

A Journal For Military Defense Counsel  
**THE ADVOCATE**

U.S. Army Defense  
Appellate Division

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Vol. 10, No. 6  
Nov.-Dec. 78

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# THE ADVOCATE

Volume 10, Number 6

November-December 1978

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Cite as: 10 The Advocate [page] (1978)

## TRANSITION

With this issue, the first decade of The Advocate comes to an end. In keeping with our responsibility of providing service to defense counsel in the field, we are presenting a detailed, cumulative Ten Year Index, which covers virtually every item that has ever been printed in The Advocate. To make the index as functional as possible, we have utilized the well-known West Key-number system. Our sincerest appreciation goes out to the West Publishing Company of Saint Paul, Minnesota for granting us a license to use its Military Justice Topic and Key Numbers.

In addition to the index, we present an article on the types of relief available to the military accused outside of the normal military justice system. The article is designed to provide defense counsel with a basic understanding of the availability of other types of relief, and, of course, should not be considered an exhaustive treatment of the matter. Also included in this issue are abbreviated features of Case Notes, Side-Bar, and the increasingly popular section, On the Record.

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### ON USING THE INDEX

Subjects are arranged in accordance with the West Key Number System currently used in the Military Justice Reporters. Within each topic the articles (underlined) are listed first in reverse chronological order, followed by case notes, memos, comments (i.e., everything else), in reverse chronological order. The page references are by volume: number: page.

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AFTER THE DUST SETTLES: OTHER MODES OF RELIEF

Robert I. Reardon, Jr., Esquire\*  
and  
Captain Raoul L. Carroll, JAGC\*\*

After trial or appeal -- after the dust settles -- it is not unusual for an accused, a concerned relative, or civilian co-counsel to ask, "Is it all over? Can anything else be done?" This article is designed to help the uniformed defense counsel respond to such questions, by reviewing the remedies which are available administratively (military boards), as well as judicially (collateral court actions). Although pursuit of these remedies by military counsel is quite limited,<sup>1</sup> counsel should be cognizant of them, because they are nonetheless available.

The administrative procedures which are addressed herein concern board appeals. For the Army petitioner who has received a punitive discharge from a court-martial, the Board for the Correction of Military Records is available to seek an upgrading of that discharge or a recharacterization of it in order to permit reenlistment. Similarly, for the petitioner who has received either a punitive discharge from a special court-martial or an administrative discharge, the Army Discharge Review Board provides a means for obtaining relief.

While historically and by statute,<sup>2</sup> civilian courts have been limited in the scope of their review of the military

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1. Guidelines regarding military counsel's actions for collateral civil relief are provided in Army Regulations 27-10 and 27-40.

2. Article 67, Uniform Code of Military Justice, 10 U.S.C. §867 [hereinafter cited as UCMJ].

judiciary and its determinations concerning military personnel, their scope of review has been expanding over the last twenty-five years.<sup>3</sup> There are now a number of forms of collateral attack on a court-martial, the most common of which is the habeas corpus petition brought in federal district court. Also available in federal district court are petitions for writs of mandamus, actions for declaratory judgments and injunctions, and even civil actions for wrongful imprisonment. Resort is often had to the federal Court of Claims, by filing a suit for back pay and thereby seeking review of the petitioner's court-martial conviction. These remedies will be addressed separately below.

## I

### MILITARY BOARD APPEALS

#### ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS

Prior to 1946, any individual who was unable to secure administrative correction of his records by the Army had to resort to Congress for relief. These private bills became burdensome to Congress and, as a result, the Legislative Reorganization Act of 1946 was enacted to establish the foundation for the creation of the Army Board for the Correction of Military Records within the Office of the Secretary of the Army.<sup>4</sup> The statute applies to all military departments and the Department of Transportation, which controls the Coast Guard.

The Secretary of a military department, acting through a departmental board for the correction of military records [hereinafter referred to as a Board], may correct any military record of that department, when he considers it necessary to correct an error or remove an injustice.<sup>5</sup> The Board consists of at least three high level civilian employees of the military department concerned, appointed by the Secretary. Its purpose is to consider all applications properly before it for the purpose of determining an error or injustice and to make a recommendation to the Secretary as to what action, if any, should be taken.

3. Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirements, 55 Virg.L.R. 483 (1969).

4. 10 U.S.C. §1552.

5. See paragraph 2, Army Regulation 15-185, Army Board for Correction of Military Records (18 May 1977).

An applicant, his or her spouse, parent, heir, or legal representative, must file a sworn application within three years after an error or injustice is discovered. The Board may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice. The claimant is required to file with his application the reasons why the Board should excuse his failure to file a timely application.

Additionally, no application will be considered until the applicant has exhausted all effective administrative remedies afforded him by existing law, and such legal remedies as the Board shall determine are practical and available to the applicant. The key word here is "effective." If the applicant has not pursued an administrative procedure because the relief sought cannot be granted in a proceeding of that type, he has complied with the regulation, even though he bypasses that procedure.

