

# T H E A D V O C A T E

## A Monthly Newsletter for Military Defense Counsel

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

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### EXTRAORDINARY WRIT PRACTICE IN THE MILITARY COURTS

Within the past four years, extraordinary writ practice in the military has grown by leaps and bounds. In 1966, the Court of Military Appeals ruled that it had All Writs jurisdiction under 28 U.S.C. § 1651 (1964);

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\*\* THE ADVOCATE INDEX: An index covering the period from March 1969 through June 1970 is enclosed with this issue. Our thanks to CPT Peter Kellogg, JAGC, Fort Gordon, Ga., who prepared the index.

United States v. Frischholz, 16 USCMA 150, 36 CMR 306 (1966), and two years later, Article 67 of the Uniform Code was amended to make it clear that the Court was an Article 1 Court. Early this year, the Army Court of Military Review ruled that it too was a court "established by Act of Congress" and thus possesses the authority granted in the All Writs Act. United States v. Draughon, No. 419184 (ACMR 20 March 1970). This position, however, has not yet been affirmed by the Court of Military Appeals.

Since the Court of Military Appeals has granted extraordinary relief in very few cases, and since the Army Court of Military Review has never granted it, very little is known about successful extraordinary writ practice in the military. There is simply no body of law to guide prospective petitioners. Indeed, the Court of Military Appeals seems to be limiting its All Writ jurisdiction somewhat in recent months, and thus will not consider extraordinary pleadings in summary courts-martial, non-BCD special courts-martial, class actions, or nonjudicial punishment cases. See cases cited in "The Miscellaneous Docket," THE ADVOCATE, May 1970.

In light of the dearth of material on this burgeoning area of the law, and in light of its increasing importance, we offer herewith some general guidelines which might be helpful in extraordinary writ practice.

Type of Relief Requested: The most usual type of extraordinary pleading filed in the military is the Petition for Writ of Mandamus. This is a common law pleading designed to compel a lower court or official to exercise its authority when it is its duty to do so. Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943). A writ of prohibition could be used to prevent a lower court or official from assuming jurisdiction or proceeding further in a matter when to do so would be unlawful. Ex Parte Chicago, R.I. & Pac. Ry., 255 U.S. 273 (1921). Certiorari is a common law writ used to bring the record forward to a higher court in order to correct an excess of jurisdiction, give full force and effect to appellate authority, or to further "justice in other kindred ways." United States v. Beatty, 232 U.S. 463 (1914). A writ of

error coram nobis may be used to vacate a judgment based on an error of fact unknown at the time the judgment was entered, and this writ goes to the same court which entered the judgment. See 18 Am. Jur.2d Coram Nobis (1965). Although the federal habeas corpus statute does not apply to military courts, 28 U.S.C. § 2241 et seq. (1964), the auxiliary writ of habeas corpus may be issued in aid of appellate jurisdiction under the authority of 28 U.S.C. § 1651 (1964). Adams v. U.S. ex rel McCann, 317 U.S. 269 (1943).<sup>1/</sup>

Under federal practice, and presumably under military practice, alternative or cumulative writs may be sought at the same time, Ex Parte Simons, 247 U.S. 231 (1918), and the improper denomination of a pleading or of the relief sought has been held to be an unimportant defect. Id.

Injunctive relief is also available under the All Writs Act, See Federal Trade Comm'n v. Dean Foods Co., 384 U.S. 597 (1966); 6 Moore, Federal Practice, ¶54.10 [3] (1966), and the right to apply for extraordinary relief under this statute inheres in the Government as well as in the individual, United States v. Mayer, 235 U.S. 55 (1914), if such relief is necessary to compel a court to perform a clear duty or to prevent undue impairment of the Government's legal rights.

No military court has to date rejected an extraordinary petition because it was misnamed, or because the wrong relief was requested. We can thus assume that the prevailing federal practice would apply also to the military.

All prerogative writs issued by an appellate court must be issued "in aid of" that court's appellate jurisdiction, but it is not necessary that the appellate jurisdiction have already attached. Exercised, or existing, or prospective appellate jurisdiction will

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<sup>1/</sup>Judge Darden is of the opinion that military courts may not be able to issue writs of habeas corpus under the All Writs Act since they have no "express authority to conduct a hearing to determine the facts" Collier v. United States, 19 USCMA 511, 42 CMR 113 (1970) (Darden, J., dissenting).

apparently be sufficient. 6 Moore, Federal Practice, supra at ¶ 54.10 [6]; but see Collier v. United States, supra (Darden, J., dissenting).

