
THE ADVOCATE

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PROCEDURE IN
THE APPELLATE COURTS

The Court of Military Appeals has recently emphasized the continuing responsibilities of the trial defense counsel through the appellate processing of their cases. Because of the tri-level military system, contact between the appellant and defense counsel is not institutionalized. Unfortunately, counsel in the field often lose track of their case after it leaves the jurisdiction for the appellate level. The following brief description of what happens to a case is offered to defense counsel.

After the convening authority takes his final action, the original plus two copies of the record are transmitted to TJAG and received by the Clerk of the Court of Military Review. The term "record", here, means not only the trial transcript, but also the review of the staff judge advocate and the allied papers, which may include the Article 32 investigation, pre-trial recommendations and referrals and other relevant miscellaneous papers.

When the record is received by the clerk's office, it is assigned to one of the panels of the Court by order of the Chief Judge. The clerk checks to see if counsel has been requested by the appellant. If none has been requested, the record is sent to the designated panel who can, if they so desire, request TJAG to appoint counsel. That case is then treated the same as if counsel was requested by the appellant. Otherwise, the "no counsel" case is ready for disposition by the panel upon receipt. The original record is maintained in either the clerk's office or, if it so desires, in the panel's office.

If counsel is requested or TJAG designates counsel, the clerk sends a copy of the record to the Defense Appellate Division (DAD) and one copy to the Government Appellate Division (GAD). The Chief of the DAD is appointed by The Judge Advocate General to represent the appellant. He, in turn, assigns the case to an action attorney who is responsible for client contact and the preparation and filing of pleadings. Also appearing on the pleadings are the action attorney's branch chief and executive officer and/or Chief, DAD. Counsel has 30 days from the date he receives the record to file an assignment of errors and brief, but enlargements of time are regularly requested from and granted by the Court. The Court may also specify such issues as it desires to be briefed.

After defense appellate has filed pleadings, GAD has an opportunity to reply. Their infrastructure is the same as DAD's with an action branch chief, executive officer and/or Chief appearing on pleadings. Enlargements are also requested and granted so a case normally doesn't reach the Court in the minimal time period. Lengthy cases or cases with many alleged errors may require several enlargements by both counsel. When the GAD pleadings are filed, counsel are then given the option of requesting oral argument. If no hearing is requested, the case goes to the panel for decision. If a hearing is desired, the panel will set a time and date for the oral argument. Each panel has one day a week set aside on which to hear oral argument. After the argument has been heard, the case is ripe for decision.

At this juncture, it is appropriate to detail the structure of the U.S. Army Court of Military Review (ACMR). Presently, the ACMR consists of a chief judge and 12 associate judges. All judges are active duty officers or retired officers recalled to active duty. They are appointed by TJAG and serve on regular assignment. The associate judges sit in four panels of three judges each, with one of the three judges designated as the senior judge. He is responsible for the administration of cases assigned to the panel as well as presiding in open court. Each panel has its own secretary and commissioner, the latter being a regularly assigned attorney who acts as law clerk and bailiff for the panel. The chief judge is the administrator for the court and presides at en banc hearings; he has his own secretary and commissioner. Normally, he does not sit with a panel but can and does act as a third judge when temporary vacancies occur due to leave or reassignment.

Each panel has its own system for determining which judge will write the opinion after they have reached a decision.

Based upon the recommendation of the senior and associate judges of the deciding panel, the chief judge chooses whether a decision is to be a published opinion of the court or a memorandum opinion. After the election is made, the operations branch of the clerk's office is responsible for the dissemination of the opinion. Both sides have ten days to move for reconsideration and if no motion is made, or is made and denied, the decision becomes final. The decisions can take varied forms: affirm both findings and sentence; affirm in part the findings and/or the sentence; set the findings and sentence aside and dismiss or order a rehearing; order a new trial; order a sanity board; or order a limited hearing. The listing is by

no means complete. In all cases, the clerk's office transmits a letter of instruction accompanying the decision to insure proper compliance with the opinion. These letters may be as simple as a direction that the appellant be served with a copy of the decision and a blank petition to the U.S. Court of Military Appeals (COMA). Or they may be as complex as detailing how a limited hearing is to be conducted. Since the COMR does not issue a mandate, the letters are often invaluable guides to the decisions. Suffice it to say, the letters are official in nature with the clerk speaking for the Court.

If the record sounds well-travelled, it is important to realize that everything takes place on the second and third floors of the Nassif Building at 5611 Columbia Pike, Bailey's Crossroads, Virginia. The court, clerk's office, and appellate divisions are all part of the U.S. Army Legal Services Agency (USALSA) a field operating agency of TJAG. USALSA also includes the trial judiciary, examinations and new trials branch, and the contract appeals division.