Each application will be reviewed to determine whether to authorize a hearing, recommend that the record be corrected without a hearing, or deny the application without a hearing. Neither the applicant nor his counsel may appear before the Board until the decision granting a hearing is made. An application will be denied if the Board determines that insufficient evidence of a probable material error or injustice has been presented. Therefore, it is extremely important that the person preparing the application document the applicant's claim thoroughly as well as attempt to convince the Board of the relative merits of granting a hearing. If the application is denied, a statement of the grounds for denial will be furnished to the applicant and counsel. Denial of an application on the grounds of insufficient relevant evidence is without prejudice, and the application may be resubmitted in the event new relevant evidence is discovered.

If the Board grants a hearing, the applicant is entitled to appear either by himself, by and through counsel, or in person with counsel. The applicant is entitled to present witnesses in his behalf at the hearing. He has the obligation to inform the Board at least fifteen days before the hearing whether he will be present, the name of his counsel, and the names of the witnesses he intends to call. All testimony before the Board is given under oath or affirmation, although the Board is not limited by the usual rules of evidence. The proceedings are recorded verbatim.

The Board may review and upgrade a punitive discharge adjudged at a general court-martial, review a discharge adjudged at a special court-martial after relief has been denied by a discharge review board, or recharacterize a discharge in order to permit reenlistment.<sup>6</sup> It may also hear cases which are not reviewable at a discharge review board because of the expiration of the fifteen year statute of limitations.

The Board may grant affirmative relief, which includes granting retroactive pay, conversion of discharge type, reinstatement, promotion and retroactive promotion.<sup>7</sup> If the decision of the Board is adverse to the applicant, he may seek judicial review of that decision. However, the individual who seeks judicial review of a decision of the Board must show by clear and convincing evidence that the decision of the Board was arbitrary, capricious, unlawful or not supported by substantial evidence.<sup>8</sup>

#### THE ARMY DISCHARGE REVIEW BOARD

The Army Discharge Review Board [hereinafter ADRB] is an administrative agency created within the Office of the Secretary of the Army, pursuant to 10 U.S.C. §1553, to review administrative discharges or a punitive discharge adjudged at a special court-martial. A punitive discharge adjudged at a special court-martial is treated as an administrative discharge for purposes of the review before the ADRB.

The ADRB consists of one or more panels of five senior officers each. During fiscal year 1979, besides the panel sitting in Washington, D.C., three additional panels will sit at various locations within the United States. The decisions of the panel are made in closed session by majority vote. Every decision is given in writing and sent to the applicant and his or her counsel.

The reviewing process commences upon either application of a former serviceperson or motion of the ADRB itself. Army

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6. Addlestone and Hewman, ACLU Practice Manual on Military Discharge Upgrading (1975), at 17.

7. Russell, The Effect of the Privacy Act on Corrections of Military Records, 79 Mil.L.Rev. 135, 149, n.51 (1978).

8. Peppers v. United States Army, 479 F.2d 79, 83 (4th Cir. 1973).

Regulation 15-180<sup>9</sup> contains the rules of procedure and the method by which an application must be filed with the ADRB. In the criminal justice area, as previously stated, the ADRB may only review the adjudication of a bad conduct discharge given at a special court-martial to determine whether or not it was "equitably and properly" given. If the ADRB should find that the punitive discharge was not properly adjudged, it may direct The Adjutant General to change the discharge and issue a new upgraded discharge, such direction being subject to review and modification only by the Secretary of the Army. The ADRB has no authority to revoke the bad conduct discharge and reinstate the member to active military service.

An applicant must submit a DD Form 293 request for review, which is available through normal distribution channels and local VA offices, to the ADRB, along with as much documentation as he desires. If an applicant is represented by counsel, his or her name should be designated in the application along with a mailing address to which correspondence in connection with the review may be sent. The application may be submitted by the former service member, or his or her surviving spouse, next-of-kin or legal representative. It is to be forwarded through the U.S. Army Reserve Components Personnel and Administrative Center in St. Louis, Missouri to the ADRB in Washington, D.C. A motion or request for review must be made within 15 years after the date of discharge. Since there are some exceptions to this rule, however, the applicant or his counsel should check with the ADRB before deciding that the time for filing an application has expired.

The ADRB will grant a request to appear before it personally (with or without counsel) or through counsel alone. Briefs and relevant legal arguments to support a formal personal appearance should be submitted at the time notification is received of the scheduled hearing date. Formal rules of evidence are not applied to ADRB proceedings.

Applicants appearing personally are permitted to introduce witnesses, documents, sworn and unsworn statements and any other relevant information in support of the application. The applicant is subject to questioning by members of the ADRB in accordance with review procedures. If the applicant requests the right to present unsworn testimony, he is also entitled to choose whether or not he wants to respond to questions from members of the ADRB panel concerning that testimony.

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9. Army Regulation 15-180, Army Discharge Review Board (15 November 1978).

A discharge will be deemed proper unless, in the course of review, it is determined that there exists an error of fact, law, procedure or discretion associated with the discharge at the time of issuance, which prejudiced the rights of the applicant. Unless there is substantial doubt that the discharge would have remained the same notwithstanding the error, it is not prejudicial.

