which he was originally acquitted at a court-martial defective because of the lack of a written request for trial by judge alone. United States v. Culver, 46 CMR 141. Judge Quinn, who dissented to the holding in United States v. Dean, 43 CMR 52, pointed to the Manual limitations on sentence in a rehearing, paragraph 81d(1), and the concept of fundamental fairness intended by the drafters of the Manual for his opinion that Private Culver could not be convicted at a "rehearing" necessitated by a Dean error. Concurring, Judge Duncan noted that a valid reference of the charges to the first court-martial gave a court of the United States proper jurisdiction and that a Dean error constitutes loss of jurisdiction not defective jurisdiction from the outset. Dissenting, Judge Darden opined that jeopardy only attaches after the introduction of evidence, a point at which in Culver's first trial the court-martial was improperly constituted.

No former jeopardy problems were found in the situation where a military judge erroneously entered findings of guilty to a lesser included offense pursuant to a plea before the court members convicted of the greater offense. United States v. Bryant, 46 CMR 36; United States v. Green, 46 CMR 51. The Court relied on the fact that the military judge neither intended nor the defense understood the judge's finding as an acquittal of the greater offense.

The offense of AWOL also presented a double jeopardy problem in United States v. Lynch, 47 CMR 498. The Court held that an acquittal for the period 7 November 1969 to 7 January 1971 from the accused's attached unit precluded a subsequent conviction for the included period 27 November 1969 to 7 January 1971 from the accused's assigned unit.

(Immunity)

In United States v. Barhardt, 46 CMR 134, a grant of immunity received after trial but before the convening authority's action was declared not to bar approval of his not final conviction because of his guilty plea and the lack of any promise to exonerate him for responsibility for the offense.

Counsel

The military accused's right to counsel of his choice suffered serious setbacks during this latest term. In United States v. Timberlake, 46 CMR 117, the accused was held to have lost the right to the services of individual counsel who had previously represented him because he did not contest his counsel's decision to withdraw from the case. As Judge Duncan noted in dissent, this basis for decision is suspect considering that the appellant was unaware of his counsel's departure from Vietnam until it occurred. Perhaps the most significant loss for military accused flowed from the decision in United States v. Jordan, 46 CMR 164, opining that Article 38(b) did not entitle accused the absolute right to detailed counsel and civilian counsel and individual military counsel if reasonably available. The Court perceived the right as between civilian counsel or individual military counsel and detailed counsel without explaining the different legislative origins between the right to civilian counsel and individual military counsel. However, the Court did not foreclose accused from requesting the services of all three types of counsel and, at least where an accused already has individual and detailed military counsel, it would be unlikely that a timely request to secure civilian counsel would not be heeded and protected by military appellate courts.

Where trial defense counsel had previously represented a co-defendant at a court-martial wherein a major blame was placed on the accused, the totality of the circumstances required a rehearing for an accused defended by the same counsel before the same judge at a subsequent trial. United States v. Jarvis, 46 CMR 260. Trial defense counsel were admonished to avoid

conflict of interests situations. (Counsel should be asked to be relieved from one of the cases and the client fully advised.) In United States v. Willis, 46 CMR 112, the fact that the defense counsel's name appeared in the allied papers as having discussed the case with the CID was held not to statutorily disqualify him from later acting as defense counsel especially since he made the standard disclaimer at trial of not having acted for the prosecution or as an investigating officer. Judge Duncan, finding Article 27's requirements more mandatory, dissented and expressed that a limited rehearing should be held on the extent of the defense counsel's prior involvement. No jurisdictional infirmity was found where the accused was defended by individually requested counsel who was also improperly detailed as one of several trial counsel on the court-martial to which the case had been referred. United States v. Phillips, 46 CMR 4. The formal relieving of the counsel in question as trial counsel, appellate affidavits, and the fact he was individually requested counsel led to finding no prejudice.

Members

In United States v. Kemp, 46 CMR 152, the Court of Military Appeals rejected an invitation to utilize its supervisory power over military justice to provide a system of random selection for court members. Instead, the Court held that a convening authority may rely upon his staff to nominate prospective court-members so long as subordinates do not arbitrarily exclude classes or are impermissibly led to believe one factor is to be controlling. Noteworthy for defense counsel is the fact that Kemp's attorneys had successfully moved at trial to discover the nature of the selection process.

Witnesses

A unanimous Court held that the military judge erred in denying the defense a continuance to obtain the testimony of a psychiatrist in an attempt to extenuate his offense and to mitigate his punishment for a sex crime. United States v. Barfield, 46 CMR 321. However, where an accused initially refused to cooperate with a military sanity board because of the lack of doctor-patient privilege in military law, the Court found insufficient basis for the hiring of a civilian doctor at the government's expense since the question of privilege for the doctor as well as the patient is governed by the law of the trial forum. United States v. Johnson, 47 CMR 402. The actual basis for the holding however, rested on the careful procedures utilized by the military judge preventing the disclosure of a report

eventually rendered by military doctors, and the defense's satisfaction with the procedures and the military report.^{1/} This decision does not mean a civilian psychiatrist may never be hired by the defense. Under paragraph 116 of the Manual such an expert could be hired where there is a history of disturbances, former diagnosis or conflicts in military psychiatric opinions. Id., at 406.

Guilty Pleas

The Court of Military Appeals qualified the rigorous standard utilized by military appellate courts in reviewing guilty pleas by opining in United States v. Logan, 47 CMR 1, 3, that for a plea to be improvident "the record must contain some reasonable ground for finding an inconsistency between the plea and the statements" and that Article 45 is "fully met by requiring some substantial indication of direct conflict between the accused's plea and his following statements." An important footnote in the opinion states that a full inquiry into a plea of guilty involves the accused's understanding of the nature and effect of his plea, the factual basis for an admission of guilt, and full inquiry by the military judge of resulting inconsistencies. The Court did find pleas of guilty improvident where the accused's statements showed a return to military control during a period of AWOL, United States v. Reeder, 46 CMR 11, and raised an issue of self-defense to manslaughter, United States v. Woods, 46 CMR 137. In Reeder the duties of a military judge in accepting pleas of guilty were emphasized and in Woods the Court of Military Review's reliance on a pretrial agreement to sustain the plea was rejected. A miscalculation in the maximum punishment (20 1/2 instead of 26 1/2 years) was held too slight and specifically of no influence on a plea of guilty in United States v. Kilgore, 46 CMR 67.

Miscellaneous

In United States v. Roman, 46 CMR 78, the Court held that the military judge erred in reconvening the court-martial two weeks after trial to give an omitted instruction on sentence relating to forfeitures. The court members had first adjudged a forfeiture of "two-thirds of all pay and allowances" but

^{1/} An ingenious defense motion placed limitations on the sanity board report preventing the trial counsel from obtaining any disclosure made by the accused during examination. See United States v. Johnson at 404.

corrected this to two-thirds "pay and allowances per month for 6 months" (emphasis added). Precedent established that the omission of the words "per month" from a forfeiture sentence permitted only a one month forfeiture (United States v. Johnson, 32 CMR 127) so that the giving of the omitted instruction could only be deemed prejudicial. By split decision on the remedy, a rehearing on sentence was ordered considering Roman's prior record.