Decisions adverse to the appellant may be appealed to COMA within 30 days after the date he is served with a copy of the decision. If no petition for review is received, the convening authority promulgates final orders in the case, which allow the execution of any punitive discharge adjudged. While an appellant may file his own petition directly to the Court, it may also be filed with TJAG who then appoints counsel* in the same manner as he did before COMR. Counsel then files the petition and, within 20 additional days, files a brief in support of the petition with the Clerk of COMA. The Government has 20 days to respond to the brief. The attorneys appearing before COMA are those of the two appellate divisions, with appearances entered in the same manner as before the COMR. Usually, the counsel who appeared before COMR are again appointed to appear before COMA. If a petition for review is granted, and that is entirely discretionary with the Court, additional briefs are normally ordered to be filed by both parties; these are referred to as final briefs. Further, the Court is not limited in its grants to those issues raised by appellant; it may specify such issues as it desires. Oral argument will be heard by the Court unless it orders otherwise. The decisions of the Court when rendered are similar to those of the COMR. Again, like the COMR, TJAG is the means by which the Court's decision are given efficacy. Often corrective action may be accomplished only at the COMR level and the record is returned to that court. A mandate implementing the decision of the Court issues, unless a motion for reconsideration, modification, or rehearing is filed within 10 days of the date of the decision.

If a petition is denied, and no motion for reconsideration is made or granted, the case is treated in the same way as if no petition had been filed and a final order is issued.

The Government's mode of appeal is to have a question certified by TJAG. Unlike petitions, certified questions must be answered by the COMA. TJAG frames issues he desires answered as questions in a particular case; usually upon the recommendation of the chief, Government Appellate Division. The questions are served on the Court of Military Appeals. The Court then must order appellate counsel to brief the issues just as though the Court had ordered final briefs on petition for review. The court has the option of ordering oral argument. The Court must make a dispositive decision on the certified questions as framed by TJAG. Other than the automatic requirement for the Court to review a case and issue a decision on the certified question; the administration of the case is virtually identical to that for a case with a grant of review.

Institutionally, COMA is composed of a chief judge, and two associate judges, all of whom must be civilians. They are appointed by the President for a 15 year term and no more than two can be of the same political party. COMA judges have writing commissioners who are also civilians in addition to a central legal staff. There is a court executive who is responsible for the administration of the court's business and a clerk of court who handles filings, docketing and administrative matters with regard to cases. The Court of Military Appeals and its various offices are located at 450 E Street, N.W., Washington, D.C. 20442.

After COMA's action has become final, it's mandate will issue. That may mean a remand for further action; but, if it is an affirmance, the case has completed its route and the appellate procedure is ended. Then the record is stored with all its predecessors from 1975 to date at the Washington National Records Center, Suitland, Maryland.

OPPORTUNITIES FOR ADVOCACY DURING THE PRESENTENCING
PHASE OF COURTS-MARTIAL

Examination of recent records of trial received at the Defense Appellate Division has indicated that, during the pre-sentencing phase of many trials, some defense counsel have neglected to resist introduction of evidence offered by the prosecution, or to present information favorable to the accused. Moreover, stipulations of fact which are offered by the prosecution frequently contain prejudicial uncharged acts of misconduct. The purpose of this article is to accentuate those problem areas for which defense counsel must be alert.

I

Resisting Prosecution Evidence Which
Portrays the Accused Unfavorably

Counsel should resist evidence that the accused has been the subject of adverse personnel action. Paragraph 75d, Manual for Courts-Martial, United States, 1969 (Revised Edition) (henceforth Manual) authorizes, pursuant to regulations established by the appropriate Secretary, the admission of personnel records reflecting the accused's past "performance and conduct." This provision traditionally has been interpreted as pertaining to records of nonjudicial punishment and personnel qualification records (DA Forms 20, 2, and 2-1). United States v. Johnson, 19 USCMA 464, 42 CMR 66 (1970); United States v. Montgomery, 20 USCMA 35, 42 CMR 227 (1970). The Secretary of the Army has promulgated a change to the applicable regulations purporting to authorize introduction of personnel records during presentencing which establish that the accused has been reduced for inefficiency or misconduct, barred from reenlisting, or received a letter of reprimand (Paragraph 2-20b, C. 16, AR 27-10, 4 November 1975).

Notwithstanding this change in the regulation, the defense position at trial should be that evidence of adverse administrative actions against the accused is not admissible. The defense at trial should argue the case authority authorizing the introduction of records pertaining to nonjudicial punishment and personnel qualification is inapplicable and that the offered evidence is incompetent, irrelevant, immaterial, and essentially unreliable. United States v. Montgomery, supra, authorizing the admission of personnel qualification records, is not analogous to this issue. Unlike adverse personnel actions, the

information contained on personnel qualification records, such as the accused's test scores, date of birth, promotion records, and past assignments, is normally innocuous as well as being an objective and reliable summary of factual data. In contrast, adverse personnel actions contain such imprecise and subjective material as the opinions of commanders. Nonjudicial punishment is essentially quasi-judicial in that it can be imposed only for violation of the Uniform Code of Military Justice and the recipient of such punishment may elect to be tried by court-martial, a decision customarily made after receiving the benefit of an attorney's advice. For these reasons, such records are analagous to previous convictions in that the misconduct alleged actually occurred, and that the acts of the accused do constitute a criminal offense. In contrast, a soldier can be barred from reenlistment because of indebtedness, or for a plethora of other reasons; and a letter of reprimand may be issued to a soldier who has displeased his commander by allegedly displaying poor judgment or otherwise deviating from a perceived, but nebulous, standard of conduct. Obviously, these types of administrative actions do not necessarily reflect a soldier's conduct, as pertains to the prior commission of illegal acts. However, their admission could support the inference that the accused should not be retained in the service. In such a context, prejudice is manifest because the sentencing authority should not make such a judgment based upon such information.