If the decision of the ADRB is adverse to the applicant, he may apply to the Army Board for the Correction of Military Records. This is not an appeal technically, but a new application. However, for all practical purposes, the procedure resembles a final appeal.

## II

### COLLATERAL JUDICIAL RELIEF

#### HABEAS CORPUS

The basic authority for the writ of habeas corpus is found in 28 U.S.C. §2241, but case law has brought about application of this remedy to court-martial petitioners. Since the 1953 Supreme Court landmark decision of Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed.2d 1508 (1953), the scope of military habeas corpus in federal courts has included inquiry into whether the court-martial had jurisdiction over the person and the offense, whether the accused was accorded due process of law pursuant to the UCMJ, and whether the military tribunal gave full and fair consideration to all procedural safeguards necessary to a fair trial under military law.<sup>10</sup> While this decision was somewhat ambiguous and subject to varied interpretations, it resulted in both the expansion of habeas corpus review of court-martial convictions and in greater willingness on the part of federal judges to hear petitioners seeking varied forms of collateral relief from the determinations of military tribunals.<sup>11</sup>

The court-martialled habeas corpus petitioner generally requests the federal court to order his immediate release from the service on the ground that he is being subjected to "unlawful custody." By making such a request, the federal court will undoubtedly review the court-martial to determine whether it had jurisdiction and whether the accused was accorded due process and given "full and fair consideration."

10. Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963).

11. Sherman, *supra* note 3, at 487; Moyer, *Justice and the Military*, §6-110 (1972).

The petitioner does face certain obstacles to this review. First, he must meet the "custody" requirement applicable to all habeas corpus petitioners. This requirement has been relaxed in recent years and it appears now that actual physical confinement may not be the only requisite, but that some lesser form of restraint, such as restriction, or mere continued presence in the Armed Forces, is sufficient.<sup>12</sup>

There is a long-standing requirement that a petitioner must exhaust all remedies available to him within the military before he can seek federal court review of a military conviction.<sup>13</sup> Thus, for the court-martialled petitioner, the exhaustion requirement includes all steps in direct appellate review, both "automatic" steps (e.g. the Court of Military Review in an appropriate case) and discretionary steps (e.g. the Court of Military Appeals and Article 69, UCMJ, petition to TJAG).<sup>14</sup> It has also been held that a petition for new trial pursuant to Article 73, UCMJ, would be necessary to satisfy this requirement in an appropriate case.<sup>15</sup> A writ of error coram nobis to the Court of Military Appeals may also be required to fulfill the "exhaustion" requirement, but it does not appear that a petition to the Board for the Correction of Military Records is necessary.<sup>16</sup> It is important to note the

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12. *Laxer v. Cushman*, 300 F.Supp. 920 (Mass. 1969); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

13. *Noyd v. Bond*, 395 U.S. 683, 89 S.Ct. 1876, 23 L.Ed.2d 631 (1969). The "exhaustion" requirement discussed in this section is applied by federal courts before they will consider any collateral relief to a court-martial conviction, whether it be habeas corpus, mandamus, declaratory judgment, injunctive relief or suits for back pay. However, different standards are applied by federal courts to meet this requirement when collateral relief is sought from military administrative determinations. That subject is beyond the scope of this article. See *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968).

14. *Gusik v. Schilder*, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950). For an explanation of the Article 69 appeal, see *Glidden*, Article 69 "Appeals" - The Little Understood Remedy, 10 The Advocate 177 (1978).

15. *Osborne v. Swope*, 266 F.2d 908 (9th Cir. 1955).

16. *Moyer*, supra note 5, at §§6-225, 6-226.

"exhaustion" requirement, since the failure to exhaust military review would result in the inability of the accused to seek civilian collateral review.

Habeas corpus is a time-tested tool for collaterally attacking a court-martial. It has been in use for over one hundred years<sup>17</sup> and it should continue to be the mainstay of military collateral remedies in the future.

#### MANDAMUS

Another more recently used collateral remedy for the convicted serviceman is a petition for a writ of mandamus brought pursuant to 28 U.S.C. §1361, which gives the district courts jurisdiction to compel officers and employees of the United States to perform a duty owed to the petitioner. The petition usually proceeds on the basis that the secretary of the military department in question is authorized to change military records when necessary to correct an error or injustice.<sup>18</sup> Thus, a petitioner normally asks the federal court to issue a writ of mandamus directing that his records be changed by the appropriate secretary, thereby collaterally attacking the underlying conviction.<sup>19</sup>

There is some question concerning the standards for collateral relief by writ of mandamus, since, generally, case law only permits this remedy when the federal officer or employee fails to perform a "ministerial", as opposed to a "discretionary", duty. Commentators have urged that equitable principles be adopted in determining the availability of the remedy.<sup>20</sup> Recently, federal courts seem to pay less attention to the ministerial/discretionary test and are more concerned with seeing that "fundamental fairness" is done.<sup>21</sup> This more liberal

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17. Ex parte Reed, 100 U.S. 13, 25 L.Ed. 538 (1879); Ex parte Milligan, 71 U.S. 2, 18 L.Ed. 281 (1858).