Over the dissent of Judge Duncan, a majority of the Court in United States v. Watkins, 46 CMR 270, failed to find prejudice in the staff judge advocate having furnished court members excepts from the Manual "for informational purposes." Trial defense counsel only objected to the inclusion in the folder of the Table of Maximum Punishments and the Table of Commonly Included Offenses and made a general challenge to the array of court members without voir dire. Inquiry by the military judge disclosed that the members had no recollection of the punishments for the charged offenses that they would take the law solely from his instructions. The combined actions of defense counsel and military judge led to the no prejudice finding in the error of the staff judge advocate

EVIDENCE

Confessions and Admissions

Of the several cases decided during this Term under the general classification of confessions and admissions the specific area of receiving most attention concerned threshold questioning of the accused after which the accused made incriminatory statements leading to his arrest and/or a subsequent search.

In United States v. Atkins, 46 CMR 244 a military policeman was patrolling a bunker line in Vietnam when he heard a burst of automatic weapon fire from a specific bunker. He subsequently entered that bunker where he found its two occupants asleep with their automatic rifles propped up near each of them. He smelled and examined the rifle by the accused and as a result suspected that it had been recently fired. He awoke the accused and without any warning asked the accused if the rifle was his. After the accused admitted ownership the MP only then advised the accused of his rights. Further questioning elicited another, and incriminating, response concerning the ownership of the weapon leading to apprehension and a subsequent search revealing heroin on his person. The Court noting the MP's own admission that no basis existed

for the accused's apprehension without the accused's admission that the weapon was his, held that the unwarned statement regarding ownership was an essential element of the probable cause for apprehension and was an exploitation of improperly obtained evidence. The Court went on to find that the contraband found during the search was the "fruit of the poisonous tree" and therefore inadmissible.

In United States v. Watkins, 46 CMR 270 the Court held that although a threshold advice was required, the failure to warn was not reversible error. The Court distinguished Atkins by noting that the accused's apprehension and the subsequent inventory were not the fruits of the unwarned statement, since the MP had already been informed of the improper car registration and of the accused's ownership before questioning him. The Court also noted that the vehicle was taken to the police station with the accused's permission and that the accused was not taken into custody until the inventory revealed marijuana thus purging the primary taint. The effect of unwarned threshold questioning was again the issue in United States v. Woods, 47 CMR 124, where a charge of quarters observed certain persons with opium and drug paraphernalia in their possession. Learning from these men that they had gotten the drug from the accused and because of his intense dislike for drug dealers, the CQ decided to try to buy some opium from the accused and then turn him in. When the accused answered his door the CQ asked "if he had anything to smoke." The accused replied that he did but arranged to transfer it later in the evening. After the transfer was made the CQ gave the contraband to his commander precipitating a search of the accused's room. Examining the CQ's testimony at trial and deciding that while he was partially motivated by his personal feelings he also believed he was acting as CQ. He was therefore directly engaged in duties as a representative of the commander and could not question the accused about a suspected offense without first warning him of his rights under Article 31. (Query whether this case will prove to be a powerful defense weapon in an entrapment case involving a controlled buy???)

The final case dealing with threshold advice was United States v. Temperly, 22 USCMA 383, 47 CMR 235 (1973). On the steps of his home, prior to any apprehension, an FBI agent first addressed the accused by his alias and the accused responded. The accused was then asked what his true name was, responded accordingly, and only then was placed under apprehension for desertion and given appropriate warnings. Noting that FBI agents apprehending deserters are not bound by Article 31 but by Miranda the Court ruled that there was no custody observing that the test of custody was an objective rather than a subjective one based on the intent of the apprehending officer.

An inculpatory statement illicitly obtained from the accused during a formal interrogation pursuant to proper warnings was found untainted by an admittedly illegal search of the accused's quarters in United States v. Foecking, 46 CMR 46. The Court held that the determining factor in such a situation was "not whether the illegal act preceded the otherwise legal activity in point of time, but whether a particular item of evidence obtained in the latter was procured by exploitation of other evidence illegally procured during the former." Stressed by the Court was the fact that the accused's own responses at the beginning of the interview left little doubt that the seizure of the pistol had no effect on his decision to waive counsel and submit to the interview.

In United States v. De Champlain, 46 CMR 150, repeated and prolonged attempts to interrogate an accused after he had exercised his right to silence led to a one-page sustaining of the lower court finding of involuntariness. Why The Judge Advocate General of the Air Force certified the case is unanswered unless it was felt that since the accused had never specifically and orally invoked his right to silence but instead merely continued to shake his head in a negative fashion over a period of six days.

Finally, two peripheral cases warrant brief mention. In United States v. Johnson, 47 CMR 402 the Court once again re-affirmed the lack of a physician-patient privilege in military law and noted that even a civilian psychiatrist "may be compellable to testify concerning disclosures made to him by an accused." In United States v. Seigle, 47 CMR 340, the Court discussed the evidence needed to corroborate a confession. After first citing paragraph 140a(5), Manual for Courts-Martial, the Court went on to note that the Manual standard was difficult to define, but that it did not require independent evidence tending to prove each element of the offense. After indicating what the standard was not, the Court never quite got around to telling us what that standard was, stating only that it should "accommodate the facts of each case so as to generate fairness in this troublesome area of trial practice."

Search and Seizure

During the October 1972 term of Court, Judge Quinn's inclination to consistently hold for the government in the area of search and seizure law achieved the level of absolute polarity. For the second consecutive term, whether in the majority or in the dissent, Judge Quinn found probable cause in every search or otherwise found justification to sustain the search. Although some defense headway was made anyway,

on balance a fair appraisal of this past term means it is ever more difficult for accused soldiers to prevail when litigating their Fourth Amendment rights. As a result, it is exceedingly important for military defense counsel to be thoroughly familiar with controlling decisions of the Court in the area, not only to better the chances of prevailing at trial, but also to protect the record for appeal. In questioning witnesses counsel should attempt to elicit responses, especially from the "authorizing officer", which favorably fall within factual circumstances relied upon by the Court of Military Appeals or which provide a sound basis for factually distinguishing unfavorable precedents.

(Probable Cause)

During the past term, four cases were decided purely on whether or not the facts presented to the authorizing officer were sufficient to constitute probable cause to search. United States v. Smallwood, 46 CMR 40; United States v. Sam, 46 CMR 124; United States v. Troy, 46 CMR 195; and United States v. Henning, 47 CMR 229. Each decision, whether sustaining or rejecting the legality of the search was marked by a dissenting opinion.

In Smallwood, the principal opinion upholding the search by Judge Quinn, relied upon three factors leading to the search of appellant's person and then his room (marihuana was discovered in both places): (1) information regarding appellant's recent drug use was provided to the authorizing officer by a previously reliable informant; (2) this information was obtained in a personal conversation with the informant, where the latter's demeanor could be assured; and (3) the information was corroborated by the fact that only a few minutes earlier another officer had seen appellant smoking what appeared to be a marihuana cigarette. Judge Quinn held that the information appeared reliable and clearly justified a search of appellant's person. Based on the fact that the informer had indicated that appellant had marihuana in his room on previous occasions, combined with the fact of finding marihuana on appellant's person, subsequently search of appellant's room was denominated as "logically and legally sound." In his concurring opinion, Judge Darden placed strong emphasis on the fact that another officer having seen the appellant commit a crime, when transferred through usual channels, was sufficient basis alone for apprehension and search of the appellant. He also agreed that the subsequent search of the room was proper based upon the information provided by the informants, citing United States v. Jeter, 44 CMR 262. In a long and well documented concurring and dissenting opinion, Judge Duncan agreed that "the

search of the person of the appellant was legally sound," but refused to extend the mantle of legality to the search of appellant's room, relying heavily on Spinelli v. United States, 393 U.S. 410 and United States v. Gibbins, 45 CMR 330. Judge Duncan stated that since "the statement of the informant, albeit reliable, that the appellant" in fact "kept marihuana and drugs in his room, was not supported in any way by showing how he gained the knowledge, the officer authorizing the search did not have a 'substantial basis' for finding the information was gained in a reliable manner."