Evidence of adverse personnel actions may also be resisted on grounds that they commonly reflect the company commander's unfavorable opinions of the accused, thereby violating Paragraph 138f of the Manual which prohibits the prosecution from attacking the accused's character before the defense has placed it in issue. Paragraph 138e is also pertinent because it provides that "as a general rule. . .a witness must state facts and not. . .opinion or conclusions." If trial counsel were to begin presentencing by calling the accused's company commander as a witness to assassinate the the accused's character by testifying that the accused should not be retained in the service, his actions would be improper. Logically, by offering personnel records containing such information, the prosecution is attempting to introduce inadmissible evidence under the guise of a permitted personnel record. This type of subterfuge was condemned by Judge Latimer, writing for the Court of Military Appeals, when he said:

. . .we have also held that merely because a document is official does not render everything recorded therein admissible. Materiality, competency, and relevancy are essential before testimony should be placed before the

members of the court (citations omitted).
United States v. Schaible, 11 USCMA 107,
110-111, 28 CMR 331,335 (1960).

Therefore, the characterization of an improper attack upon the accused's character as an official record does not render it admissible, and the attempted introduction of such evidence should be vigorously resisted.

Counsel should also be cautious, when entering into stipulations of fact, to avoid inclusion of information regarding uncharged misconduct. Unfortunately, the damage inflicted by counsel who agree to include such information in a stipulation usually cannot be purged. In the past, the trial judge was required to sua sponte instruct the members to disregard any adduced evidence of uncharged misconduct in assessing sentence. United States v. Turner, 16 USCMA 80, 36 CMR 236 (1966). However, pursuant to the 1969 revision of the Manual, Paragraph 76a was amended to allow the sentencing authority to consider all properly admitted evidence of misconduct by the accused in adjudging an appropriate sentence. Although this change effectively negated earlier decisions of the Court of Military Appeals, it has been upheld as ". . . a permissible exercise of authority granted the President, earlier case law notwithstanding." United States v. Worley, 19 USCMA 444,446, 42 CMR 46, 48 (1970). Therefore, because the admission of evidence of uncharged misconduct in a stipulation of fact will not ordinarily constitute a basis for appellate relief, it is imperative for the defense not to stipulate to such information.

When trial counsel insists that the accused stipulate to uncharged acts of misconduct, defense counsel should explore the possibility of including the damaging evidence in a stipulation of expected testimony, rather than in a stipulation of fact. See generally, United States v. Thompson, CM 432672 (ACMR 30 September 1976), pet. denied 9 February 1977; compare, Paragraph 115a with Paragraph 154b(1), Manual. As the court noted in Thompson:

When opposing counsel stipulate as to facts, they in effect admit them to be the truth. When opposing counsel stipulate as to expected testimony of an absentee witness, they are only agreeing as to what the witness would say if he were present in court, not his veracity. Moreover, stipulation of testimony neither relieves the prosecution of the burden of proving the facts of the

case, nor deprives the defense of the opportunity to attack or rebut. United States v. Gerlach, 16 USCMA 383, 37 CMR 3 (1966). (emphasis in original) United States v. Thompson, supra, slip op. at 3.

Thus, the defense can properly object to the inclusion of objectionable material contained in a stipulation of expected testimony, thereby subjecting the information contained therein to the rules of evidence.

The defense should also strive to limit the role of the prosecution during presentencing. When the accused enters a plea of guilty, the trial counsel is entitled to present a prima facie case during the post-findings phase of the trial to establish the aggravating factors. In a contested case, the prosecution can present only admissible previous convictions, permitted personnel records, and rebuttal evidence. United States v. Taliaferro, 51 CMR 13 (ACMR 1975); United States v. Clark, 49 CMR 192 (ACMR 1975). Therefore, an appropriate objection should be entered when, in a contested case, the government attempts to call non-rebuttal witnesses. Even when the accused has entered a plea of guilty, the trial counsel may not introduce evidence tending to establish facts which occurred after the offense and which do not tend to explain it. Thus, it has been held that the following facts have been improperly admitted: that the victim of a carnal knowledge offense subsequently attempted suicide (United States v. Shields, 40 CMR 546 (ABR 1969)); that the accused had a generally poor attitude (United States v. Peace, 49 CMR 172 (ACMR 1974)); that, after the offense was committed, the accused uttered inflammatory words unrelated to the offense for which he was charged (United States v. Roberts, 18 USCMA 42, 39 CMR 42 (1968)); and the accused had been disrespectful to his company commander who had been killed in combat (Id.). Evidence of physical injury to the victim, if relevant to the offense alleged, may be admissible to aid the court in comprehending the accused's misconduct; but graphic photographs should be admitted only if they are also essential to prove identification to depict the extent of wounds or the manner of death, or to show the scene of the incident. United States v. Bartholomew, 1 USCMA 307, 3 CMR 41 (1952). Obviously, a plea of guilty would tend to negate the justification for such pictorial evidence by admitting the truth of the charges. Evidence of a subsequent change in behavior patterns of the victim of a crime such as rape, as manifested by the reluctance to engage in sexual relations with her husband, would also appear to be both remote and unnecessary.