18. 10 U.S.C. §1552.

19. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

20. Moyer, supra note 5, at §6-132.

21. Ashe v. McNamara, supra note 13; Smith v. McNamara, 395 F.2d 896 (10th Cir. 1969), cert. denied 394 U.S. 934, reh. denied 394 U.S. 995 (1969); Brown v. United States, 365 F.Supp. 328 (E.D. Pa. 1973).

approach is very helpful to the defense counsel who might have difficulty overcoming this obstacle to mandamus relief.<sup>22</sup>

Military defense counsel should note that in one case a federal court entertained a petition for a writ of mandamus, but then refused to review two of the alleged errors since they had not been raised before the military tribunal.<sup>23</sup> Because failure to raise alleged errors may be construed as a waiver, it is incumbent upon trial and appellate defense counsel to place all alleged claims of error on the record.

#### DECLARATORY JUDGMENTS

The Declaratory Judgments Act, 28 U.S.C. §2201, provides the basis for a relatively new form of collateral attack on court-martial convictions. It offers a remedy only in situations where federal jurisdiction otherwise exists. Consequently, requests for declaratory judgments are customarily joined with the statutory actions of habeas corpus or mandamus.

In Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971), the petitioner sought both a declaratory judgment that the court-martial which had tried him over twenty years before was without jurisdiction and void and mandamus to correct this conviction on his military records. The court granted declaratory relief and directed that his records be changed, finding that his court-martial was subjected to unlawful command influence.

Declaratory judgment should be requested as a matter of course along with alternative relief when collaterally attacking a court-martial, since some federal judges prefer to use that remedy over others.<sup>24</sup>

22. Brown v. United States, supra note 15 contains an excellent discussion of the collateral remedy of mandamus.

23. Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), cert. denied 401 U.S. 918 (1971).

24. Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966), cert. denied 385 U.S. 881 (1966); Kauffman v. Secretary, supra note 6.

## INJUNCTIVE RELIEF

Federal courts have sometimes been willing to exercise their general equitable jurisdiction and hear requests for injunctive relief from the actions of military tribunals.<sup>25</sup> Since the court's authority lies in its equity jurisdiction, the petitioner must show irreparable injury and assert that no adequate remedy exists at law, before the merits can be reached.<sup>26</sup> Most suits are brought to enjoin a pending court-martial, rather than to attack a court-martial conviction.<sup>27</sup> They have met with very limited success, although federal judges often grant temporary restraining orders ex parte for a few weeks until the merits of the suit can be heard, thus giving the defense a brief delay to formulate further strategy.

Most success with this remedy is found when the petitioner seeks to enjoin administrative action of the military, such as the issuance of an administrative discharge, simply because a more cogent argument for the inadequacy of a remedy at law can be made in such cases.<sup>28</sup>

## TORT ACTIONS

The common law tort action of false imprisonment has been seldom used to attack court-martial convictions.<sup>29</sup> Such

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25. Federal Rule of Civil Procedure 65 grants the court injunctive relief as a remedy.

26. *Schlesinger v Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975).

27. *Schlesinger v. Councilman*, *supra*, at note 20; *McLucas v. DeChamplain*, 421 U.S. 21, 95 S.Ct. 1365, 43 L.Ed.2d 699 (1975); *Torres v. Connor*, 329 F.Supp. 1025 (N.D. Ga. 1970).

28. *Nevarez v. Schlesinger*, 440 F.Supp. 741 (P.R. 1977) (reservist ordered to active duty - command enjoined); *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965) (issuance of undesirable discharge enjoined pending review by Board for Correction of Military Records); *Trueblood v. Alexander*, Civil Action No. W-77-CA-76 (W.D. Tex., 17 March 1977) (unpublished) (command enjoined from involuntarily relieving a reserve officer from active duty pending military appeal).

29. *Dynes v. Hoover*, 61 U.S. 65, 15 L.Ed. 838 (1858); *McLean v. United States*, 73 F.Supp. 775 (W.P.S.C. 1947); *Owings v. Secretary of Air Force*, 298 F.Supp. 849 (D.C. 1969), rev'd on other grounds, 447 F.2d 1245 (D.C. Cir. 1971).

a complaint should be made in conjunction with other forms of relief discussed earlier in any case where the petitioner is in military confinement. A demand for money damages in excess of \$10,000 should be included, thus stating another basis for federal jurisdiction.<sup>30</sup>

#### COURT OF CLAIMS - BACK PAY SUITS

The Federal Court of Claims has authority, pursuant to 28 U.S.C. §1491, to render judgment upon any claim against the United States founded upon the Constitution, an act of Congress, or regulation of an executive department. This authority has been the vehicle for many ex-servicemen<sup>31</sup> and some on active duty to attack their court-martial convictions, by alleging that it was unlawful and that they should therefore recover back pay lost because of it. The Court of Claims may only award money damages; it cannot order release from confinement or discharge. As with the other forms of relief previously discussed, exhaustion appears to be required before jurisdiction to hear the claim will be granted.<sup>32</sup> Further, the question of waiver might also arise, as it does with other collateral remedies.<sup>33</sup> While this court is limited in its scope of review and will not "retry the facts" of the case,<sup>34</sup> the court may examine the court-martial proceedings where the petitioner sues for back pay and collaterally attacks the conviction on the ground that his constitutional rights were violated.<sup>35</sup>

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30. 28 U.S.C. §1331.