In United States v. Sam, *supra*, in somewhat confused factual circumstances, Judge Duncan writing for the majority in a fashion consistent with his reasoning in Smallwood, *supra*, held that a minor misunderstanding of the facts was not fatal to a search based upon otherwise sound information, but where probable cause existed to search appellant's person, the same facts did not justify a subsequent search of his locker. The Sam decision is important, not for its result, but for its statements of law. Judge Duncan criticised "the uncomplimentary nature of provisions of military law which permit oral application and authority to search and seize," decried the lack of a tangible and specific authorization in the "silent" record of trial, because it left the Court with insufficient facts to determine the exact extent of the search authorized of appellant's person, where incriminating evidence was found in his wallet. The search was nonetheless upheld "under these rather peculiar circumstances" only because the Court was able to find that the permission to search appellant's person was "clearly granted." In extremely important language, Judge Duncan ruled the search of appellant's belongings and locker illegal, stating in language applicable in many military cases:

Although a soldier's room or locker are often likely placed to conceal items he does not wish discovered, the Fourth Amendment requires more than the joinder of this likelihood with the suspicion that he has committed a crime to justify a search of these places in the hope that evidence or the fruits of crime may be discovered there."

In his concurring and dissenting opinion, Judge Quinn diametrically opposed the above majority conclusion and would have upheld the search of the locker as "a logical and probable place of concealment."

The holding in United States v. Troy, *supra*, written by Judge Darden, is a logical follower to Smallwood, Sam and Gibbins, all *supra*. A shaving kit was found in the common area of a "hootch" in Vietnam which contained barbituates and personal papers belonging to appellant. The majority held that where no additional relevant information was at that time possessed by the authorizing officer, he erred in authorizing a search of appellant's belongings based upon the shaving kit findings. In so holding the majority stressed that "personal possession of contraband material at a place away from home does not, standing alone, provide probable cause to search the possessor's living quarters. Gibbins; see also Racz, 44 CMR 78. The Court also found that the search tainted a contemporaneous oral admission. Judge Quinn wrote a short factual dissent, citing no cases.

The most disappointing decision in the "probable cause" cases is the holding of Judge Quinn, with Judge Darden's concurrence, in United States v. Henning, *supra*, that the reliability of an unidentified informant was adequately established and the underlying circumstances were fairly inferable. As is evidence from the dissent of Judge Duncan, the decision is an aberration and should be construed as applicable to its particular facts and circumstances.

In sum, although the case law announcing the general principles of the "probable cause" area of search and seizure law is somewhat stable, each case will continue to be decided upon its own peculiar facts. In light of that, it is especially important for defense counsel to marshal the evidence, and elicit testimony in each in such a fashion as to stress favorable aspects of their factual circumstances, and argue favorable Court of Military Appeals cases by analogy.

(Special Exceptions to Probable Cause)

In three cases, the Court of Military Appeals severely limited the Fourth Amendment rights of servicemen by terming the governmental intrusion to be "reasonable" or "justified," thereby avoiding the "probable cause" requirement.

In United States v. Torres, 46 CMR 96, a unanimous opinion written by Judge Duncan held that a postal clerk who was ordered to open a sealed package belonging to him, by an officer who intended to make an "example" of a military postal employee having personal property in the post office in contravention of the regulation. The package seized and opened was found to contain silverware stolen from the mail. Relying in part upon United States v. Maglito, 43 CMR 296, the Court concluded

that "an inspection of this kind is reasonably calculated to effectuate a proper Government interest," and that appellant should not reasonably have expected "freedom from governmental intrusion designed to insure proper, efficient, and secure operation of the postal unit."

Lest their decision in Torres be misconstrued as a limited holding, narrowed simply by the fact that postal regulations were involved, Judges Quinn and Darden quickly expanded the "reasonableness" theory in United States v. Poundstone, 46 CMR 277. The majority concedes that a gate vehicle search in Vietnam was not supported by probable cause, but nonetheless upheld the search as "reasonable" when ordered by the battalion commander of his own vehicles. While Judge Quinn's principal opinion mostly stressed the combat environment and the right of the government to retain possession and control over its own property, Judge Darden's concurring opinion stressed the commanding officer's inherent right to protect the security of his installation, along with the fact that the incident occurred in a combat zone. Judge Duncan vigorously dissented, refusing to suspend the Fourth Amendment simply in the fact of purported "military necessity." The most that can be said for Poundstone is that it is now of more academic than practical value because of its limitation to a combat environment.

The last in this series of cases, United States v. Unrue, 47 CMR 561 demonstrates that bad facts often make bad law. The search was conducted at a drug checkpoint at Fort Benning, Georgia with the assistance of a well-trained marijuana sniffing dog. Although not specifically stated as a basis for Judge Quinn's majority opinion, a factor was that at a preliminary checkpoint, appellant was directed to read a 5 1/2 by 3 feet sign stating:

Attention, narcotics check, with
narcotics dogs. Drop all drugs
here and no questions asked.
Last Chance.

It is evident that the majority was not in sympathy with appellant because he did not take advantage of the opportunity to use the "amnesty barrel" and throw his drugs away without fear of punitive action. Although the majority admitted that this was a roadblock rather than gate search, and that "there was no consent to the search" the search was sustained under a "military necessity" rationale. The Court assumed without much discussion that an "alert" of a marijuana detection dog can, by itself, supply probable cause. In his dissenting opinion,

Judge Duncan stated "the major reason for my reaching a decision different from the other court members is that they find the facts of this case sufficient to show a military necessity while I do not." Judge Duncan drew a sharp distinction between the search in Unrue and a normal gate search, stating: "I believe the search here to be general in nature, non-consensual, and not within the authority of [the gate search regulations]." In conclusion, Judge Duncan stated that "since the stopping of the vehicle was without any reasonable belief that criminal activity was afoot, and was not within one of the exceptions to the requirement of probable cause, it was violative of the appellant's Fourth Amendment rights."

It appears from the above group of cases that it is becoming increasingly difficult to predict whether or not search and seizure cases will be ultimately litigated on the issue of probable cause. Outside of the Vietnam situation, the government argument of "military necessity" or "reasonableness" will surely lose much of its force. While all three cases can be readily distinguished on their facts [Torres (flaunting of postal regulations); Poundstone (combat and Unrue (amnesty box)], these cases demonstrate a disturbing narrowing of the Fourth Amendment rights of servicemen, which may partially reflect official panic surrounding the epidemic proportions of the military drug problem. Trial defense counsel should establish sufficient facts in the record to serve as a sound basis for distinguishing any or all of the above cases.

(Standing)

An outgrowth of Poundstone, supra, and decided the same day, is United States v. Simmons, 46 CMR 288, another unanimous decision upholding a Vietnam gate search. The appellant was a passenger in an army jeep driven by a fellow soldier. Heroin was found in a sock in the gas can. In the principal opinion, Judge Duncan found that appellant was lawfully a passenger in the jeep, but did not have standing to challenge the search because he "could not have reasonably expected privacy in the gasoline can." This view is somewhat curious because it appears to base standing on the cleverness of the hiding place rather than a reasonable expectation of privacy in the use of the vehicle. Indeed, the very use of the gas can as a hiding place for the contraband would indicate appellate reasonably expected it free from governmental intrusion. In his concurring opinion, Judge Quinn relied on Poundstone, and Wesenfelder, 43 CMR 256, to hold both "reasonableness" and no standing. Judge Darden, in his concurring opinion, held that appellant had no standing whatsoever to challenge the search of the government vehicle,

because it was not like his "locker or living area." Judge Duncan, however, specifically refused to go that far stating that "under certain circumstances there may be certain rights of privacy extending to a serviceman in a military vehicle and its attachments." It remains to be seen in the future whether the Court will deny standing in a nonwar zone search of a government vehicle where the contraband is located inside the passenger compartment.

