

# THE ADVOCATE

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## THE IMPLICATED INFORMER -- RELIABLE OR UNRELIABLE?

If an anonymous soldier goes to the CID and admits that on a previous occasion he has purchased marihuana from another, does that information, without more, authorize the suspect's commanding officer to search his belongings? The question of the reliability of the implicated informer has recently been raised anew in military and civilian criminal jurisprudence, and it is a difficult one.

In Spinelli v. United States, 393 U.S. 410 (1969), the Supreme Court reaffirmed the principle that in order to establish a basis for probable cause, an informer's tip must either (1) inform the magistrate of the underlying circumstances from which the informer gained his information, and from which the officer believed him to be reliable, or (2) be independently corroborated. Under the first prong of this test, it is not sufficient that the affidavit merely state that the police officer believes his informer to be reliable, he must state why. The question raised, however, is what can legitimately constitute reliability.

One test of reliability is clear--previously reliable information in the past. Thus, in McCray v. Illinois, 386 U.S. 300 (1967), the informer had given the police officer reliable information over 15 times in the past. This type of reliability, coupled with some minimal independent corroboration, was sufficient to establish probable cause. See generally Webb, Military Searches and Seizures - The Developments of a Constitutional Right, 26 Mil. Law Rev. 1, 20 (1964).

Is there, however, any other type of reliability which might give sufficient credence to an informer's tip to constitute probable cause? In Jones v. United States [Cecil Jones] 362 U.S. 257 (1960), the police officer had information from an informer that the defendant was involved in drug traffic and kept a supply of heroin at his apartment. The officer's

affidavit stated that his informer (1) admitted purchasing narcotics there in the past, and (2) had given previous reliable information in the past. Also, the officer swore that the defendant admitted being a user of narcotics, and that he had been given similar information by "other informers." The Supreme Court found the search to be based on probable cause, and it discussed the informer's reliability:

[W]e may assume that [the officer] had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in his apartment. Had that been all, it might not have been enough; but [the officer] swore to a basis for accepting the informant's story. The informant had previously given accurate information. 362 U.S. at 271. (Emphasis added.)

Thus, the Supreme Court at least implied that information from an implicated informer would probably be insufficient for probable cause.

Chief Judge Quinn of the United States Court of Military Appeals thought similarly as late as 1963. In United States v. Davenport, 14 USCMA 152, 33 CMR 364 (1963) the Court struck a search based on information from an informer without any showing whatsoever of his reliability. "There is nothing in this record," said the Court "to reflect that the OSI's informant was any more reliable than an anonymous caller." 33 CMR at 369. Judge Quinn dissented, and would have treated the information received from an "ordinary citizen" as inherently reliable, unless it be shown that the tipster was himself engaged in criminal conduct.

The credibility of a known cheat, pervert, drug addict, and the like, is initially suspect. The layman,

as well as the lawyer recognizes the damaging effect on credibility of previous acts of moral turpitude, or the commission of serious crime. . . . Consequently, information supplied by such persons would not normally be believed by a reasonable and prudent man, without some basis for crediting the hearsay. Information received from informants not known to be engaged in conduct tending to undercut their credibility stands on an entirely different footing.

The Supreme Court in Spinelli, supra, however, led some observers to believe that the Jones rule--that an implicated informer was not per se reliable--was on the way out. The majority, noting that the affidavit did not contain a sufficient statement of the underlying circumstances from which the informer gained his information, wrote that: "We are not told how the FBI's source received his information--it is not alleged that the informant personally observed Spinelli at work or that he ever placed a bet with him." 393 U.S. at 416. It seems clear from the opinion that this remark went to the lack of a showing of underlying circumstances, rather than the lack of a showing of reliability. Nevertheless, Mr. Justice White, concurring, picked it up and used it as a possible benchmark of reliability, despite the teaching of Jones. "If," he wrote, "the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient."

Recently, the Virginia Supreme Court of Appeals held that information from an implicated informer was sufficiently reliable to establish probable cause. In Manley v. Commonwealth, S.E.2d (Va. Sup. Ct. App. 1970) 7 Crim. L. Rptr. 2502, the Court ruled that an affidavit

"established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant."

This opinion is at odds with the traditional view that an informer who implicates himself is less, not more, reliable. Thus, there are now existing two lines of cases, those which hold that "ordinary citizens" are reliable, see, e.g., Garcia v. State, 298 S.W.2d 831 (Tex. Crim. App. 1957) and those which hold that "criminals" are reliable, Manley, supra.