31. The statute of limitations for these suits is six years. 28 U.S.C. §2501.

32. See note 7.

33. See note 17.

34. *Artis v. United States*, 506 F.2d 1387 (Ct. Cl. 1975).

35. *United States v. Augenblick*, 393 U.S. 89 S.Ct. 528, 21 L.Ed.2d 537 (1968).

### Conclusion

The very existence of the Board for the Correction of Military Records and the Army Discharge Review Board is highly complimentary to the military. Both Boards provide a valuable service review to servicemembers because they look beyond formal technicalities and are willing to apply equity standards. Since petitioning the Boards is a valuable right of servicemembers, it is essential that they be made aware of their existence and availability.

It is apparent from a study of the last twenty-five years of activity by federal courts in the area of military collateral relief that federal judges have become less reluctant to interfere with the military judiciary. Just as trial defense counsel should be cognizant of "protecting the record" for military appellate purposes, he should now be equally conscious of the potential for civilian collateral review. Certainly today, with our large standing armed forces and with the concomitant number of courts-martial, the guarantees of fair trial will continue to be protected by both military appellate courts and boards and civilian collateral review.

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## CASE NOTES

### FEDERAL DECISIONS

#### SEARCH AND SEIZURE -- RIGHT TO COUNSEL

United States v. Praetorius, 24 Crim. L. Rptr. 2097 (E.D.N.Y. 1978)

A grand jury indicted the defendant on drug conspiracy charges. The next day, drug enforcement agents went to the defendant's home to make the arrest. An agent read the defendant her rights and then had her read a standard consent search form which advised her that she did not have to consent to any search. The defendant told the agents that they "can look anywhere you wish," and aided the agents in a search that disclosed incriminating evidence. The district court held that the oral consent was invalid and therefore the search was unreasonable. Once the defendant was indicted, the agents were under a duty to warn her that she was being prosecuted and that she had the right to counsel and to explain the significance of counsel and the dangers of proceeding without having counsel present. The court reasoned that, since the defendant had already been indicted, the search was a form of pretrial discovery. A postindictment request to search is a critical stage of the prosecution at which a defendant is entitled to counsel. A waiver of Fourth and Sixth Amendment rights, under these circumstances, must be based on all relevant information in order for the waiver to be intelligently made.

#### PERJURY IN GUILTY PLEA CASES

United States v. Stassi, 24 Crim. L. Rptr. 2032 (3d Cir. 1978)

A defendant was convicted of false declarations based on inconsistencies between statements made at an evidentiary hearing (28 U.S.C. §2255) on a motion to vacate his prior plea of guilty and those he made at the original hearing on that plea. At his guilty plea hearing, the defendant said that he had received no promises in regards to his sentence. However, at the evidentiary hearing, the defendant stated that he had received promises which the Government failed to uphold.

The presiding judge at the evidentiary hearing, who had also been the judge at the original hearing, held that the Government's evidence, including the testimony of the prosecutor, the defense counsel, and the documentary record, established that the defendant's plea had been knowing and voluntary and that no promises were ever made. The defendant's statements at the evidentiary hearing were false, and the conviction for those false declarations was proper.

#### SEARCH AND SEIZURE -- FULL DISCLOSURE TO ISSUING MAGISTRATE

United States v. Rettig, 24 Crim. L. Rptr. 2150 (9th Cir. 1978)

Drug Enforcement Agency agents asked a federal magistrate for an arrest warrant and a search warrant of defendant's residence to look for cocaine. The federal magistrate granted the arrest warrant, but refused the search warrant because of stale supporting information.

The next day, while several of the agents stationed themselves outside of the defendant's residence, another one called the defendant and "warned" him of the impending arrest. The agents were planning that the defendant would flee with the cocaine on his person, thereby side-stepping the problem arising from the lack of a proper search warrant. Since the defendant did not leave, however, the agents went inside the residence, to execute the arrest warrant, and discovered him disposing of marijuana in a toilet.

The agents then proceeded to a state magistrate, and obtained a warrant to search for marijuana-related evidence. The application did not mention the prior denial of their request for a federal warrant. Armed with the warrant, the agents thoroughly searched the defendant's house and discovered cocaine.

The Ninth Circuit Court of Appeals held that the search was improper. The agents did not confine their search in good faith to the objects of the warrant, but used it as a general warrant. Moreover, they were under a duty to disclose their true intent to search for cocaine to the issuing authority, as well as the fact that the federal magistrate had previously denied a warrant. The magistrate could not properly supervise the scope, purpose, or limits of the search without such

material facts, the Court concluded in reversing the cocaine conviction.

