

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

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The views expressed in THE ADVOCATE are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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SPECIAL FINDINGS

The Military Justice Act of 1968 provides that in trials by a military judge alone, the judge must, upon request, find the facts specially in the event of a conviction. Article 51(d), Uniform Code of Military Justice. Paragraph 74i, Manual for Courts-Martial, United States, 1969, goes further and provides that upon request, "special findings shall be made of factual matters reasonably in issue." Counsel desiring special findings must make a request prior to the announcement of the general findings.

Military defense counsel should take full advantage of the new special finding procedure. Special findings in a trial by a judge alone have the same relation to general findings as do instructions to the court in a trial with court members. [The Court of Military Review has recently condemned the practice of making special findings in cases with court members. CM 420885, Robertson, 10 September 1969, (dictum).] The

significance of this for appellate purposes should be apparent. Unless special findings are requested and made a part of the record, there will be no way to achieve appellate relief in a case where the judge operates under an erroneous concept of the applicable law, relies on inadmissible evidence, or is otherwise misguided. We suggest the following approach:

1. Make full use of special findings. Request special findings on all seriously contested factual issues. The basic policy behind special findings is to promote better-reasoned decisions by making the judge stop and think before ruling. Use your professional judgment in making requests, but do not be cajoled out of making a request. The Manual provides that upon request, findings shall be made on factual issues reasonably in issue. This includes findings on motions and defenses as well as on the elements of the offenses. The Manual also provides that only one set of special findings may be requested by a party in any case. Appendix G of the new Military Judges' Guide has interpreted this to mean that while counsel may make numerous requests for findings during trial, the judge is only required to issue findings at one time during trial and need not prepare individual findings as the requests are made.
2. Specify your request. Do not merely ask for findings on all factual matters reasonably in issue. Specify the motions, defenses and offenses on which you wish findings to be made. The judge may require you to put the request in writing. This is reasonable and you should do so as a matter of course. It should also be noted that Appendix G of the Military Judges' Guide suggests that special findings may also be made on contested factual issues arising in the presentence hearing, whenever the issue is relevant to a sentencing decision.
3. Submit proposed findings when they help your case. In certain cases, particularly those with close sufficiency issues you may find that it will improve your chances of acquittal if you submit proposed findings which marshal the evidence in a

fair but favorable way. Such an exercise approximates the function of the statement of facts in an appellate brief. If it is a close case, proposed findings might tip the scale in your favor. Nonetheless, it must be remembered that the policy behind special findings is best served by making the judge himself justify his decision in writing. In most cases, therefore, do not attempt to preempt this judicial function. It is also important to remember that defense counsel cannot be required to submit proposed findings as a precondition to special findings by the judge. This is not the law in the military or elsewhere. Federal appellate courts have often condemned trial judges for abdicating their role in this area by merely approving special findings proposed by counsel.

COURT-MARTIAL JURISDICTION OVER MARIHUANA OFFENSES

In one of the broadest jurisdiction cases this year, United States v. Beeker, No. 21,787, ___USCMA___, ___CMR___ (12 September 1969), the Court of Military Appeals ruled that use and possession of marihuana, on or off a military base, has a special military significance and hence is always a service-connected offense. The Court noted, as it had in the past, that use of marihuana and narcotics has "disastrous effects" on the health, morale and fitness for duty of persons in the armed forces.

Beeker, in our opinion, opens what may be a promising door for the trial defense counsel. There, the accused pleaded guilty and no evidence was adduced on the debilitating effects or lack thereof of the marihuana in question. Since the test for service-connection depends on the effect of the drug on the health, morale and fitness for duty of the persons involved, the actual biological and psychological consequences of marihuana use now become relevant to the issue of jurisdiction. These are factors which have rarely before been admissible on the merits of a marihuana or narcotics prosecution.

The Court in Beeker drew no distinction between marihuana and so-called "hard" narcotics. Much

has been written, however, to suggest that perhaps there is a real biological and psychological difference--marihuana is apparently not habit-forming, carcinogenic, stimulating or narcotic. It produces only mild hallucinogenic reactions and may not be nearly as debilitating as some have thought. See generally President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 12, 13 (1967).

Hard evidence on the effects of marihuana use is scarce because it is rarely relevant to any material issue. But see Commonwealth v. Leis, 243 N.E. 2d 898 (1969) (Sup. Jud. Ct. Mass.) (eighteen expert witnesses testified on effects of marihuana in unsuccessful broad-scale attack on state marihuana law). Conceivably, however, if it could be established that marihuana is, for example, no more debilitating or duty-endangering than, say, alcohol, this should form a firm basis for a motion to dismiss for lack of jurisdiction. Whether such evidence exists, and how it should be proffered is, of course, a question which must be left to the forensic judgment of the trial defense counsel.

IDENTITY OF INFORMERS -- A CORRECTION

In last month's issue of THE ADVOCATE we indicated that the prevailing federal rule was that the identity of informers was discoverable on the issue of probable cause. This statement was incorrect. McCray v. Illinois, 386 U.S. 300 (1967) held that the identity of an informer was discoverable only if it could be shown that the identity was essential to the issue of guilt or innocence. We regret the error.