Chief Judge Quinn has, on different occasions, taken both positions. In Davenport, supra, he would have credited the information of an "ordinary citizen," and in United States v. Crow, 19 USCMA 384, 41 CMR 384 (1970), he would have credited the information of an admitted "marihuana and opium user." There, the majority struck down a search because it was based on stale information. Judge Quinn dissented, and discussed the reliability of the informer who admitted having used druges with the appellant on several occasions. "In my opinion," Judge Quinn wrote, "[the informer's] statement indicated a course of conduct on the accused's part . . . which gave reasonable assurance that the accused probably had marihuana in his possession." The informer had never given previously reliable information. Nevertheless, Judge Quinn wrote, "his reliability, even as a reformed marihuana and opium user, established he was not a faceless or anonymous informant." 41 CMR at 387, 388.

Whether the implicated informer will ultimately be deemed to be more or less reliable than a member of the public generally is still open to question. In the military, the testimony of an accomplice is "of questionable integrity and is to be considered with great caution." Paragraph 153a, Manual for Courts-Martial, United States, 1969 (Revised edition). It would seem anomolous that the testimony of an implicated informer would be entitled to more weight because of his involvement before trial, and less weight because of his involvement during trial. In any event, counsel who seek to attack a search based on an informer's tip are advised to familiarize themselves with the recent case law concerning the reliability to be attached to the statements of the implicated informer and to establish a sufficient factual predicate for their attack along these lines at trial.

#### DISQUALIFICATION OF THE POST-TRIAL REVIEWER

In the Army it is quite common for attorneys in a staff judge advocate's office to perform many differing roles, with these roles changing often on a daily basis. Almost everyone is aware of Army attorneys acting as defense attorneys one day and prosecuting as trial attorneys the next, and these changes have even occurred on the same day. See DA Pam. 27-5, Staff Judge Advocate Handbook 7 (1963) [hereinafter referred to as SJA Handbook]. This practice has been recognized by the United States Court of Military Appeals, and the court has said that no adverse consequences will flow from the performance of multiple roles so long as incompatible duties are not performed in the same case. United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958). The Congress was aware of the military's tradition of utilizing attorneys in multiple roles. This led to concern that convicted servicemen might not always receive an impartial review at the trial court level. In order to insure review by an impartial staff judge advocate, Article 6(c), Uniform Code of Military Justice was enacted and it currently provides:

No person who has acted as member, military judge, trial counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case. See also Paragraph 85a, Manual for Courts-Martial, United States, 1969, (Revised edition).

See S. Rep. No. 486, 81st Cong., 1st Sess., 9 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess., 12-13 (1949).

A significant body of law has developed under this statute which alert defense attorneys may use to the benefit of their clients.

It is not surprising to find that the objection to incompatible roles in the same case has been limited to attorneys assigned to or associated with the staff judge advocate's office. Thus there are no military cases involving a court-martial member or an investigating officer, usually laymen, acting improperly as the reviewer of convictions by courts-martial.

With the return of part-time military judges in the Army there is increased importance in closely observing their conduct for possible incompatible roles. A military judge may not act as a judge and thereafter either conduct the post-trial interview or draft the post-trial review in the same case, and even if the staff judge advocate adopts the judge's recommendations, the accused will have been denied an impartial review. United States v. Crunk, 4 USCMA 290, 15 CMR 290 (1954). In addition, the statutory language "upon the same case" has been read broadly so that the disqualification applies to separately tried cases of co-accused where the offenses arose out of the same event or transaction. See United States v. Hill, 6 USCMA 599, 20 CMR 315 (1956).

Just as the military judge is statutorily disqualified from reviewing the same case, so too are the trial and defense counsel and their assistants. In this area, drastic remedies may even be available. For instance, in United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1954) the trial counsel acted as the post-trial reviewer. The court held this statutory violation constituted general prejudice and, like the remedy utilized in United States v. Crunk, *supra*, ordered a rehearing. In addition the trial counsel may neither conduct the post-trial interview, United States v. Clisson, 5 USCMA 277, 17 CMR 277 (1954) nor may he act as reviewer in a separate but related case. United States v. Hightower, 5 USCMA 385, 18 CMR 9 (1955). These rules also apply equally to the defense counsel and his assistants. In United States v. Rivera, 16 CMR 357 (ABR 1954) a detailed assistant defense counsel, who was absent at trial, prepared the post-trial review. The issue, of course, was whether he had "acted" in the same case. This issue was resolved against the government as Paragraph 6a of the 1951 Manual provided that counsel were "deemed to have acted" unless the record contained "evidence to the contrary". Here the record was silent on the activities of the assistant defense counsel between his detail to the case and the trial, and a certificate by the assistant defense counsel stating that he had not participated could not be received into evidence on appellate review. Therefore a new review and action were ordered. Also, defense counsel and their assistants should not participate in post-trial interviews as interviewers, (United States v. Owens, No. 419358, (ABR 10 December 1968), but they may participate as defense attorneys in order to assure due process for their clients. See THE ADVOCATE, March 1969.