COURT OF MILITARY REVIEW DECISIONS

WAIVER

United States v. Manuel, CM 436534 (ACMR 17 November 1978)  
(unpub.) (ADC: CPT Healy)

Upon pleading guilty, the accused was sentenced by a general court-martial consisting of three lieutenant colonels, one captain, one master sergeant, and two sergeants first class. The Army Court of Military Review declined to consider the accused's allegation that the convening authority systematically excluded servicemembers in the grades E-6 and below, because it was not raised initially at trial.

EQUAL PROTECTION -- SEX OFFENSE CASES

United States v. Muzquiz, CM 436651 (ACMR 26 October 1978)  
(unpub.) (ADC: CPT Anderson)

The Army Court of Military Review upheld the constitutionality of Article 120, UCMJ (rape and carnal knowledge), rejecting appellant's position that its applicability only to males denied him equal protection of the law. See Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), cert. denied 23 Crim. L. Rptr. 4078 (5 June 1978). In a footnote, the Court left open the question of whether granting the limited scope of Article 120, UCMJ, equivalent sexual misconduct of female service members might be punishable under another article including Article 134, UCMJ, or under the Assimilative Crimes Act, 18 U.S.C. §13 (1976 ed.).

## STATE COURT DECISIONS

### PEREMPTORY CHALLENGES -- EXCLUSION ON BASIS OF RACE

People v. Wheeler, 24 Crim. L. Rptr. 2069 (Ca.Sup.Ct. 1978)

The California Supreme Court has held that a prosecutor may not use his peremptory challenges to exclude a racial or other cognizable group from a jury. The use of peremptory challenges solely for racial exclusion violates the right, as propounded by the United States Supreme Court (see e.g., Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)), that an accused have a jury drawn from a representative cross-section of the community. Such a selection is a prerequisite to an impartial jury.

In order to establish this systematic exclusion, the moving party must show on the record in a timely fashion that the group excluded is a cognizable group within the "cross-section" rule and that there is a strong likelihood that the persons are being challenged because of their group association rather than specific bias. The Court cautioned that its rule was different and broader than the rule established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

### ATTORNEY WORK PRODUCT

Lepley v. Lycoming County Court of Common Pleas, 47 L.W. 2284 (Pa.Sup.Ct. 1978)

A public defender was compelled to turn over to the state his personal tape recording of his client's pretrial hearing, which was the only record of that proceeding. The prosecution intended to introduce some of the recorded testimony into evidence at the client's trial. The Pennsylvania Supreme Court held that the tape was not protected by any privilege and was not the attorney's work product. It contained none of the attorney's private thoughts and was, in reality, nothing more than an account of a public hearing.

## "SIDE-BAR"

or

### Points to Ponder

1. Preserving drug case issues. It goes without saying that success on appeal depends on the effectiveness of counsel at the trial level. Nearly every contested drug case contains at least one of the following issues, which could be raised initially at trial:

a. Search and seizure

- (1) Neutral and detached magistrate. In United States v. Ezell, pet. granted, No. 31,304 (CMA 23 December 1975), and other cases, the appellants are asking the Court of Military Appeals to overrule its holding in United States v. Hartsook, 15 USCMA 291, 35 CMR 263 (1965) and declare that military commanders are per se not neutral and detached magistrates, and are incompetent to grant authorizations to conduct searches.
- (2) Failure to reduce the authorization/warrant to writing. In cases such as United States v. Fimmano, pet. granted 4 M.J. 279 (CMA 1978), the appellants are asking the Court to adopt the rule, followed by a number of civilian jurisdictions, that oral search warrants are constitutionally defective. See, e.g., Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971); State v. Pointer, 343 A.2d 762 (N.J. Super. 1975).
- (3) USAREUR supplement to AR 27-10. In conjunction with the preceding paragraph, in Europe, the USAREUR supplement to AR 27-10 requires that the authorization to search be in writing. The failure of the Government to follow this regulation is under attack at CMA. United States v. Murray, pet. granted, No. 36,298 (CMA 29 Nov. 1978).
- (4) Off-post searches. In United States v. Bunkley, pet. granted, 2 M.J. 145 (CMA 1976) and similar

cases, the appellants are arguing that commanders in Germany may not authorize searches off-post.

- (5) Authorizing a search based on unsworn information. In cases such as United States v. Hood, pet. granted, 4 M.J. 284 (CMA 1978), the appellants assert that "any information relied on by a magistrate be taken under oath and that this be shown in the record." United States v. Acosta, 501 F.2d 1330,1334 (5th Cir. 1974).
- (6) Delegation of authority to search. Being challenged at CMA also is the commander's authority to delegate search authorizations to a subordinate. The contention is that authority to search is a judicial function, which may not be passed on to a subordinate. United States v. Kalscheuer, pet. granted, 5 M.J. 363 (CMA 1978).

b. Chain of custody.