(Customs searches)

In two companion cases, United States v. Carson, 46 CMR 203 and United States v. Hamilton, 46 CMR 209, the Court was faced with searches made in the passenger waiting area of a military airport, by the noncommissioned officer in charge. Various factors, not amounting to probable cause, aroused the suspicions of the noncommissioned officer, who sent for a marijuana detection dog. This dog "alerted" to the appellants' baggage and a search ensued. The majority (Judges Darden and Duncan), noted that the appellants' had booked passage on a MAC plane due to leave a few hours later, and also noted, "a sign in the terminal warned that anyone that is going out on a MAC aircraft is subject to having his baggage searched." The majority in reversing the conviction, recognized that as a general principle customs searches serve a "proper public function," but that the search in the terminal was premature to serve that function, stating:

in our view, a member of the armed forces in these circumstances does not commit himself to a flight and subject his baggage to inspection until he delivers the baggage for weighing or handling by others at the checkin point. Until that time, he retains his right of privacy that can be abridged only upon a showing of probable cause determined by an authorized official, or by demonstration of one of the exceptions to the probable cause requirement.

Judge Quinn dissented, opining that the suspicions of the noncommissioned officer, when verified by the marijuana detection dog, provided probable cause for a military policeman present to arrest the appellants, notwithstanding the lack of authorization by a commander.

(Consent Searches)

In the case of United States v. Glenn, 46 CMR 295 the government sought to sustain a gate search in the United States "both because the accused had consented to it and a station regulation . . . authorized it." Judge Quinn held in the principal opinion that when the appellant was confronted with a marijuana detection dog team, and was told they wanted to inspect his vehicle, he freely gave his permission to do so. Judge Quinn, therefore, felt it unnecessary to determine whether the evidence established "reasonable cause" to search, under the Poundstone rationale. Also finding consent, Judge Duncan concurred in the result. Judge Darden, however, concurred in the result specifically under Poundstone.

(Conclusion)

This past term was not encouraging for further advancement in military search and seizure law. However, the departure of Judge Darden may reverse the trend. The frequent dissents of Judge Duncan should be carefully examined, and used as the basis for imaginative trial and appellate attacks on future searches. To prevent the application of the doctrine of waiver it is necessary that search issues be fully and specifically litigated.

Discovery--Jencks Act

Reaffirming that the Jencks Act (18 U.S.C. § 3500) applies to courts-martial, the Court unanimously held in United States v. Albo, 46 CMR 30, that the military judge erred in not providing the defense, upon proper motion, with the "case activity notes" of a CID agent who testified for the Government. This is an important discovery device. Interestingly, because a court-martial does not have continuing existence a majority of the Court concluded that a full rehearing was necessary rather than a remand for the limited question of resolving the Jencks Act question as is sometimes done in federal civilian courts.

Cross-Examination/Refusal to Testify

In United States v. Colon-Atienza, 47 CMR 336, a prosecution witness testified on direct examination that he purchased heroin from the accused but refused on self-incrimination grounds to answer questions on cross-examination regarding his own use and supply of narcotics. The military judge's failure to strike all the testimony of the prosecution witness was held prejudicial error where the unanswered questions not only adversely affected the witness' credibility but also went to the core of direct testimony and defense theory that the heroin allegedly purchased in fact belonged to the witness.

SUBSTANTIVE OFFENSES

Attempts (Article 80)

In United States v. Frost, 46 CMR 233 the Court held that where a check or other purported negotiable instrument is patently incomplete such incompleteness rebuts the principle that the value of the check is its face value. Such a check also does not support a conviction for attempted larceny of the face value of the check but will only support a conviction for larceny of the nominal value of the paper itself.

Conspiracy (Article 81)

Distinguishing United States v. Brice, 38 CMR 134 (1967), which had held legally insufficient a specification charging the sale of marihuana without an allegation of wrongfulness, the Court held that a conspiracy to sell hashish need not be pleaded with the same technical precision inasmuch as the agreement in the heart of the crime. United States v. Irwin, 46 CMR 168. Further, it was noted that the conspiracy specification also alleged that such conspiracy was "to commit an offense under the Uniform Code of Military Justice" which thereby implicitly alleged the unlawfulness of the conspiracy.

AWOL (Article 86)

Where the accused was specifically instructed by an agent of the Government to go home and wait for orders during out-processing from Fort Polk the Court held that such accused was not guilty of AWOL. United States v. Davis, 46 CMR 241. Rejected was the Government contention that at some point in time the accused could no longer reasonably believe he was to remain home. The Army's negligence in losing track of the accused was not allowed to be converted into individual misconduct.

In yet another AWOL case, the Government failed to appreciate the importance of an inception date. In United States v. Lynch, 47 CMR 498, the Court held that the accused's acquittal of charges of AWOL from his attached unit from 7 November 1969 until 7 January 1971 barred prosecution on a charge of AWOL from his assigned unit from 27 November 1969 until 7 January 1971. This case is important as an application of the principle that a single continuous AWOL cannot be fragmented into separate periods. When there has been a return to military control during an alleged period of AWOL only the period including a valid inception date (whether shorter or longer) may lead to a finding of guilty. United States v. Reeder, supra.

Disrespect (Article 89)

Under the facts before it in United States v. Virgilito, 47 CMR 331, the Court ruled that disrespect to a superior commissioned officer was a lesser included offense of willful disobedience of that officer's order. Applying the test enunciated in United States v. Thacker, 37 CMR 28, 30 (1966) of "whether the specification of the offense on which the accused was arraigned 'alleges fairly, the proof raises reasonably, all elements of both crimes' so that 'they stand in relationship of greater and lesser offenses,'" the Court determined that the evidentiary aspect of the test was satisfied as the accused's reply to the order was "obviously disrespectful." Examining the elements of both offenses, the Court observed that all except that of using disrespectful behavior or language are common to both. In a vigorous and well-reasoned dissent, Judge Duncan asserted that unless the Court was willing to rule that disrespect was lesser included to every willful disobedience as a matter of law, then the manner in which such order was disobeyed--which manner is to serve as the element of disrespect--must be alleged. Absent some indication in the specification of the essential element of disrespect, Judge Duncan would hold that such specification "simply does not state that offense."

Lawful General Regulations (Article 92)

Wondering why drafters of general orders cannot clearly state punitive nature of regulations, the Court held that USARPAC Regulation 19030 was not a punitive regulation since it was directed primarily to commanders and the paragraph allegedly violated was merely a listing of the drugs and drug-related paraphernalia with which any drug suppression program outlined in the regulation was to be concerned. United States v. Scott, 46 CMR 25. The factors considered by the Court in reaching its determination were: 1) The stated purpose of the regulation was to prescribe basic requirements of a drug suppression program; 2) commanders were directed to take further steps to implement the program, and 3) the regulation was directed to commanders, as opposed to ordinary soldiers.

Based on a complex "once-only" factual situation, the Court held in United States v. Jenkins, 47 CMR 120, that the evidence was insufficient to sustain a conviction of failure to obey a regulation requiring service personnel to be clean shaven except when a medical waiver had been granted, where:

1) The accused did have a medical form granting a permanent shaving waiver; 2) the accused testified he had been told this waiver would be good at any base; and 3) there was nothing in the record to indicate a permanent waiver could not be issued, or that the accused's reliance thereon was unreasonable or that a purported change in the waiver at the base to which the accused had been transferred was properly accomplished.