Although the statutory words "upon the same case" have been read broadly, the word "acted" in the statute has been read narrowly. While one would

normally consider that nothing more than being officially detailed as counsel would be required to establish that one had "acted" as counsel, this is not currently the case. In United States v. McNeil, 37 CMR 604 (ABR 1966) a detailed trial counsel did not perform any acts for the government and he was absent at the time of trial. The board of review held this meant he had never "acted" --i.e., performed some act on behalf of the government--as trial counsel and he could therefore properly be the post-trial reviewer.

The statutory disqualification also applies to the command staff judge advocate himself by an inverse reading of the statute. If the staff judge advocate is to be disqualified, it must be shown that he acted on behalf of one of the officials who is statutorily disqualified; e.g., if it were shown that he investigated or prosecuted the accused, such an incompatible role would be disqualifying and thereafter he could not review the conviction. See SJA Handbook 75. Naturally the staff judge advocate will not be formally on orders as either the investigating officer or the prosecutor. But this is not required as it is not the appointment which is disqualifying, United States v. McNeil, supra; rather it is the performance of acts in an incompatible role.

The staff judge advocate, of course, has been given numerous roles to play within the command. SJA Handbook 75-80. The Court of Military Appeals has recognized that the staff judge advocate has "duality of functions" and as these functions were created by statute "the military must live with it". See United States v. Smith, 13 USCMA 553, 559, 33 CMR 85, 91 (1963). Within this context, the test for disqualification is whether the staff judge advocate's actions would make reasonable men impute to him a personal interest in the outcome of the case. United States v. Turner, 7 USCMA 38, 21 CMR 164 (1956).

Thus a staff judge advocate may provide legal advice to the CID in the performance of its functions, United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953), draft the charges against the accused when other attorneys are unavailable, United States v. Smith, 13 USCMA 553, 33 CMR 85 (1963), determine personally facts bearing on legal impediments to trial and whether government witnesses would be available, United States v. Dodge, 13 USCMA 525, 33 CMR 57 (1963), disagree with the Investigating Officer's recommendations, United States v. Rowe, 13 USCMA 302, 32 CMR 302 (1962), and control the trial counsel's presentation of the case at trial. United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954).

The staff judge advocate is disqualified as post-trial reviewer if he secures witnesses for the government either by a grant of immunity, United States v. Cash, 17 USCMA 208, 31 CMR 294 (1962), or by an informal agreement to reduce a co-accused's sentence in return for his testimony, United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958). He is also disqualified if he becomes personally involved in securing the accused's conviction. United States v. Kennedy, 8 USCMA 251, 24 CMR 61 (1957). However, he may inform the trial counsel of an available witness either before or during the trial, United States v. Ortiz-Vergara, 24 CMR 315 (ABR 1957), accept a guilty plea containing a promise to testify against an accused, United States v. Gilliland, 10 USCMA 343, 27 CMR 417 (1959), and request a grant of immunity for a government witness assigned to a separate general court-martial jurisdiction. United States v. Lockridge, 39 CMR 714 (ABR 1968).

What is important to note from the cases is that the entire chain of officials preparing the review are considered reviewers for the purpose of disqualifications. United States v. Shaffer, 40 CMR 794 (ABR 1969). The defense attorney should therefore question the impartiality of not only the action attorney who drafts the review and the attorney who conducts

the post-trial interview, but the chief of military justice and deputy staff judge advocate if they edit the review, as well as the staff judge advocate. This may prove very fruitful, particularly with respect to the chief of military justice, if this official actively helped the trial attorney prosecute the case.

If a disqualified reviewer is discovered by the defense attorney, he should present the facts underlying the disqualification, and the applicable law, to the convening authority for corrective action in an Article 38(c) brief. See United States v. Shaffer, supra. If the action of the convening authority has been taken before discovery of the disqualified reviewer, and the record forwarded, then the Article 38(c) brief should be submitted either to the United States Army Court of Military Review or The Judge Advocate General, US Army Judiciary, ATTN: Examination and New Trials Branch, as appropriate. By detecting the disqualified reviewer, the defense attorney will be taking one more step in assuring due process during the post-trial review for his client. See THE ADVOCATE, April 1970.

#### A COMPARISON OF ACQUITTAL RATES IN MILITARY AND FEDERAL COURTS

A recent issue of Newsweek reported that the conviction rate in military courts was 94%. General Hodson, in a subsequent television interview reported that the comparable conviction rate in federal courts was 95%. The Newsweek figure was apparently based on the average monthly conviction rates released by the Records Control and Analysis Branch of the US Army Judiciary. The 95% conviction rate for federal courts can be obtained from the report of the Administrative Office of the US Courts.