GENERAL INSANITY VOIR DIRE EXAMINATION

1. Members of the court, the defense intends to raise the defense of insanity. In support of this defense, we will call Major Smith, a psychiatrist, as a witness. Do any of you know Major Smith?

2. Have any of you heard about the McNaughton or "Right-Wrong" test for insanity? Have you any feelings regarding the validity of that test?
3. Have you or any of your close relatives or friends ever studied law?
4. Have you ever studied psychology, medicine, psychiatry, or sociology?
5. Have you formed any view concerning the validity of psychiatry, psychology, any of the behavioral sciences?
6. Have you ever served on a court-martial before where the defense of insanity was raised?
7. Do you have any reservations or feelings which would influence you or prevent you from fairly considering the evidence on insanity in this case?
8. Do you belong to any religious or philosophical organizations which reject the concept that a man may not be responsible for his acts because of his mental condition?
9. Do you feel that anyone who is physically able to commit a crime is necessarily responsible for his actions and is not insane?
11. Do you feel that mental illness is or should be limited to conditions which totally destroy an individual's ability to thrive or function?
12. Do you have any personal opinions concerning psychiatrists as individuals?
13. Do you feel that psychiatrists are no more qualified or competent to judge the mental condition of an individual than are laymen?
14. Would you be unable to weigh the professional qualifications, opportunity to observe and information which a psychiatrist brings to his opinion in a case?

15. Have you or any close relatives or friends ever been employed by a mental institution or clinic?

16. Have you ever been employed by a hospital?

17. Do you have any reason why you could not fairly and impartially render a verdict on the issues in this case?

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

TAILORING THE SENTENCE WORKSHEET

In the April 1969 issue of THE ADVOCATE we suggested that the sentence worksheet be tailored to permit the court to credit pretrial confinement against any sentence adjudged, if it desired. Counsel should be aware that in CM 419542, Allison, (31 July 1969) the law officer agreed to so tailor the worksheet and the court did in fact credit the accused with pretrial confinement when it announced a sentence. The case was affirmed by the Board of Review without opinion. The issue is also now pending before the Court of Military Review in CM 421189, Newby.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

ARREST -- FINGERPRINTS: Police arrested accused for vagrancy without probable cause, and took his fingerprints. At trial for burglary, the fingerprints were used. Court held that use of fingerprints was error because the vagrancy arrest was a subterfuge. It was irrelevant that evidence on burglary was strong. [See also Davis v. Mississippi, 394 U.S. 721 (1969)], Mills v. Wainwright, ___ F.2d ___ (5th Cir. 1969) 6 Crim. L. Rep. 2004.

MARIHUANA -- TRACES: Specification alleging possession of "burned residue" of marihuana was insufficient to state an offense since residue of marihuana was not a prohibited substance.

United States v. McDonnell, unpublished memorandum decision, Army special court-martial, 8 September 1969 (Hanft, J.).

COURT OF MILITARY REVIEW -- "ALL WRITS" POWER:
In the August 1969 issue of THE ADVOCATE we suggested that the Court of Military Review may have "all writs" power. One panel of the Court of Military Review agrees. CM 419804, Dolby, (19 September 1969) (dictum).

EXTRAORDINARY REMEDIES -- MILITARY JUDGES:
The Court of Military Appeals has denied a petition for a writ of habeas corpus alleging illegal pretrial confinement, on the ground, inter alia, that the petitioner "failed to seek appropriate relief from the Convening Authority or the Military Judge (see Article 39a, Uniform Code of Military Justice)", thus implying that judges have extraordinary remedy power. In re Strichland, Misc. Docket 69-48, (COMA, 24 September 1969). [See THE ADVOCATE, August 1969; cf. CM 419804, Dolby, (19 September 1969) (COMR has "all writs" power) (dictum)].

UNCHARGED MISCONDUCT -- INSTRUCTION: The Navy Court of Military Review views Paragraph 76a(2), Manual for Courts-Martial, United States, 1969 as insufficient to abolish the military judge's duty to instruct the court to disregard uncharged misconduct prior to sentencing. NCM 69 1681, O'Neal, (5 September 1969). [The Army Courts have not faced the issue squarely. See CM 420334, Taylor, (23 September 1969)].

GENERAL REGULATION -- PUNITIVE EFFECT: Paragraph 38a, MACV Directive 37-6 (total value of dollar instruments purchased with MPC will not exceed \$200.00 per month) held to be nonpunitive since it was directed only to those who accomplished the transactions. CM 420976, Benway, (12 September 1969).

SPEEDY TRIAL -- PREJUDICE IN ABSENCE OF RESTRICTION:
A seven-month pretrial delay and a four and one-
half month post-trial delay held prejudicial per
se where there was no adequate explanation, even
though the accused was not in pretrial confinement
or in restriction. NCM 69 1416, Guinn, (9 July 1969).



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