By resisting the admission of such prejudicial evidence, which tends to portray the accused in an unfavorable light, the client's rights are protected during the presentencing phase of trial and the possibility of a harsh sentence is minimized. Although defense objections to this material may be denied, such a ruling by the trial judge may be a fruitful issue for appellate litigation by the defense.

II

Introducing Opinion Evidence Which is Favorable To The Accused.

Although Paragraph 138e of the Manual states, "It is a general rule that a witness must state facts and not his opinions or conclusions," the defense may introduce opinion evidence which favorably portrays the accused. This opinion evidence may be in the form of character evidence or information regarding the accused's mental condition or capacity.

Evidence pertaining to the accused's mental condition is admissible in mitigation, and it need not be in the form of expert testimony. Paragraph 122c of the Manual enables a lay witness who has observed the behavior of the accused to express an opinion concerning his general mental condition. Paragraph 123 encourages the use of "psychiatric" evidence after findings:

In arriving at its sentence, the court may consider any evidence with respect to the mental condition of the accused which falls short of creating a reasonable doubt as to his sanity. The fact that the accused is a person of low intelligence, or that, by virtue of a mental or neurological condition his ability to adhere to the right is diminished, may be a mitigating factor.

In interpreting this paragraph, it has been held that a psychiatrist's opinion of the accused's diminished capacity (United States v. Scott, 46 CMR 541 (CGCMR 1971)) or character disorder (United States v. Paul, 96 CMR 779 (CGCMR 1971)) was properly admitted. In United States v. Barfield, 22 USCMA 321, 46 CMR 321 (1973), the military judge refused to grant a brief continuance to enable the defense to secure the attendance of an expert witness in extenuation and mitigation. The accused had pleaded guilty to a specification of committing a lewd act upon a five-year-old child, and the requested witness was a psychiatrist who had examined the accused, and who had expert knowledge of several studies of sex offenders. The Court of

Military Appeals held that, because the psychiatrist would testify that sex offenders are seldom recidivistic and that the accused was not likely to commit another offense, the denial of the defense request was error.

Paragraph 75c(1) of the Manual provides that, for the defense during extenuation and mitigation, "the military judge . . . may relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of apparent authenticity and reliability." Subsection (4) of that paragraph allows the defense to introduce evidence of "particular acts of good conduct or bravery," as well as "the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other traits that go to make a good officer or enlisted person." The Court of Military Appeals has interpreted these provisions to authorize the accused's supervisors, whose testimony occupies a unique and favored place in military law, to include in their assessment of the accused's character a recommendation that no punitive discharge be adjudged. United States v. Vogel, 17 USCMA 198, 37 CMR 462 (1966); United States v. Robbins, 16 USCMA 474, 37 CMR 94 (1966); United States v. Guy, 17 USCMA 49, 37 CMR 313 (1967); United States v. Shields, 40 CMR 546 (ABR 1969). By canvassing the accused's friends, associates, and supervisors, the defense usually will discover at least one witness who can testify favorably about some facet of almost any accused's character. The ready availability of this type of evidence, however, is not unknown to the triers of fact, particularly to professional jurists, so its impact may be de minimis.

Endorsements by the members of the accused's chain of command and recommendations of the Article 32 investigating officer might also uncover favorable information which could be presented to the court in mitigation. Although military appellate courts have been inconsistent in upholding the admissibility of such recommendations for disposition of cases, the issue was eventually resolved in the accused's favor. In United States v. Walker, 28 CMR 575 (ABR 1959), pet. denied 28 CMR 414, the Army Board of Review ruled that the law officer erred in excluding the recommendation of the accused's commander and the Article 32 investigating officer that the accused be tried by special court-martial, the Army Board stated:

Certainly if the accused's commanding officer recommended the accused be tried by a court-martial which could not adjudge a punitive discharge it might reasonably be inferred that accused had a good

reputation for efficiency and other traits that go to make a good soldier. Such evidence is clearly admissible in mitigation. 28 CMR at 576; but see, United States v. Capito, 31 CMR 369 (ABR 1962), pet. denied 32 CMR 472; United States v. Lucas, 32 CMR 619; (ABR 1962).

Subsequently, the Court of Military Appeals resolved this issue in favor of the defense when it enunciated the following standard for determining the admissibility of evidence offered by the defense in extenuation and mitigation:

Essentially, the standard that should be applied is whether the information offered will be helpful to the court in determining an appropriate sentence or even to serve as a ground for a later recommendation of clemency (citation omitted). United States v. Barfield, 22 USCMA 321,322, 46 CMR 321,322 (1973).

This decision renders military practice analagous to the general federal practice enunciated in Rules 32a and 32c of the Federal Rules of Criminal Procedure which authorize the sentencing agency to receive information in the form of a presentence report of investigation pertaining to the accused's financial condition, general circumstances affecting his behavior, or other information which may be helpful in imposing sentence. Unlike prevailing civilian practice, however, military procedure does not allow for the relaxation of evidentiary standards for the prosecution so that general material adverse to the accused is admitted. The relaxation of evidentiary standards for the defense after the findings provides an excellent opportunity for the advocate to introduce beneficial evidence.