It is not at all clear, however, that either of these figures is based on sufficiently similar data

so that one could be meaningfully compared with the other. For example, it is necessary to exclude AWOL-type offenses from military statistics, since AWOL is easy to prove, accounts for a high percentage of military convictions, and has no civilian counterpart. In an effort to make such a meaningful comparison of military and civilian conviction rates, the editors of THE ADVOCATE have examined raw data in the Records Control and Analysis Branch of an essentially similar type to data published by the Administrative Office of the US Courts. The published military figures record as a conviction a case which results in a conviction of any offense charged. Thus, if a soldier is tried for premeditated murder and a one-day absence, is acquitted of the former and pleads guilty to the latter, the case is nevertheless counted as a conviction. Moreover, both figures include guilty pleas, but the federal figures also record cases disposed of before trial, whereas the military figures do not.

We have examined military cases for a one-month period, and we have limited our study to four types of offenses for which there were similar federal statistics. Moreover, we have sought to compare military cases only with cases tried in the District Court of the District of Columbia, since that is the only federal court with first-level criminal jurisdiction similar to a military general court-martial. The categories we chose were assault, larceny, robbery and narcotics offenses, since these crimes are essentially similar in the military and civilian community and are treated alike in military and civilian law. Our assault category included all types, aggravated and unaggravated. Attempts were included, but conspiracies were not. Larceny comprehended wrongful appropriation in military law, and other types of theft in civilian law.

Our study revealed that the conviction rate for these four types of offenses in a general court-martial

in the Army, following a not-guilty plea, is 73.5%. For a similar period, the conviction rate in the District Court for the District of Columbia for the same offenses is 67.7%.

If guilty pleas are counted as convictions, the conviction rate in the military becomes 81.6%, and in the District of Columbia District Court, the conviction rate is 81.1%.

The conclusions we draw from this are that the true conviction rate in either system of justice is not as high as had been previously reported, and that when similar crimes are considered similarly, the two systems of justice provide virtually the same acquittal ratios.

#### THE ARTICLE 38(c) BRIEF: A FORGOTTEN DEFENSE TOOL

Although both the Uniform Code and the Manual specifically authorize the trial defense counsel to file appellate briefs in behalf of their clients, we are constantly dismayed by the paucity of Article 38(c) briefs being attached to records of trial. This provision of the Code provides counsel with one of the most effective weapons in the defense arsenal, and no counsel should ever complete his representation without at least considering the possibility of an Article 38(c) brief.

Article 38(c), Uniform Code of Military Justice, provides in part that the defense counsel may, in every court-martial proceeding, "forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate." This provision applies to summary and special courts-martial as well as to general courts.

In United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955), the Court of Military Appeals took a broad

view of Article 38(c) briefs. "The Code does not describe the nature of the matters which may be noted in defense counsel's post-trial brief. Neither does it directly indicate to whom the brief should be forwarded. However, it is clearly inferable that the brief may include factors relating to the sentence and that it is to be forwarded to the convening authority." Id. at 20 CMR 97. In that case, the Court noted that the Article 38(c) brief need not be written: "We think the fair intendment of the statute contemplates an oral presentation as well. With regard to the sentence, the oral presentation may take the form of a personal interview of the accused by the convening authority's legal officer." Id. Thus, Article 38(c) has become the only statutory authority for the post-trial interview. Since that interview was originally intended to replace a written brief on behalf of the accused, there is no authority for the inclusion in a staff judge advocate's review of any derogatory material garnered from the accused during the interview.

The Court of Military Appeals has always been concerned with the failure of counsel to make use of Article 38(c). In United States v. Fagnan, 12 USOMA 192, 30 CMR 192 (1961), Judge Ferguson called the attention of counsel to "the responsibility of the trial defense personnel for including in the record all possible information which may have a bearing on the sentence to be adjudged and approved. Moreover, we refer once more to the infrequently invoked provisions of [Article 38(c)] which permit the defense counsel to prepare a brief to be forwarded 'for attachment to the record.'" In that case, the court ruled that the board of review was limited to consideration of the "entire record", but it added that an Article 38(c) brief was part of the "entire record." The clear import of this decision is that matters may be included in such a brief which were not otherwise included in the record proper. Thus, the Article 38(c) brief becomes a very important vehicle for counsel who has either forgotten to include some important

evidence in extenuation and mitigation for his client, or who feels that some additional evidence should be considered by appellate authorities. It should be noted, however, that the Court of Military Review will not consider new material in such a brief unless it was first presented to the convening authority. United States v. Lancaster, 31 CMR 330 (ABR 1961); compare United States v. Strahan, 14 USCMA 41, 33 CMR 253 (1963).