A plea of guilty to wrongful possession of secobarbital, in violation of AR 600-32 was set aside in United States v. Walters, 46 CMR 255, where the accused was a hospital patient, the drug had been prescribed by a doctor following the accused's complaints of headache and inability to sleep but, instead of swallowing it as directed by the nurse, the accused removed it from his mouth and placed it in a syringe with water for later injection into his arm.

The General Article (Article 134)

In a conviction for wrongful introduction of a narcotic into a military base, the interesting issue of whether it is required to allege the purpose for such introduction was deftly avoided by the Court, which held that the accused and his counsel left absolutely no doubt that they understood personal use was implied in the allegations of the specification. United States v. Ross, 47 CMR 5.

A charge of indecent exposure resulted when the accused removed all his clothing in the semiprivacy of an office of a military headquarters in the presence of other males (no females), including his military superiors, but made no obscene or indecent remarks or gestures. Under these circumstances, and noting that nudity per se is not indecent, the Court opined that while such conduct may have been punishable as being contemptuous or disrespectful it did not constitute indecent exposure. United States v. Caune, 46 CMR 200.

In an order in United States v. Unrue, 47 CMR ____, issued without benefit of briefs or oral argument the Court upheld the constitutionality of Article 134 citing Dynes v. Hoover, supra, in the face of recent decisions in Levy v. Parker, supra, and Avrech v. Secretary of the Navy.

SENTENCE AND PUNISHMENT

The most significant case affecting sentencing during the 1972-1973 Term was United States v. Alderman, 46 CMR 298, involving the admissibility of evidence of previous convictions by summary and special court-martial where the accused had not been represented by qualified lawyer counsel.^{2/} Because of a three way split decision, the outcome of the effect of Argersinger v. Hamlin, 407 U.S. 25 (1972) on the military justice system presently rests on Judge Quinn's opinion that where an accused had been confined pursuant to a summary court-martial sentence evidence of that conviction was inadmissible but where confined pursuant to a special court-martial the conviction is admissible because an officer counsel (not a lawyer) satisfies the Argersinger requirements.^{3/} The strength of this holding is questioned, considering that Judge Duncan believes Argersinger requires lawyer-counsel at all courts-martial and that departing Chief Judge Darden did not believe that Argersinger was applicable to the military justice system absent an express Supreme Court ruling.

The combination of Judges Quinn and Darden led to the decision that correctional custody could be imposed under Article 15 without counsel. United States v. Shamel, 47 CMR 117.

In Ferry, 46 CMR 339, one of the four previous convictions was improperly admitted because it was adjudged by a special court-martial which was convened by a commander who had no authority to convene the court.

In Lallande, 46 CMR 170, the Court discussed the convening authority's power to prescribe conditions of probation and the validity of certain prescribed conditions when a sentence has been suspended. The Court opined that Articles 71 and 72 of the Code and paragraph 88e(1) of the Manual fairly imply that imposing conditions on probation is proper, noted that under title 18, United States Code section 3651, a federal criminal court can impose conditions on probation, and concluded

2/ See also United States v. Roeder 46 CMR 312; United States v. Cruse, 46 CMR 325; United States v. O'Brien et al, 46 CMR 325; United States v. Petters, 46 CMR 340; United States v. Ross. 47 CMR 5.

3/ United States v. Henry, 46 CMR 328; United States v. Wilkins, 46 CMR 334; United States v. Acosta, 46 CMR 347.

that similar practices could be adapted to the court-martial system. After declining to decide whether appellant was precluded from challenging the validity of conditions which he himself proffered in a pretrial agreement, the Court considered the validity of the following three of the five conditions imposed:

3. Conducts himself in all respects as a reputable and law abiding citizen;
4. Does not associate with any known users of, or traffickers in, dangerous drugs or narcotics, or marijuana; and
5. Submits his person, vehicle, place of berthing, locker and/or other assigned personal storage areas aboard a Naval vessel or command to search and seizure at any time of the day or night, with or without a search warrant or appropriate command authorization, whenever requested to do so by his commanding officer or authorized representative.

Although Condition 3 was indefinite,, the Court said that it was "not so overbroad as to be unconscionable." The condition was analogized to indefinite conditions in the civilian system such as "the parolee will . . . not drink alcoholic beverages to excess." The Court opined that Condition 4 was reasonable and appropriate for one who was convicted for wrongful possession of prohibited substances. After voicing concern that Condition 5 could be abused by commanding officers, Judge Quinn opined that "the potential for abuse in the exercise of power is not so inimical to possession of the power as to require that the power be denied. . . . Inquiry into whether the power has been properly exercised is appropriately reserved for the time of its exercise."^{4/} Recidivism in drug cases was said to be common enough that a relapse could be anticipated and therefore "inspection" on less than probable cause was reasonable.^{5/}

^{4/46} CMR, at 174.

^{5/}Judge Duncan, dissenting in part, argued that the hearings on Article 72 of the Code indicated that the convening authority has no power to impose conditions which do not require affirmative misconduct on the part of the probationer. He felt that Condition 5 could be violated without any affirmative misconduct and, as such, the condition was invalid.

In United States v. Keith, 46 CMR 59, the argument of trial counsel during a rehearing on sentence that despite the extenuation and mitigation presented the accused should receive a punitive discharge led defense counsel to urge in rebuttal that the court members not impose a punitive discharge, but leave the type of discharge up to an administrative discharge board. After the references to an administrative discharge board, members of the court posed several questions to the military judge which indicated that they were confused as to the alternatives available to them. The Court held that, under the circumstances, the military judge erred in failing to inform the court members of the conditions under which they could, after announcement of sentence, recommend an administrative discharge, disapproval of the punitive discharge or suspension of the punitive discharge.^{6/} The Court also held that the judge's instruction that no forfeitures could be adjudged at the rehearing^{7/} was erroneous because such instruction did not consider the possible substitution of forfeitures for the other types of punishment previously adjudged.

In Foecking, 46 CMR 46, the Court held that when the Court of Military Review determines that the staff judge advocate's advice is inadequate and orders a new advice and a new action by the convening authority, the forfeitures approved by the convening authority in his second action cannot be applied to pay accrued prior to that second action.^{8/}

^{6/} See Change 3, paragraph 4-e, DA Pam. 27-9 Military Judge's Guide.

^{7/} This instruction was obviously given because of the mandate found in Article 63(b) of the Code. "Upon a rehearing . . . no sentence in excess of or more severe than the original sentence may be imposed. . . ."

^{8/} See Brousseau, 33 CMR 156.

INSTRUCTIONS AND FINDINGS

In United States v. Garcia, 46 CMR 8, the Court reviewed the rules for determining a witness is an accomplice so as to require instructions on accomplice testimony. In holding that the military judges correctly denied a requested instruction the Court used the test of whether the evidence established that the witness is subject to criminal liability for the same crime as accused. An affirmative answer establishes he is an accomplice, while with some exceptions, a negative answer determines he is not. In Garcia, the presence of both witnesses at the scenes of the crimes (riot) was insufficient to justify accomplice instructions, even though one witness was named a co-accused in one of the specifications, as the evidence did not establish any act by the witness that would give rise to his criminal liability. Also involving accomplice instructions was United States v. Diaz, 46 CMR 52, where the Court found the accomplice testimony amply corroborated, was not so self-contradictory or uncertain so as to require an instruction, and the defense induced the giving of an erroneous instruction.