PRETRIAL CONFINEMENT

Until recently, commanding officers were afforded scant judicial guidance in deciding whether to confine an accused serviceman before trial. No standardized procedure existed by which commanders could make accurate assessments of the need to detain a particular defendant. In United States v. Heard, 3 M.J. 14 (C.M.A. 1977), the Court of Military Appeals (COMA) established some guidelines to be employed in evaluating the need to confine.

Regardless of what name it may be assigned, confinement before trial appears to be a form of punishment. As such, confinement of an individual before his guilt or innocence has been determined presents unique problems to defense counsel and confinement officials. It has long been recognized, for example, that pretrial prisoners must be kept separate from sentenced convicts whenever possible. United States v. Bayhand, 6 USCMA 762, 21 CMR 86 (1956).

Early decisions held that the only basis on which to impose confinement was to insure the accused's presence at trial. United States v. Bayhand, supra. Later, other courts took a different view. The Fourth Circuit Court of Appeals ruled in United States ex. rel. Chaparro v. Resor, 412 F.2d 443, 445 (4th Cir. 1969), that Article 10 "permit[s] a variety of factors to be considered..." in assessing the need for pretrial confinement. COMA appeared to be giving credence to this view in United States v. Nixon, 21 USCMA 480, 45 CMR 254, 256 (1972), when it held that "confinement is authorized to insure the accused's presence at trial or to protect the person and property of others from serious harm." However, in 1974, the court reverted to its old standard -- only risk of flight could justify incarceration before trial. De-Champlain v. Lovelace, 23 USCMA 35, 48 CMR 506, 508 (1974). By the time Heard was decided, therefore, the law was in a state of confusion.

The facts of the Heard case provided the Court of Military Appeals with an excellent opportunity to articulate a clear standard for confinement. Defendant Heard had been incarcerated four times before going to trial, twice because of his AWOL record and twice because of his (new) commanding officer's feeling that he was a "pain in the neck" and required an inordinate amount of attention from his superiors. United States v. Heard, 3 M.J. at 16, supra. In holding the latter

two confinements illegal, the court established a two step process for imposing confinement. The first step, required by Article 9, Uniform Code of Military Justice, involves a determination of whether probable cause existed to believe an offense was committed and that the accused committed it. This resolves whether the accused could be detained. Id. at 17. Next, the magistrate must determine whether the accused should be confined, in accordance with the language of the Uniform Code of Military Justice, Article 10, 10 U.S.C. § 810 (hereinafter UCMJ) authorizing detention "as circumstances may require." The court ruled that two grounds exist on which to impose confinement: (1) to insure the accused's presence at trial, and (2) the seriousness of the offense charged. Id., at 18. Paragraph 20, Manual for Courts-Martial, United States, 1969 (Revised edition) (hereinafter MCM). The court thus discredited DeChamplain and distinguished Bayhand by noting that no UCMJ provisions were cited in support of its dictum that only presence at trial could serve as a basis for confinement.

Judge Perry also incorporated the American Bar Association (ABA) Standards for pretrial release into his opinion "insofar as the peculiarities of the military system do not make it impossible for them to apply." Id., at 22. These standards outline a graduated series of restrictions to be considered before resorting to incarceration. They do not, unfortunately, lend themselves readily to military application. Indeed, standard 5.2 is quite similar to 18 U.S.C. § 3146, in the Bail Reform Act of 1966. Much of the ABA's official analysis of these standards addresses the problems with existing bail procedures and how the new standards are designed to remedy them. See generally ABA Standards, Pretrial Release (1968) (commentary). (Hereinafter cited as Commentary). However, some cases are cited in the Commentary which shed light on issues common to the civilian and military systems. For example, confining an individual to prevent the commission of additional crimes -- one facet of the "seriousness of the offense" ground -- is fraught with constitutional problems, despite Judge Perry's claim that the stepped process provides sufficient protection to the defendant. In Carbo v. United States, 82 S. Ct. 662, 7 L. Ed.2d 769 (1962), the Supreme Court ruled that confinement was lawful if the defendant could be shown to pose a threat to the community. Even so, as noted in the Commentary, 69, the fact that a particular defendant might be determined to present a danger to his community would have a "devastating" effect on his trial. Judge Perry appears to be trusting in the graduated restriction approach to avoid this problem in the case of all but the most serious offenders. Unfortunately, no cases have been found which

expressly interpret these standards. Usually, they are simply incorporated by reference in a footnote with no discussion of how they should be applied. Thus, there is little on which to base a prediction as to their effectiveness in a military context.