The Article 38(c) brief may be used by counsel to rebut or correct omissions in the post-trial review. United States v. Cash, 12 USCMA 708, 31 CMR 294 (1962). It has also been used on occasion to fill gaps in the record of trial created by unrecorded conversations. United States v. Strahan, supra. The absence of an Article 38(c) brief has been used by the courts to diminish the credibility of an accused who makes allegations of irregularities for the first time on appeal. United States v. Tawney, 33 CMR 459 (ABR 1963).

An Article 38(c) brief should, as we have already noted, first be filed with the convening authority. In this event, matters otherwise aliunde the record may be presented. If the brief is filed directly with the appellate tribunals, there is a great risk that it may be disregarded, for the law seems clear that except in exceptional circumstances, appellate tribunals are limited to the record as presented to the convening authority.

On occasion, appellate defense counsel will adopt an Article 38(c) brief as their own pleading, and will merely amplify it during oral argument. United States v. Harris, 34 CMR 522 (ABR 1963). Moreover, there have been cases when a late-filed Article 38(c) brief has caused the Court of Military Review to reconsider an earlier decision. In United States v. Wright, 40 CMR 895 (ACMR 1969), the trial defense counsel wrote to the appellate defense counsel concerning the trial, and entitled his letter "Article 36(c) [sic] brief." Appellate counsel filed

the letter with the Court, which by that time had already decided the case. The Court reopened the case and ordered that the letter be considered as an Article 38(c) brief. Counsel for both sides were then permitted to file further pleadings. The Court refused to grant the government's motion to strike the brief, noting that it merely restated, in clearer form, arguments which had already been made at trial. The government, said the court, was placed at no disadvantage since it filed pleadings opposing the brief on the merits.

It should be obvious that Article 38(c) provides an excellent means for counsel to make one last plea for his client. It gives counsel an opportunity to submit last minute evidence in extenuation and to make a final argument on the appropriateness of the sentence. This can be more important than a similar plea made by appellate counsel, because the trial defense counsel had a personal as opposed to a paper relationship with his client. A defense counsel who neglects to examine the possibility of an Article 38(c) brief for his client does his client a distinct disservice at a time when his client has a great need for his continued assistance.

#### INTERLOCUTORY APPEAL OF DENIAL OF PRETRIAL DISCOVERY REQUEST

During an Article 32 investigation, the defense moved before the Investigating Officer for production of a report prepared by the government which the defense claimed had bearing on the case and which might lead the convening authority to refrain from referring the case to trial. The Investigating Officer denied the production request, as did the convening authority, The Judge Advocate General and the Secretary of the Army.

In a petition for writ of mandamus filed with the US Army Court of Military Review the petitioner asked that the Secretary of the Army be directed

to make the report available because the inability to rebut the report "will prejudice the Petitioner before the convening authority." Neither the convening authority, the investigating officer nor the trial counsel had seen the report.

In a per curiam decision, the Army Court refused to grant the writ, nothing that the request could be renewed before the military judge in the event that the case ever went that far. Henderson v. Resor, Misc. Docket No. 70-7, ACRM 22 September 1970 (en banc) 8 Crim. L. Rptr. 2012.

The most remarkable portion of the opinion, however, was not the result but the dictum. The Court said:

That which has thus far been said should not be taken as an indication that we believe that the respondent is justified in withholding the document from the petitioner. Our perusal of the document leads us to a contrary conclusion. However, since there is an adequate remedy in the normal process of judicial administration, no basis for an issuance of a writ of Mandamus or other Order for Extraordinary Relief appears. . . .

The import of the case, in our view, is not that the court declined to order production of the document, but that it virtually instructed the trial judge to order the document produced when, and if, the case is ever referred to trial. The Court of Military Review is empowered to find facts- and after perusing the report, it found as a matter of fact that the respondent was "not justified" in withholding the report. Since the thrust of the appellant's argument was that production of the report at this stage might lead the convening authority not to refer the case to trial, or might lead the Article 32

investigator not to recommend trial, it follows that if the judge orders production at a later date, a new Article 32 investigation and referral by the convening authority would be in order.

Whether this case means that one can now litigate as an interlocutory matter the denial of discovery during the Article 32 investigation, a remedy not ordinarily available in the federal courts, is not entirely clear. The result of the case would indicate that one cannot so litigate an issue of discovery, but the fact that the Court made a finding of fact that the government's refusal to release the document was unjustified might lead to a contrary conclusion in the proper case.