- (1) Chain of custody receipts. The argument is based on the footnote in Nault (United States v. Nault, 4 M.J. 318,329, n.7 (CMA 1978), which, incidentally, has been characterized as obiter dictum by ACMR (United States v. Porter, 5 M.J. 759 (ACMR 1978)) that chain of custody receipts are made primarily for the purpose of prosecution. The defense position also encompasses the standard hearsay issues inherent with all documents.
- (2) Missing links. Even when the prosecution does bring into court the handlers of fungible contraband and other physical evidence, sometimes it fails to establish an essential link in the chain of custody. United States v. Riggins, pet. granted, No. 36,466 (CMA 27 Nov. 1978).

c. Laboratory reports. Lab reports are being challenged:

- (1) As constituting incompetent hearsay;
- (2) As not being properly authenticated;
- (3) As made chiefly for the purpose of prosecution; and

- (4) As denying the accused of his right to confront witnesses against him. United States v. Santiago-Rivera, petition granted 3 M.J. 265 (CMA 1977).

2. Requesting open-end extension for Goode reply. Trial defense counsel should consider the results in United States v. Paige, 6 M.J. 529 (ACMR 1978), before requesting an open-end extension for submitting his Goode reply. In Paige, defense counsel requested an open-end extension of time on the last day of the Goode response period. The extension was immediately approved. Thirty-four days thereafter, defense counsel deposited his reply in the mail. The convening authority took action on the case on the 132d day after sentencing. On appeal, the accused argued that the Dunlap "clock" recommenced to run against the Government when the reply was placed in the mail; therefore the convening authority was not timely in finalizing his action, resulting in a Dunlap violation. The Army Court of Military Review rejected the accused's position and held that the Dunlap 90 day period did not begin to run again until the Government was in actual receipt of the response to the post-trial review. By its holding, the Court found sufficient defense delay to reduce the processing time attributable to the Government to 90 days. In a footnote, however, it cautioned against the practice of requesting indefinite delays, suggesting, instead, asking for definable time periods in which to file the response.

3. May substitute counsel reject service of the post-trial review? That question has been posed in light of the Court of Military Appeals' opinion in United States v. Iverson, 5 M.J. 440 (CMA 1978) and its progeny. After all the rhetoric, the consensus is "probably not." However, we are still concerned about the number of records which we receive in which, for example, service of the review is made on a specially detailed military defense counsel as opposed to individual civilian or military trial defense counsel when a new review and action is taken by a different convening authority in another command, or on such substitute defense counsel after trial defense counsel has transferred to another command and is not actually unavailable for service of the review for purposes of United States v. Goode, 1 M.J. 3 (CMA 1975). In some cases, the accused is on excess leave and substitute defense counsel is unable to contact him to enter into an attorney-client relationship. Therefore, the following

suggestions are proposed, as ways of dealing with substitute-for-convenience-service:

- a. Substitute counsel should first consider discussing the service with the staff judge advocate informally and encourage re-serving the review on the trial defense counsel. If this method does not succeed, substitute counsel might attack the service in the Goode response itself. "It was error for the SJA to serve his review upon me as substitute defense counsel in lieu of Captain \_\_\_\_\_, the trial defense counsel . . . (when trial defense counsel was transferred to, but remained on active duty at, Fort \_\_\_\_\_; and he was not actually unavailable for service of the review) (when I was unable to enter into an attorney-client relationship with the accused because . . . .) (when trial defense counsel was only temporarily absent because of leave/TDY, etc) . . . ."
- b. Trial defense counsel, during an Article 39(a) session, might announce on the record that, in accordance with the desire of the accused, service of the review be made on himself. "One further matter, Your Honor. My client wishes that I presently give notice to the Government that service of the review of the staff judge advocate for purposes of Goode be made on me."
- c. After trial, the accused himself could aid his own cause by submitting a message to the Government, such as the following:

TO: STAFF JUDGE ADVOCATE  
\_\_\_\_\_  
Armored Division  
Fort Swampy, \_\_\_\_\_

SUBJECT: Service of Review of the Staff Judge Advocate  
in the case of United States v. \_\_\_\_\_

THIS IS TO ADVISE YOU that I, the undersigned, the accused in the above entitled case, request that (CPT) \_\_\_\_\_, my trial defense counsel, be served

with a copy of your review pursuant to United States v. Goode.

(PVT), U.S. Army  
Accused

Date: \_\_\_\_\_

I have (caused to be) served this notice on (the (Deputy) Staff Judge Advocate) (the Chief of Military Justice) (an agent of the Staff Judge Advocate) this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

CPT, JAGC  
(Trial) (Senior) Defense Counsel

Hopefully, the above suggestions will assure compliance with CMA's position that only in the absence of truly extraordinary circumstances, should service of the review be made on an attorney other than the trial defense counsel.