Another problem with the Heard decision is traceable to the language of the opinion itself. Concluding his review of the relevant MCM and UCMJ provisions, Judge Perry states, "the only time that circumstances require the ultimate device of pretrial incarceration is when lesser forms of restriction or conditions on release have been tried and have been found wanting." Supra, 21-22. (Emphasis added). If this is meant to apply to those who are confined to insure presence, the result is disastrous. Individuals who have been adjudged flight risks would first have to be released to the care of some superior. If that condition failed to secure the accused, then progressively more restrictive measures would have to be taken either until the trial or no alternative to actual incarceration remained. Such a procedure would mean a waste of both judicial time, as each "step" of restriction was actually tried, and investigative police manpower, as the defendant was tracked down after each AWOL. Nevertheless, a literal reading of the opinion can support no other interpretation. The Standards help to clarify the matter. Standard 5.1(a), while asserting that an accused is presumed to be "entitled" to release on recognizance, asserts that this presumption "may be overcome by a finding that there is a substantial risk of nonappearance" (emphasis added). Further, 5.1(b) enumerates factors to be considered in determining risk of nonappearance, but makes no mention of unsuccessful efforts at prior detention. Standard 5.2 requires that a judicial officer impose "the least onerous condition reasonably likely to assure the defendant's appearance in court." Taken together, these standards could reasonably be interpreted as allowing a judge or magistrate to consider all relevant aspects of an accused's background, apply this information to the grades of restrictions available, and determine which one is appropriate for that particular defendant. Under this interpretation, Judge Perry's statements would not produce such anomalous results as they do by the literal approach. Nevertheless, while Heard goes a long way toward reconciling the contradictory holdings of earlier cases, it does not fully address all the issues facing trial defense counsel. Application of the ABA standards is only one of the unresolved issues; the meaning of "tried and found wanting" is another. Until subsequent decisions are handed down, such questions must remain unanswered.

Before turning to the remedies for illegal confinement, a brief look at the military magistrate program is in order. The magistrates' duties were set down in Army Regulation 27-10, Legal Services-Military Justice (change 16, dated 22 Mar 1976, AR 27-10). According to paragraph 16-4 magistrates are empowered to order release of any prisoner confined in violation of paragraphs 20-23 MCM. The magistrate "must decide if a person could be detained and if he should be detained." Courtney v. Williams, 24 USCMA 87, 51 CMR 261 (1976). This probable cause determination does not, of course, go to the final question of guilt or innocence. "Because of its limited function and its non-adversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." Gerstein v. Pugh, 420 U.S. 103, 122 (1975). In Gerstein, the Supreme Court recognized a need for flexibility, and thus did not mandate a specific procedure to be followed. It did require a "fair and reliable" determination of probable cause, to be made by a judicial officer, "before or promptly after arrest." Id., at 124, 125. However, in United States v. Peters, 24 USCMA 287, 51 CMR 803 (1976), the Court of Military Appeals ruled that a determination at trial by the military judge that probable cause existed and that the accused was a flight risk at the time of confinement, was sufficient to comply with Gerstein. This approach seems to afford little protection to an accused, for by the time a trial judge reviews the confinement, it is an accomplished fact. At that point, all that remains for defense counsel is the possibility of securing an adjustment in the sentence. A provision of AR 27-10 should minimize the number of times this problem arises, however. Paragraph 16-5 requires that every case be reviewed at least once every two weeks, from date of initial confinement until commencement of trial. If, at any time during this period, the magistrate determines that probable cause no longer exists, the accused must be released.

The latest revisions to AR 27-10 go a long way to safeguard the rights of an accused before trial. In DeChamplain v. Lovelace, 510 F.2d 419 (8th Cir. 1975), vacated as moot, 412 U.S. 996 (1975), the Court of Appeals for the Eighth Circuit ruled that the initial decision to confinement should be made by a "neutral and detached" magistrate. However, the Court also opined that referring a case for trial did not necessarily deprive the convening authority of the requisite neutrality, Id., at 426. A more profound aspect of the decision concerned the process of reviewing cases where confinement had already been imposed. The court ruled that defendants were entitled to a full hearing, with an opportunity to show why they

should not be confined. Further, the burden of proof to justify continued confinement was to rest on the government. It is difficult to imagine how such a hearing could be conducted without counsel for both sides. Gerstein, supra, was handed down a few days after DeChamplain, so it seems unlikely that this portion of the Eighth Circuit's opinion will ever be implemented. The requirement of a magisterial determination for initial confinement, however, may yet be effectuated. Developments in this area may parallel the recent directions taken in search and seizure law, where the need for a magistrate's review of search warrant applications is receiving increased attention. Until then, defense counsel should continue to insure that their clients are interviewed at the required bi-weekly intervals (if not more frequently), and that the commanding officer furnishes the magistrate with a written statement of his reasons for confining, as required by AR 27-10.

If a client remains in confinement despite reviews by the magistrate, there are still actions available to defense counsel. In considering which course to follow, counsel should keep in mind that his case will be enhanced if he can show that the allegedly illegal confinement inhibited the preparation of a defense. For example, counsel might be able to demonstrate that the confinement made it difficult to interview the client to ascertain names of witnesses, possible alibis, etc. See Boller, Pretrial Restraint in the Military, 50 Mil. L. Rev. 71 (1970).

Under the literal interpretation of Heard, supra, all lesser forms of restriction must be attempted before confinement can be imposed. This provides defense counsel with ample opportunity to object, as anything less than full compliance would stand out as a clear violation of Heard. Even under the alternative interpretation set out above, Heard still requires a showing by the government that lesser forms of restriction would be ineffective. The problem, however, lies in bringing errors to the attention of someone who can remedy them. Aside from the magistrate himself, who has probably already reviewed the case, the defense counsel has no one to turn to. Military judges are on weak jurisdictional grounds if they review a confinement before the case is referred to them for trial. Thus, for example, an Article 39(a) session could not be held.