#### THE MISCELLANEOUS DOCKET

Convicted by a general court-martial of rape, robbery and interstate transportation of a stolen motor vehicle (Dyer Act), the petitioner was ultimately confined in the U.S. Penitentiary, Leavenworth, Kansas. By motion "Pursuant to Title 28, Section 1361, United States Code," construed by the Court of Military Appeals as a motion for appropriate relief, petitioner sought an order directed to the warden of the penitentiary requiring him to credit petitioner with time for good behavior. At the time of filing, petitioner was no longer in the military, his case having been previously finalized and a punitive discharge executed. The court dismissed the petition for lack of jurisdiction, noting, "[T]his Court's jurisdiction is limited to the administration of the Uniform Code of Military Justice exclusively within the Armed Forces of the United States . . ." Swisher v. Secretary of the Army, COMA Misc. Docket No. 70-59 (29 September 1970).

#### RECENT CASES OF INTEREST TO DEFENSE COUNSEL

**ASSAULT ON AN OFFICER -- LEGAL AND FACTUAL SUFFICIENCY --**  
The accused was charged with lifting up a weapon against a superior commissioned officer by pointing

a rifle at the officer in question. The Court of Military Review, interpreting Paragraph 169a, Manual for Courts-Martial, United States, 1969, (Revised edition), held that this offense presumes the existence of a simple assault. If a simple assault is established by the evidence, then the elements of the Article 90 offense should be examined. In the instant case, the court held that, according to Paragraph 207a, Manual, supra, the facts did not support even a simple assault. The evidence clearly showed that the rifle pointed at the officer was not loaded nor held in such a manner as to be used as a club. The un rebutted testimony of the accused was that he believed the rifle was unloaded at the time he pointed it at the officer. Although the officer testified that he was scared because he did not know if anything was in the rifle, the court found that his apprehension of bodily harm was not reasonable under the circumstances. The incident occurred during noncombat conditions (a training exercise in Hawaii), the officer knew that ammunition had not been distributed to the members of his platoon that day, and there was the conditional nature of the accused's accompanying statement that if he had any ammunition he would kill the officer with the weapon. The court concluded that these factors negated the reasonableness of the alleged victim's apprehension that "force will at once be applied to his person." United States v. Waller, No. S5653 (ACMR 9 October 1970).

COMMUNICATING A THREAT -- EFFECT OF INTOXICATION -- The accused was convicted of communicating a threat to a sergeant. He was acquitted of offering violence against and willfully disobeying three superior commissioned officers at the same time and place because of his state of intoxication. The Court of Military Review held that this evidence of intoxication was also sufficient to cast a reasonable doubt that the accused had formed, at the time of his communication to the sergeant, a determination to injure or kill him. The court was not convinced beyond a reasonable

doubt that the accused had a present purpose or intention of carrying out the alleged threat. United States v. Jackson, No. 422546 (ACMR 16 September 1970).

COMMUNICATING A THREAT -- SUBJECT OF THREAT -- The accused was convicted of communicating a threat to his battery commander, Captain M, by his stating to another battery officer, "He better have all the protection in the world when something happens." The Court of Military Review was not convinced beyond a reasonable doubt that the language used by the accused constituted a threat under the particular circumstances. The accused entered his orderly room and asked another officer the whereabouts of the accused's lost rifle. This officer told the accused that Captain M would probably want to talk to him later in the day in regard to a formation missed by the accused. The accused then became upset and uttered the alleged threat as he left the orderly room. The court held that the accused's statement did not show a declaration of a purpose or intention to injure his battery commander as required by Paragraph 213f(10), Manual for Courts-Martial, United States, 1969, (Revised edition). The court indicated that it was questionable whether the statement was directed at Captain M or at someone else in the battery. The court noted that the accused was upset and angry, his rifle was missing, and he was beset with other troubles. Also, just before he spoke to the officer in the orderly room, the battery first sergeant told the accused, in regard to the missing rifle, that he would pay for it and would go to jail. The accused was also charged with, and pleaded guilty to, communicating threats to kill two named sergeants who were in a group that attempted to arrest the accused. The accused testified that he did not remember if these two-named individuals were in fact in the group. The court held his plea of guilty improvident. "It is quite possible, of course, for an accused to commit the crime of communicating a threat to a person whom he does not know by name, but it is another matter for an accused at a court-martial to plead guilty to specifications which allege

that he threatened to kill two persons that he didn't know were present in the group." United States v. Copeland, No. S5756 (ACMR 9 October 1970).