4. Involuntary separation of convicted reserve officers attacked at CMA. An extraordinary writ has been filed at CMA in the case of CW2 Bosma v. MG Heiden, et al, CM 437578, Misc. Docket No. 78-\_\_\_\_, (CMA 28 Nov. 1978), attacking the regulation under which the Army is attempting to separate him involuntarily prior to the completion of his appellate review. The Army Regulation in question, paragraph 3-71a, AR 635-100, Personnel Separations - Officer Personnel (C24, February 1969), provides that active duty Army Reserve or National Guard officers who are sentenced to either dismissal (in the case of commissioned officers) or a dishonorable discharge (in the case of warrant officers) without confinement may be relieved from active duty upon approval of the sentence by the reviewing authority and prior to completion of appellate review. Paragraph 3-71b of the regulation provides that where confinement is adjudged in conjunction with dismissal or dishonorable discharge, and where the confinement has been served prior to completion of appellate review, such reserve or national guard officers will be released from active duty.

Because the regulation does not apply to RA officers or enlisted personnel (nor does it appear to have a counterpart in the Navy or Air Force), the extraordinary writ alleges equal protection/due process and Article 71, UCMJ, violations. Additionally, once a reserve officer is involuntarily separated pursuant to this regulation, there is no provision effecting his reinstatement to active duty, even though the conviction is later overturned. See paragraph 3-73g, AR 635-100. This situation can seemingly be avoided by the officer requesting excess leave before being involuntarily separated. Then, upon reversal of his case, the officer can terminate his excess leave, if he wishes to return to active duty. Paragraph 3-71a, AR 635-100. Accordingly, a reserve officer who wants to be able to return to active duty upon reversal of his court-martial conviction has to request excess leave to preserve that possibility.

Trial defense counsel who have clients confronted with the possibility of involuntary separation, yet wanting to remain on active duty pending the completion of appellate review, should consider a personal appeal to the convening/reviewing authority before contemplating other legal action. MILPERCEN is of the opinion that the reporting provisions of paragraph 3-73a, AR 635-100 are discretionary with the convening/reviewing authority in the case of a reserve officer under an appealed sentence of dismissal or dishonorable discharge without confinement. Once counsel has pointed out the discretionary route of paragraph 3-71a, AR 635-100, counsel must persuade the convening/reviewing authority not to report the matter to CMDR, MILPERCEN, or to do so with a recommendation for retention on active duty pending completion of appellate review. During this personal appeal to the convening/reviewing authority, counsel can point out the inequity and arbitrary nature of involuntary separation of a reserve officer and that federal district courts have repeatedly issued preliminary injunctions preventing such action. Huff, Fitts and Hines v. Alexander, et al, Civil Action No. 77-2186 (D.Kan January 26, 1978); Trueblood v. Alexander, Civil Action No. W-77-CA-26 (W.D. Tex, 17 March 1977). A personal appeal should be considered not only because the regulation is discretionary where a dismissal or dishonorable discharge without confinement is adjudged, but also because the success of an extraordinary writ is questionable.

"ON THE RECORD"

or

Quotable Quotes from Actual  
Records of Trial Received in DAD

\* \* \* \* \*

TC: Your Honor, may I approach the bench?

MJ: So, what's the purpose, we have no jury.

TC: Oh, I'm sorry, I -- I -- that's my favorite line, sir.

\* \* \* \* \*

MJ (instructing the court): Those of you who have heard these instructions before, you might listen to them. You might catch something that you missed before.

\* \* \* \* \*

MJ: Understanding these rights, by whom do you wish to be represented?

ACC: Judge alone, Your Honor. Oh, excuse me . . .

\* \* \* \* \*

MJ (to Navy officer): Do you prefer to be called doctor or commander?

W: Doctor. It took me longer to get that.

\* \* \* \* \*

MJ: Have you seen this prosecution exhibit, Mister \_\_\_\_\_?

IC (civilian): Yes, Your Honor, I have seen a copy of it.

MJ: Do you have any objection:

IC: Well, I have objections to it, but from my understanding of military law, my objections are futile.

\* \* \* \* \*

MJ: Well, we'll hold up on that . . . so let's not enter a plea at this time. Anything further?

TC: Yes, Your Honor, there are a few matters.

MJ: I was afraid of that.

\* \* \* \* \*

TC: Your Honor, I'm wondering whether it would be objectionable to move to amend that specification . . .

MJ: Go ahead and wonder.

\* \* \* \* \*

Q: Did you complete high school?

A: Well, at that time, when I was going to school -- when I was in the ninth grade I got promoted to the tenth and about two weeks after I was in the tenth they promoted me to the eleventh and about two months after they put me in the twelfth and then I went to a public school to become an architect and then I came back and they dropped me back down to the tenth and then promoted me up to the eleventh and I said "look, I'm joining the Army."

Q: Why did you join the Army?

A: To become an architect.

\* \* \* \* \*

MJ: Private \_\_\_\_\_, I now ask you how do you plead? However, before receiving your plea, I advise you that any motions to dismiss the charge or to grant other relief should be made at this time.

DC: Your Honor, the defense has no motions at this time. The accused pleads, to the charge and its specification, guilty.

ACC: Like hell, I do.

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