In United States v. Frost, 46 CMR 233, where accused was charged with attempted larceny of a United States treasury check of a value of \$6400.00 the Court held erroneous the instruction that "the property would become, as result of the activity of the accused with respect to the check, of a value of \$6400.00 or of some lesser value..." when in fact the check was nonnegotiable.

Special findings played a prominent role, to the accused's benefit, in the Court's decision in United States v. Davis, 46 CMR 241. The accused was charged with an unauthorized absence and the trial judge found that an agent of the U.S. Government had instructed the accused to go home and wait for orders. The Court's opinion made several references to the special findings in support of its decision.

POST-TRIAL PROCEDURE

Disqualification

The staff judge advocate and convening authority were disqualified and a new review and action were ordered in United States v. Diaz, 46 CMR 52, because the convening authority accepted the recommendation of the staff judge advocate for a sentence reduction for the accomplice in exchange for his testimony. Of critical importance was the role of the deputy staff judge advocate in receiving the testimony and the court's recognition of the unitary functioning of a staff judge advocate office. In United States v. Jolliff,

46 CMR 95, the Court of Military Appeals decided that review proceedings were improper and set aside the convening authority's action where the Article 32 investigating officer had prepared a draft of the post-trial review which was the basis of the advice submitted to the convening authority.

Post-Trial Review

The need for a fair post-trial review received emphasis in United States v. Chandler, 46 CMR 73, where the testimony of a major prosecution witness could be read to mean that the accused was drunk at the time of the offense or it could be read that he was not drunk at the time of the offense but had been drunk the night before a new review and action was ordered because the post-trial review unequivocally stated that the testimony had been that the accused was not drunk on the night of the offense but was drunk on the prior evening. The same relief was afforded where the testimony of a witness on the only real issue at trial was not summarized in the review, United States v. Samuels, 46 CMR 238, and where the review ignored the provocative nature of the victim's remarks as testified to at trial and stated only that the offenses were the result of "bad remarks" by the victim, United States v. Roeder, 46 CMR 312. Where the review failed to mention the accused's testimony and other presentencing evidence the court remanded the case to the Court of Military Review for a reassessment of the sentence. United States v. Timmons, 46 CMR 226. Continuing the Boatner-Rivera error a commanding officer's recommendation against elimination which was not included in the review required a new review and action where the convening authority had changed since the pretrial advice. United States v. Parker, 47 CMR 10. However, where the Court of Military Review had ordered a new review and action because of doubt that the convening authority had been aware of the military judge's recommendation for suspension, the Court in United States v. Steffey, 46 CMR 105, reversed finding the review contained all pertinent matters including the military judge's recommendation.

Post-Trial Delay

Post-trial delay, even though unreasonable and deplorable, in itself provides no basis for appellate relief without other error in the case. United States v. Gray, 47 CMR 483; United States v. Timmons, 46 CMR 226; United States v. Willis, 46 CMR 112. The remedy for unreasonable delay is Article 98, or application to the Court for extraordinary relief. Gray and Timmons, both supra. See Extraordinary Remedies, infra.

APPELLATE REVIEW

Record of Trial

A record of trial which was missing 60 to 80 pages because of the negligent erasure of four tapes covering the testimony of five defense witnesses could not be reconstructed to provide a verbatim record from which to conduct appellate review. United States v. Boxdale, 47 CMR 351. Also of note in the case was the limiting of paragraph 82i of the Manual, which provides for reconstruction of a record, to supplying the convening authority with a transcript from which to decide whether to direct a re-hearing.

In United States v. Thompson and Rogers, 47 CMR 489, the Court found that it was error not to prepare a verbatim transcript in every general court-martial resulting in a finding of guilty. However, where the sentence was not one which would necessitate review by the Court of Military Review (see page 94 infra) and the summarized record permitted a fair appellate review the Court held that the error could be cured by affirmance of a sentence no greater than a special court-martial could adjudge (no bad conduct discharge). Of importance to military accused and defense counsel is that a verbatim transcript should be prepared and, as a corollary, may be requested by reviewing authorities and the accused. It would behoove accused through counsel to request a verbatim transcript no matter what the sentence as meaningful appellate review is best accomplished with a complete record of trial.

The principle that a record of trial must be authenticated before the convening authority takes his action was reaffirmed in United States v. Hill, 47 CMR 397. But where the staff judge advocate prepares his post-trial review before authentication, the review may be tested for prejudice by comparison with the authenticated record for errors and omissions in the review.

Counsel

The Court in United States v. Patterson, 46 CMR 157 and United States v. Herrera, 46 CMR 163, found no legislative basis in Article 70, Uniform Code of Military Justice, for military accused to request specific military counsel to represent him on appeal. Accordingly, The Judge Advocate General was found not to have abused his discretion by denying the accused the appellate services of his trial defense counsel. Judge Quinn, in dissent, would have required TJAG to at least state the reasons for denying an accused's request.

Court of Military Review

When one panel of the Court of Military Review looked to pretrial statements in the allied papers to reduce the severity of an assault charge, the Court of Military Appeals held that the lower court had erred in going outside the record of trial (transcript) to make a factual determination on the merits of the case. United States v. Bethea, 46 CMR 223. This case demonstrates the importance of trial defense counsel looking carefully at all pretrial statements and of placing all relevant information on the record. Although the Court wondered why defense counsel had not endeavored to introduce the inconsistent pretrial statement that had caught the attention of the lower court, the judges did not find ineffective assistance of counsel. The accused was therefore deprived the benefit of significant evidence which the Court of Military Review had found warranted a reduction in the charge.

Adhering to the procedures explicated for handling the issue of mental responsibility on appeal in United States v. Triplett, 45 CMR 271 (1972), the Court held that the Court of Military Review erred in failing to take into consideration and treat as new evidence post-trial reports bearing on appellant's mental responsibility at the time of the offenses and time of trial. United States v. Norton, 46 CMR 213. Concluding that the post-trial evidence would be reasonably likely to produce a different verdict, rather than remand to the lower court, the Court of Military Appeals ordered a rehearing.

Where one panel of the Navy Court of Military Review had reduced a conviction to unpremeditated murder, the Court of Military Appeals, noting the fact-finding powers of the intermediate appellate court, declared that another panel of the Court of Military Review could not later affirm premeditated murder after the first panel's decision had been reversed on different grounds (see 44 CMR 247). United States v. Crider, 46 CMR 108.

Court of Military Appeals

Where an accused, after a Certificate of Attempted Service of the action of the Court of Military Review was prepared because of his unauthorized absence, had not petitioned the Court of Military Appeals within the 30-day statutory period, there was no basis for his appellate defense counsel to initiate an appeal in his behalf. United States v. Smith, 46 CMR 247.

EXTRAORDINARY REMEDIES

Except for former PFC Gallagher who finally obtained reversal of his conviction after almost ten years of litigation in military and civilian federal courts, because of the absence of a written request for enlisted court members (Gallagher v. United States of America, 46 CMR 191, see page 67 supra) no other petitioner received extraordinary relief from the Court of Military Appeals during the 1972-1973 Term.

Failure to exhaust remedies was the basis for denying a review of the effort to secure individual military counsel. Bumpus v. Thurnher, 47 CMR 227. The normal course of appellate review was deemed adequate to handle complaints over adverse military judge rulings concerning the situs of trial (Chenoweth v. VanArsdall, 46 CMR 183) and speedy trial, discovery, and a challenge to Article 134 (DeChamplain v. McLucas, 47 CMR 552). A writ of prohibition to bar court-martial action was dismissed as untimely where jurisdiction between Turkish and United States authority was undecided. Hansen v. Hobbs, 46 CMR 181.