In Dale v. United States, 19 USCMA 254, 41 CMR 254 (1970), the Court of Military Appeals ruled that before a petition for extraordinary relief could be entertained, the accused would have to exhaust his Article 138, UCMJ remedy. This would be accomplished by bringing the alleged illegal confinement to the attention of the officer exercising general court-martial

jurisdiction over the accused's commander. If no satisfactory action were taken, the accused would then have to bring the matter to the Court. Paragraph 5(1)(a) Army Regulation 27-14, Legal Services (1974), suggests that the Article 138 procedure may not apply to cases of pretrial confinement. Nevertheless, in Catlow v. Cooksey, 21 USCMA 106, 44 CMR 160, (1971), the court observed,

[I]t is now well established that one who believes he is wronged by a decision directing his confinement prior to trial must pursue the remedy provided by Article 138, [Uniform Code of Military Justice] prior to seeking the intervention of this court pursuant to 28 U.S.C. § 165(a). Id., at 162.

The Court went on to hold that if the Article 138 procedure proves ineffective, "the issue may be raised by appropriate motion presented to the military judges of the court-martial to which the pending charge or charges are referred." Id. In Tuttle v. Commanding Officer, 21 USCMA 229, 45 CMR 3 (1972), the Court ruled that merely forwarding to the appropriate officer a copy of a habeas corpus petition is not sufficient to comply with Catlow. Finally, in Horner v. Resor, 19 USCMA 285, 41 CMR 285, 286 (1970), the Court ruled that the degree of restriction to be imposed on an accused was a determination to be made within the sound discretion of a commander, and absent a showing of abuse of such discretion, his decision would be allowed, to stand. It appears, therefore, that the extraordinary remedy of habeas corpus is likely to meet with little success.

There is still another remedy available to counsel. While outright dismissal of charges has been rejected as an acceptable remedy for illegal confinement, an adjustment of the sentence may be appropriate. United States v. Jackson, 41 CMR 677 (ACMR 1969). It should be kept in mind, however that a one-for-one "reduction" for days served in illegal pretrial confinement may actually work to the accused's detriment in computing time for good behavior. See United States v. Larner, 24 USCMA 197, 51 CMR 442 (1976), for a detailed explanation of how to give proper credit for time served in illegal pretrial confinement.

The confused case law of pretrial confinement remains clouded after the Heard decision. The opinion itself is subject to highly unsettling interpretations which will only be

reconciled by subsequent Court of Military Appeals decisions. The military magistrate program, ostensibly designed to safeguard defendants from the arbitrary decisions of their commanding officers, nevertheless places the final decision of whether to confine in the hands of those same commanders. Worst of all, defense counsel have few alternatives other than to see that the magistrate performs an adequate review of a confinee's case, and that the commanding officer had a specific reason for ordering confinement. Beyond this, defense counsel can only hope to secure adjustments in the sentences of those defendants actually convicted.

RECENT OPINIONS OF INTEREST

COMR OPINIONS

APPLICABILITY OF ABA STANDARD IN RAISING ADEQUACY OF COUNSEL

United States v. Crooks, ___ MJ ___ (ACMR 1977).

Before the Army Court of Military Review, the appellant challenged the adequacy of his trial defense counsel's representation. The Army Court of Military Review held that Standard 8.6, ABA Standards Relating to the Prosecution Function and Defense Function, is applicable to military appellate counsel in their relationship with trial defense counsel. Standard 8.6 provides:

Challenges to the effectiveness of counsel.

(a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the defendant on that ground.

(b) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case provided effective assistance, he should so advise his client and he may decline to proceed further.

MAXIMUM IMPOSABLE SENTENCE TO CONFINEMENT FOR PCP OFFENSES

United States v. Bartram, 4 MJ 510 (ACMR 1977).

The accused was convicted, pursuant to his pleas, of possession and sale of PCP in violation of Article 92, on two different occasions. As a result of a determination of multiplicity, the accused was informed by the military judge that the maximum permissible sentence to confinement in this case was hard labor for four years (2 years for each of the two punishable offenses) and ancillary punishments. The Court of Military Review held that the maximum imposable sentence to confinement for possession/sale of PCP (and presumably, LSD) was one year for each specification as prescribed by the D.C. Code, under the rationale of note 10, United States v. Courtney, 1 MJ 438 (1976).

An important factor to be considered is that Bartram was tried on 14 December 1976, which was before the effective date (15 January 1977) of the new paragraph 4-2(a)(7), Army Regulation 600-50, April 1973, which requires PCP and LSD to be charged under Article 92. United States v. Dillard, MJ (ACMR 1977), petition for grant of review pending, challenges the validity of this regulation. In Dillard, the issue is whether different charging schemes among the various services gives rise to the same equal protection infirmities found to exist in United States v. Courtney, 1 MJ 438 (CMA 1976), and United States v. Jackson, 3 MJ 101 (CMA 1977).

PRETRIAL AGREEMENT CONDITIONS

United States v. Brown, MJ (ACMR 9 November 1977).

The appellant, an E-5 pled guilty to uttering 29 checks totally \$9,000 without sufficient funds. As a part of the pretrial agreement, the convening authority agreed to suspend all confinement for one year providing that the appellant provide full restitution for the bad checks. The Army Court of Military Review found that this requirement was valid, especially in light of the military judge's interpretation of the agreement "to be binding on the convening authority if the appellant, acting in good faith, was unable to make the required restitution through no fault of his own."