CONSCIENTIOUS OBJECTORS -- JUDICIAL REVIEW OF ADMINISTRATIVE DECISION -- The accused was convicted of willful disobedience of an order issued by his superior commissioned officer. Prior to the order, the accused's application for discharge on the basis of conscientious objection had been denied by the Secretary of the Army. The Court of Military Review noted that Department of Defense Directive 1300.6, 10 May 1968, (which authorizes separation of conscientious objectors) establishes a requirement that the military departments may not disapprove a conscientious objection application unless there is a basis in fact for so doing. This Directive also indicated that in-service conscientious objection claims were to be judged by the same standards that are applied when such claims are asserted before induction. The court further noted that, according to the Military Selective Service Act of 1967, judicial review of conscientious objector decisions made before induction is limited to whether there is "no basis in fact for the classification assigned" to the registrant. Therefore, the court held that the same judicial review should be afforded in-service conscientious objection determinations as are provided in the case of pre-induction decisions. The court stated that this limited review (basis in fact) is "restricted to reviewing only the application file that was considered by the Secretary and to determining whether that file contains any evidence to support the disapproval by the Secretary. The military judge is not empowered to conduct a trial de novo or to consider new evidence." United States v. Goguen, No. 421998, \_\_\_ CMR \_\_\_ (ACMR 1970).

COURT MEMBERS -- PREDISPOSITION AS TO SENTENCE -- The accused was charged with four offenses involving heroin. The defense counsel, on a voir dire examination

elicited from all the court members statements indicating that they were predisposed to adjudge a punitive discharge if the accused was convicted of the charged offenses. The trial counsel then elicited responses from the court members that they would, in arriving at a sentence, consider all matters presented in extenuation and mitigation. Further questioning by the defense counsel was curtailed by the military judge. The Court of Military Review held that the responses to the trial counsel's questions did not establish a change or modification of the members' previous statements reflecting a predisposition for a punitive discharge upon conviction. The court held that the military judge's act of curtailing further inquiry regarding the court's predisposition to adjudge a punitive discharge constituted prejudicial error. United States v. Kelly, No. 422350, \_\_\_ CMR \_\_\_ (ACMR 1970).

DEPOSITIONS -- UNAVAILABILITY OF WITNESSES -- The Court of Military Review, in holding a government deposition inadmissible over defense objection because of a lack of reasonable notice in the taking of the deposition, offered several guidelines in regard to the use of depositions. Citing United States v. Davis, 19 USCMA 217, 41 CMR 217 (1970), the court stated that a mere change of duty station of the deponent from an overseas station (in this case, Vietnam) to one in the United States raises a substantial question as to whether the witness is actually unavailable. The court stated its "firm view" that a military witness about to depart a command on routine transfer orders to another station must either be retained or called back to appear as a witness in the event of trial, unless "the accused personally waives confrontation and thereby consents to the use of a deposition, after being fully advised of his rights and afforded every other protection to which he is entitled under military due process." The court quoted from Chapter 23, DA Pam. 27-2, "Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised edition," 28 July 1970:

"it is considered undesirable to emphasize the use of depositions in view of the development of the law since 1951. Additionally, it is the exception rather than the rule to use depositions in trials today. Therefore, the Manual should not infer that their use is normal." Finally, the court advised defense counsel to assert any valid objection they might have at the time the deposition is taken in order to avoid any possibility of waiver. United States v. Giles, No. 421978 (ACMR 29 September 1970).

ESCAPE FROM CUSTODY -- SUFFICIENCY OF THE EVIDENCE -- The evidence in regard to a charge of escape from custody established (1) that the accused was ordered into confinement by his company commander who sent him to the first sergeant, and (2) that the accused was apprehended 25-55 minutes later off post by a civilian policeman. At the time of his apprehension, the accused was handcuffed to another individual. The Court of Military Review noted that the record of trial did not indicate whether the guard was present when the accused left, or whether the guard released the accused. The court stated that it was "not willing to assume that the accused freed himself from restraint" and, therefore, dismissed the charge of escape from custody. United States v. Adams, No. S5822, (ACMR 28 August 1970).

EXTENUATION AND MITIGATION -- REBUTTAL BY THE PROSECUTION -- The accused, testifying in extenuation and mitigation, stated that he had been in the military service for approximately eight years, had been awarded the "conduct medal," and had "about six years good time." The trial counsel, over defense objection, then elicited from the accused two occasions of nonjudicial punishment and two other instances of misconduct. The Court of Military Review noted that Paragraph 138f(2), Manual for Courts-Martial, United States, 1969, (Revised edition), prohibited introduction by the prosecution of specific acts of misconduct by an accused unless it is in rebuttal of evidence by the defense that the accused has not committed other

offenses or acts of misconduct. The court held that the defense in the instant case did not introduce such evidence. It stated that the award of the Good Conduct Medal was based upon an appraisal of the accused's overall conduct within a particular time frame by persons other than the accused himself. The court refused to conclude that by mentioning his receipt of this medal, the accused was in effect denying that he had committed other acts of misconduct. Further, his reference to having completed six years of "good time" refers to that period of time creditable toward completion of a term of military service. During this time of service, he may or may not have committed an act or acts of misconduct. The court also stated that, assuming the evidence in question raised the issue of the accused's good character, the introduction of other acts of misconduct committed by the accused for the sole purpose of rebutting evidence of his good character was erroneous (Para. 138g, Manual, supra). United States v. Sanders, No. 422679, CMR (ACMR 1970).