The lack of success in challenging pretrial confinement was continued with denials in DeChamplain v. McLucas, supra, and Newsome, et al v. McKenzie, 46 CMR 92 (arose out of U.S.S. Kitty Hawk incident)(Judge Duncan would have required the Government to show cause, observing that the military judge had no power to compel release from pretrial confinement). Habeas corpus relief was also denied where the petitioner remained incarcerated thirty-eight days after reversal of his conviction as the Court held the convening authority was permitted a reasonable time (not yet lapsed) to determine the practicability of a rehearing. DeChamplain v. United States, 46 CMR 211, In the most substantive extraordinary relief case, the Court sustained court-martial jurisdiction for a rehearing over an individual twice court-martialed where the first conviction was reversed after he was discharged under the second conviction. Peebles v. Froehlke, 46 CMR 266.

The tool of extraordinary relief was expanded a bit during the past term in the area of post-trial delay. In Rhodes v. Haynes, 46 CMR 189, the Court declared that where a petitioner shows a prima facie case of unreasonable delay in the post-trial process the Court will take steps to remove the impediment to appellate review. In Rhoades (116 days) and Thornton v. Joslyn, 47 CMR 414 (179 days) the Court issued orders that the convening authority take action by a specified date and forward a certified copy of the promulgating order to the Clerk of Court at which time the Court would either dismiss the petition or take appropriate further action. See "Extraordinary Writs and Post-Trial delay," THE ADVOCATE, Vol. 5, No. 3 at 52 (1973).

THE STATISTICS

Action of Individual Judges

	<u>Darden</u>	<u>Quinn</u>	<u>Duncan</u>	<u>Total</u>
Opinion of Court ^{c/}	30	34	27	91 ^{a/}
Concur	44	44	36	124
Separate Concurring	8	1	4	13
Concur in Result	4	4	3	11
Concur in part/ Dissent in part	1	-	6	7
Dissent	<u>7</u>	<u>10</u>	<u>20</u>	<u>37</u>
TOTAL	<u>94^{b/}</u>	<u>93^{b/}</u>	<u>98^{b/}</u>	283

^{a/} Does not include 15 per curiam and 13 memorandum opinion. Total of 119 written opinions compared to 125 in 1971-72 term. These statistics are unofficial and were composed in the Defense Appellate Division.

^{b/} These total more than 91 because of dissents, concurrence, etc. to per curiams and memorandum decisions.

^{c/} These were 46 unanimous full opinions. Of the remaining, judges Quinn and Duncan joined only 4 times (see. Introduction).

A FUNCTIONAL LOOK AT THE ARMY
COURT OF MILITARY REVIEW

The United States Army Court of Military Review received 2,146 records of trial by courts-martial to review in 1973. Because of this heavy volume of cases, and the fact that the Court is divided into four independent panels of three judges each, ^{9/} it would be most difficult to present a digest of cases and demonstrate consistent judicial trends. However, THE ADVOCATE believes that it is important that trial defense counsel possess at least a functional knowledge of the workings of this lower level of court-martial appeal^{10/}.

Jurisdiction

After a general court-martial convening authority takes action in a general or special court-martial case the record of trial is forwarded to the Clerk of Court, U.S. Army Judiciary, Nassif Building, Falls Church, Virginia 22041. The case is administratively processed by the Records Control and Analysis Branch and then automatically referred to either, (1) the Examination and New Trials Branch if the approved sentence of a general court-martial does not include a punitive discharge or confinement at hard labor for one year or more (See Articles 66(b) and 69, UCMJ),^{11/} or (2) the Court of Military Review if the approved sentence includes a punitive discharge (including those suspended) or confinement of one year or more. A general court-martial case with a less severe sentence may also be referred to the Court of Military Review by The Judge Advocate General if he determines, with the advice of the Examination Branch, that the case presents an issue requiring full judicial review. Article 69, UCMJ.

^{9/} The Court on occasion also sits en banc on issues deemed important upon motion by the Court or one of the parties. This occurred only four times in 1973. With an exception of an en banc opinion the different panels of the Court do not consider themselves bound by each others' decisions. See United States v. Hatton, 47 CMR 457 (ACMR 1973); United States v. Hill, 47 CMR 151 (ACMR 1973); United States v. Penman, CM 427657 (ACMR 29 August 1972).

^{10/} This article is an up-date of "Appellate Procedure in the Army," THE ADVOCATE, Vol. 1, No. 5 at 4 (1969).

^{11/} This includes general courts-martial cases involving complete acquittals as they are reviewed for jurisdictional defects. The Examination and New Trial Branch received a total of 323 cases in 1973, 138 of which had resulted in no findings of guilty.

Designation and Activities of Appellate Counsel

If the case has been referred to the Army Court of Military Review and the accused has requested the services of appellate defense counsel, a copy of the record of trial will be given to the Defense Appellate Division. During 1973 we received 1,590 cases. If the accused has not requested military appellate counsel and has not retained civilian counsel, his case will be reviewed by one of the Panels on its own to determine if any errors have occurred. Infrequently, a Panel will request the appointment of appellate counsel, notwithstanding the accused's choice, in order to have the benefit of briefs and argument on a specific issue.

If an accused is represented by appellate defense counsel one of three courses of action will be taken after a reading of the record and review of the issues:

- (1) submit the case on its merits;
- (2) submit the case on its merits with an argument for sentence relief;
- (3) submit the case with assignment(s) of error and, most likely, an argument for sentence relief.

After appellate defense counsel have filed pleadings and the government has responded thereto the case is presented to the Court for decision. Whether or not an oral argument is presented rests primarily within the discretion of appellate defense counsel.

The Length of Time In Appellate Review

Perhaps the most frustrating factor in appellate review for the accused and his attorneys is the length of time involved. Appellate review in the military justice system is complicated by the necessity of a post-trial review and action which often consumes significant periods of delay. Trial defense counsel are in the best position to assist accused in this first review process. See "Extraordinary Writs and Post-Trial delay," THE ADVOCATE, Vol. 5, No. 3 at 52 (1973). This delay often matches or exceeds the time required for appellate review once the case enters the Defense Appellate Division. Trial defense counsel should explain to their clients that appellate review before the Court of Military Review will involve a significant period

of time. Because the average number of cases an appellate defense attorney handles a year before this Court and the Court of Military Appeals is 150, with 25 or more cases active at one time, it is usually necessary for appellate counsel to seek enlargements of time within which to file the case with the Court. As of December, 1973, the average time from receipt of the case by Defense Appellate Division to the filing of pleadings was slightly over two months for guilty plea cases and three months for not guilty pleas cases.^{12/} The average time for a Government reply is one month. After the case is submitted to a Panel for decision the average time to decision was 21 days for a guilty plea and 47 days for a not guilty plea. (The Court's times are generally less for special courts-martial.)

In advising clients of the time involved in appellate review counsel should always caution that these are average times and that a case with substantial legal issues or of extreme length will most likely take additional time. On the other hand, the Defense Appellate Division endeavors to act quickly on those cases where it is readily apparent that relief (especially confinement reduction) may be possible. Appellate review by nature involves time and military accused should be made fully cognizant of this. A case reviewed by the Court of Military Review without the benefit of appellate counsel does statistically take considerably less time before the rendition of a decision but appellate review without counsel involves substantial costs for an accused by limiting the scope and thoroughness of various opportunities in appellate review.^{13/}

Powers of the Court

Some trial defense counsel, and consequently many convicted servicemen, are unsure about the powers enjoyed by the Court of Military Review in reviewing courts-martial. The Court may only affirm as much of the findings and sentence as it finds "correct in law and in fact." Article 66(c), Uniform Code of Military Justice. Although also directed by the statute to consider that the trial court heard and saw the witnesses, the

^{12/} The statistics used herein are based primarily on those compiled by the Records Control and Analysis Branch, U.S. Army Judiciary. These statistics also reveal that the average case also suffers 25-30 days delay in mailing and administrative processing from convening authority action to receipt by the Clerk and forwarding to the Defense Appellate Division.