The appellant also alleged that he was given inaccurate advice by his trial defense counsel to the effect that he could go on excess leave after the convening authority's action. The appellant contended that this "condition" was vital since, as an E-1, he could not earn enough money to comply with the terms of the pretrial agreement, whereas he could earn enough as a civilian computer programmer. The Army Court of Military Review, while finding that excess leave was mentioned by the trial defense counsel, held that it was not a condition of the pretrial agreement. The Court noted that under paragraph 5-2(d)(4), Army Regulation 630-5, dated 1 June 1975, excess leave may not be granted to one who is serving a suspended sentence. See also, United States v. Lentz, MJ (ACMR 1976), reversed, 25 USCMA 313, 54 CMR 829, MJ (1977).

RECENT OPINIONS OF INTEREST

COMA OPINIONS

DISQUALIFICATION OF THE STAFF JUDGE ADVOCATE

United States v. Johnson, 4 MJ 8 (CMA 1977).

The principal witness against the accused testified in exchange for a promise from the trial counsel that he would testify favorably at the principal witness' subsequent sentencing proceeding. The trial counsel did testify, stating that without the principal witness' testimony the accused's conviction in the instant case would not have been possible. The Court of Military Appeals said that, under these facts, the Staff Judge Advocate was disqualified from writing the review.

In a footnote the Court of Military Appeals stated:

"In light of the military function of a staff judge advocate's office, action by the trial counsel will be imputed to the staff judge advocate absent evidence indicating that the staff judge advocate did not place his blessing thereon. United States v. Sierra-Albino, 23 USCMA 63, 65, 48 CMR 534, 536 (1974); See United States v. Diaz, 22 USCMA 52, 46 CMR 52 (1972)."

SPEEDY TRIAL

United States v. Bryant, 3 MJ 396 (CMA 1977).

The appellant was convicted in San Diego, California. On the 77th day of his post-trial confinement, the post-trial review was completed and the record of trial was mailed to his counsel at the Army Judge Advocate General's School in Virginia. Delivery was not made until the 88th day. The Court of Military Appeals held that the unusually extended period of time required by the Postal Service to transmit the post-trial review to the trial defense counsel constituted "a circumstance which removes this case from the application of the Dunlap presumption."

RIGHT TO COUNSEL/PRETRIAL STATEMENTS

United States v. McDonald, 3 MJ 1005 (ACMR 1977).

The appellant was in pretrial confinement for selling marijuana. A few days after being placed in pretrial confinement, a secret service agent contacted the local CID and asked to interview the appellant concerning other unrelated offenses. In the course of this interview, and after being properly advised of his rights, the appellant made an incriminating statement and gave incriminating handwriting exemplars. The appellant's trial defense counsel was never advised that the interview was going to be held and was not present at the interview. The CID agent apparently knew that counsel had been appointed to defend the appellant against the drug offenses.

The Court of Military Review held that United States v. McOmber, 1 MJ 380 (CMA 1976), was distinguishable since the request for an interview with the appellant originated with the Treasury department. At the time of the Treasury department's request, the Army had not instituted an investigation similar to The Treasury department's investigation. The Court concluded that "[w]e are unwilling to adopt a rule which would be so broad as to make military authorities the guarantor of an accused's counsel rights for any inquiry by any investigative agency once the military authorities are on notice that an accused has counsel." Id. at 1007. See also, Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

On 12 December 1977, the appellant's petition for grant of review was granted by the Court of Military Appeals on this issue. For an in-depth discussion of the issue, see Recasner, "Notification to Counsel of Pre-Trial and Post-Trial Interviews of Accused," The Advocate, Vol. 9, No. 4, p. 2 (July-August 1977).

WITNESSES

United States v. Moore, CM 435707 (ACMR 30 September 1977).
(Unpublished Memorandum Opinion).

Where the evidence shows that 2 former soldiers would have "gladly" returned for the Article 32 investigation if the government had paid their way, it was error not to reopen the Article 32 investigation upon a defense counsel request.

CIVILIAN COURT DECISIONS

On 12 December 1977, D.C. Superior Court Judge Tim Murphy ruled that the three-year-old City Council regulation prohibiting possession of five drugs, two of which are PCP and LSD, was unenforceable because it did not state why the drugs were dangerous, as required by the D.C. Code. The possession of these drugs would still be prohibited by the Federal Controlled Substances Act. Since the maximum imposable sentence to confinement for some drug offenses in the military is determined by reference to the D.C. Code (See United States v. Bartram, 4 MJ 510 (ACMR 1977)), Judge Murphy's decision would make it unnecessary to consider the general maximum punishment in the D.C. Code. Thus, the correct maximum imposable sentence to confinement would be two years under Article 92 as opposed to five years under Title 21, United States Code, Section 841(b)(2). As The Advocate has not had an opportunity to examine the full opinion by Judge Murphy, it is difficult to evaluate the effect on the military from this decision. If the recent change to paragraph 4-2a(7)(a), AR 600-50 dated 15 January 1977, is valid, then Judge Murphy's ruling would appear to be irrelevant since the maximum sentence under Article 92 is two years by regulation. However, this provision is being challenged in United States v. Dillard, MJ _____ (ACMR 13 October 1977), petition for grant of review pending. The Government has appealed Judge Murphy's ruling. The Advocate will follow the developments in this case and report in our next edition.