FORFEITURES -- COMPARISON WITH A FINE -- The accused, an officer charged with larceny of postal funds, was sentenced to dismissal, payment of a fine, and confinement until the fine was paid, but not for more than one year. There was a pretrial agreement which provided for disapproval of any confinement adjudged. The convening authority disapproved that portion of the sentence providing for confinement in lieu of payment of the fine. The Court of Military Review held that because of a conflict between the pretrial agreement and the sentence, the fine had to be disapproved altogether. As the pretrial agreement contemplated a maximum sentence of dismissal and total forfeitures without any confinement, the fine portion of the sentence exceeded the scope of the agreement. A fine renders one pecuniarily liable to the United States for the amount of money specified and the Government may bring suit to collect it after the individual has been discharged from the service. A forfeiture, however, is collectable only

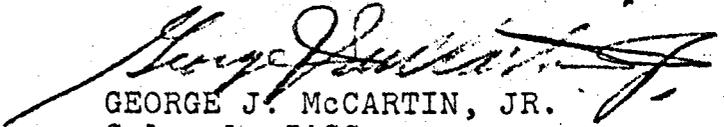
while the individual is on active duty and entitled to draw pay and allowances. In the instant case, since the sentence as approved included a punitive discharge, but no confinement, a forfeiture cannot legally be collected until the sentence is ordered executed (after the completion of appellate review). The net result is that the individual never forfeits any pay and allowances. The court therefore stated that the fine, under the circumstances of the instant case, was a more severe punishment than a forfeiture. United States v. Addair, No. 422686 CMR (ACMR 1970).

IDENTIFICATION -- EFFECT OF PRIOR LINE-UP -- The Court of Military Review held erroneous the admission of an in-court identification of the accused as well as the pretrial line-up identification (for corroboration purposes) as they were admitted without regard to the possible invalidity of the line-up. The court noted that Paragraph 153a, Manual for Courts-Martial, United States, 1969, (Revised edition), adopted the rule of Gilbert v. California, 388 U.S. 263 (1967), United States v. Wade, 388 U.S. 218 (1967) that an identification of an accused at a line-up conducted in violation of the right to counsel is an illegal line-up and "any later identification by one present at the illegal line-up is a result thereof, unless the contrary is shown by clear and convincing evidence." The prosecution has the burden of proof to establish a lack of taint. The court cited United States v. Webster, 40 CMR 627 (ABR 1969), which held that an out-of-court hearing should be conducted to determine if the accused was accorded his Wade-Gilbert right of assistance of counsel, or, in the alternative, if the in-court identification is based upon an independent source. United States v. Bowman, No. 422158, CMR (ACMR 1970).

MORNING REPORTS -- LACK OF AUTHENTICATION -- To prove the unauthorized absences of the accused, the government introduced a DA Form 188 containing several entries

pertaining to the accused. The defense counsel objected to the admissibility of this document because it was a carbon copy and the signature on it was illegible. The Court of Military Review noted that the signature block in the Certification and Authentication portion of the DA Form 188 contained some "illegible traces of writing," but that to conclude it was the signature of the commanding officer of the special processing detachment, "is to strain one's imagination, let alone his eyesight." The court, citing United States v. Takafuji, 8 USCMA 623, 25 CMR 127 (1958) stated that if the defense attacks the admissibility of morning report entries, the ultimate burden of proving officiality rests on the government. The court held that the government, in the instant case, did not meet its burden regarding authentication. In addition, the court noted that two entries on the extract, purportedly made the same day were signed by two different commanding officers of the same special processing detachment. The court stated that "when two different 'Commanding Officers' purport to sign the original morning report on the same day, it is logical to conclude that the extract copy of the entries thereof lacks authenticity." United States v. Lawson, No. 423631, \_\_\_ CMR \_\_\_ (ACMR 1970).

SEARCH AND SEIZURE -- PROBABLE CAUSE -- The accused's automobile, located in a post parking lot near his company area, had been searched and marihuana was found in the accused's clothing in his car. The only evidence to support the search was the finding, in an ammunition impact area on another part of the post where the accused had briefly stopped his motorcycle, of an open ammunition can apparently containing marihuana. The Court of Military Review held the marihuana inadmissible as there was no evidence showing or even suggesting the presence of marihuana in the appellant's distant automobile. The court stated that suspicion alone will not support a finding of probable cause so as to permit the search of the automobile. United States v. Freeman, No. 421667 (ACMR 24 September 1970).

  
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