^{13/} See n.8, infra. An accused may request appellate counsel even though he initially waived counsel by notifying the Clerk of Court prior to a decision in his case.

judges of the Court of Military Review must be convinced of guilt beyond a reasonable doubt. The fact finding powers of the Court are, however, limited to evidence presented in the trial transcript and it is at trial that counsel must of course present his case. United States v. Bethea, 22 USCMA 223, 46 CMR 223 (1973).

The powers of the Court of Military Review with regard to sentence are extremely broad. The Court may affirm any lesser sentence that it deems appropriate. The only power not possessed is the authority to suspend sentences as a matter of clemency although a sentence may be suspended to conform to a pretrial agreement. United States v. Cox, 22 USCMA 69, 46 CMR 69 (1972). Further, in determining an appropriate sentence the Court may consider the entire record including allied papers and any clemency matter submitted to the convening authority. United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955). The broad clemency power of the Court of Military Review may be forgotten by trial defense counsel and underscores the importance of submitting matters after trial to the convening authority.^{14/} See "The Article 38(c) Brief: A Forgotten Defense Tool," THE ADVOCATE, Vol. 5, No. 2 at 27 (1973). It is in the area of arguing for clemency before the Court and other authorities that appellate defense counsel can provide services unavailable to an accused not represented by counsel before the Court of Military Review.^{15/}

^{14/} A most disturbing consequence of the failure of trial defense counsel to present sentencing evidence sometimes occurs in a murder case where the court-martial is faced with a minimum life sentence. Extenuation and mitigation is still very important as the Court of Military Review may reduce the confinement if there is relevant sentencing information in the record.

^{15/} The Court of Military Review in times of greater manpower resources had JAGC Captains serving as Commissioners (clerks) who often assumed responsibility of reviewing no counsel cases, but the absence of such Commissioners makes the decision to forego appellate counsel more significant.

The Court's Record

In disposing of 2,146 cases in 1973 the Army Court of Military Review affirmed the findings and sentence without modification in 1,642 cases. Some form of sentence relief was rendered in 409 cases.^{16/} The charges were ordered dismissed in only 37 cases with rehearings ordered in 39 cases. Part of the findings were disapproved but the entire sentence approved in 26 cases: part of the findings and sentence were disapproved in 40 cases.

The Court issues three types of decisions:

(1) A short form affirmance in which the findings and sentence are approved without explanation (this occurred 1,574 times in 1973).

(2) A modification short form in which the sentence may be modified but the findings are affirmed. This type of opinion, of which there were 274, may contain one or two sentences relying on or distinguishing precedent.

(3) A long holding which is a written opinion over one page long. All cases involving the modification of the findings, all officer cases, and all cases referred to the Court by The Judge Advocate General receive a long holding under the Court's SOP. There were 298 long holdings during the past year.^{17/}

^{16/} Owing to post-trial delay and other factors the sentence relief granted is often illusory and meaningless as confinement has already been served or the appellant is in a nonpay status or clemency has already been granted by the Clemency and Parole Board of the Disciplinary Barracks.

^{17/} One of the consequences of not requesting appellate counsel appears to be a less likely chance of obtaining a written opinion. Out of the 556 no counsel cases decided, only 10 received a written opinion with only 7 findings affected and 3 of those obtaining no sentence relief. In contrast, 288 long holdings were obtained in the 1,590 cases handled by appellate counsel.

Helping Your Client on Appellate Review

The best assistance you can render your client for the appellate process is, of course, to make a good record of trial for appeal with appropriate objections and factual support for your trial position. Of next importance is to insure that all relevant information favorable to your client (whether obtained before or after trial) is presented to the convening authority before his action. At the same time trial defense counsel may greatly assist the chances for meaningful sentence relief on appeal by encouraging a prompt post-trial review and action. Trial defense counsel should also bring matters to the attention of appellate defense counsel which might have a bearing on the potential for appellate relief. The Defense Appellate Division encourages you to contact the office (Autovon 289-1807) to communicate with the designated appellate defense attorney if you have any questions or suggestions about the case. Finally, by familiarity with the operation of the Court of Military Review trial defense counsel should be able to realistically advise their clients about the facts concerning appellate review--the potentially lengthy period of time involved, the consequences of requesting appellate counsel, the roughly 17-20% chance for modification of at least some portion of their sentence, and the roughly 6-7% chance for a modification of findings.

RECENT CASES AND NOTES OF INTEREST TO DEFENSE COUNSEL

Speedy trial

As we feared in the speedy trial article published in our last issue the Court of Military Appeals has ruled that in order to invoke the Burton presumption of an Article 10 violation when pretrial confinement exceeds three months the defense must raise the issue at trial. United States v. Sloan, 23 USCMA , 48 CMR (February 15, 1974). The Court noted that no claim of inadequacy of counsel had been raised. Defense counsel in the future who let lay dormant the benefit of the heavy presumption afforded by Burton without explanation will leave themselves open to attacks on the adequacy of their trial representation.

Previous Convictions--Proof of Finality

At least one panel of the Army Court of Military Review has decided that Change 8 to Army Regulation 27-10, effective 15 December 1971, changed the requirements for proving the finality of a previous court-martial conviction. Insofar as paragraphs 2-24, 2-25, and 2-31 of AR 27-10 now require a showing of finality on promulgating orders, the Form 20B, and DD Form 493 (Extract of Previous Convictions), such records cannot be presumed to prove finality of a conviction. The records must reflect the date of appellate or supervisory review or the presumption is now against finality. See DA Pam. 27-2, "Analysis of Contents, MCM, US, 1969 (Rev. ed.)," at 13-6 (July 1970). Appellate relief may only be obtained if defense counsel make the appropriate objections at trial to the records of previous convictions. The cases in which relief has been granted are all modified short forms, not full opinions, and may be cited as United States v. Reed, CM 430323 (ACMR 31 October 1973) (MSF); United States v. Yakley, CM 430204 (ACMR 24 July 1973) (MSF); United States v. Bryant, S-8858 (ACMR 4 May 1973) (MSF); United States v. Hopper, CM 428332 (ACMR 18 January 1973) (MSF). A more complete explanation of the objection will appear in the next issue of THE ADVOCATE.

General Regulations (Article 92)

Success has been recently achieved in attacking the character of several general orders and regulations or the specifications alleged thereunder. The defective regulations include Fort Hood Reg. 210-40 (United States v. Bala, 46 CMR 1121 (ACMR 1973)); Fort Bragg regulation labeled "Military Police, Crime Prevention" (United States v. Jackson, 46 CMR 1128 (ACMR 1973)); Paragraph 8a(4), Electronics Command Reg. 210-4 (United States v. Wright, S-9301 (ACMR 29 January 1974)); Paragraph 8, Fort Hood Reg. 210-15 (United States v. Madlock, CM 429893 (ACMR 12 February 1974)); Fort Knox Reg. 210-1 (United States v. Branch, S-3983 (ACMR 25 October 1973)); CONARC Reg. 190-1 (United States v. Wood, S-8879 (ACMR 27 June 1973)). A full exposition of the Article 92 problem will be published in an upcoming ADVOCATE issue.

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