Caption: In the absence of any guidance to the contrary from either court, we suggest some arbitrary rules for deciding who should be named as a respondent in your pleadings. The United States should always be named as a respondent. If habeas corpus is sought, the convening authority exercising jurisdiction over the installation confinement facility wherein the accused is being confined should also be named and served with a copy of the pleadings. In other habeas corpus cases, the appropriate convening authority with authority to release the accused should be named as co-respondent, if possible. Where mandamus is sought, the officer or court sought to be compelled should be named. Ex parte pleadings should be avoided, since the court must, in those cases, determine for itself who should be ordered to do what. The general rule which should be followed is the lowest ranking official with authority to grant the relief you request in your petition should be named as a co-respondent. A caption listing the "chain of command" as respondent is unnecessary and should be avoided.

Service: The named respondent should be formally and personally served with a copy of your pleadings and exhibits, and a certificate of service should be attached to the pleadings filed with the Court. If you fail to do this, the pleadings will probably be sent back to you for proper service. Paragraph 5, Army Reg. 27-1 may offer help in analogous situations, but is not directly in point in military extraordinary remedy cases.

Number of Copies: Extraordinary pleadings are usually considered by one panel of the Army Court of Military Review, and hence an original and two copies should be filed with the clerk of that Court. If en banc consideration is desired, a suggestion for en banc hearing should accompany an original and twelve copies of the pleadings. The Court of Military Appeals requires an original and four copies of all pleadings. Courtesy copies should be sent to the Chiefs, Defense and Government Appellate Divisions.

Representation: The trial defense counsel is authorized to file pleadings both in the Court of Military Review and in the Court of Military Appeals. If he is called upon to appear and argue his cause, he will have to be properly admitted to practice. Applications for admission to practice can be obtained from the clerk of either court. In addition, the Defense Appellate Division has taken the position that, pursuant to Article 70(c)(1) and (2), Uniform Code of Military Justice, counsel assigned to that division will enter an appearance in either military appellate tribunal after pleadings have been originally filed, if such appearance is specifically requested by the accused, or when the United States is represented by counsel. The Defense Appellate Division will then undertake to cooperate with the defense counsel, and will assist him in the filing of further pleadings or in argument if necessary. In order to avail themselves of this representation, counsel should attach with their pleadings a request for appellate defense representation signed by the accused. When the original pleadings with such a request are filed, the Defense Appellate Division will automatically enter an appearance with the Court unless specifically requested not to do so.

Tribunal: Many counsel have wondered whether they must exhaust their extraordinary remedies before the Court of Military Review before petitioning the Court of Military Appeals. The simple answer to this question is that while the Court of Military Appeals has not yet required a showing of such exhaustion, good orderly practice should dictate that recourse be had first to the lowest level court empowered to grant the relief requested. The Government to date, has taken the position that the Court of Military Review does not have All Writs power, and thus has not yet argued that the failure to exhaust remedies in that court is a ground for denial in the Court of Military Appeals.

Judgments: In the Court of Military Appeals, judgments in extraordinary relief cases are self-executing. There is no mandate of the Court requiring the services to carry out the decision of the Court. Thus, in Collier v. United States, supra, the opinion of the Court was also its order. The

last sentence of the court's opinion there declared: "His [Collier's] release from custody is ordered." Thus, extraordinary remedy cases become the first class of military cases wherein the judgement of the court is self-executing, akin to other federal court judgments. Counsel who expect the usual ten to twelve day delay while the Court's mandate issues in these cases will now be forced to reexamine their calendar. The issue of how the Court will enforce a self-executing order is still an open question.

#### WIRETAPPING IN THE ARMY

There has been some recent inquiry into wiretapping practices in the Army. See MacDonald v. Keaton, COMA Misc. Docket No. 70-44 (order dated 2 July 1970), THE ADVOCATE, July-August 1970. Although we cannot confirm the existence of any current wiretapping being performed with a view toward prosecution, this is not to say that evidence obtained by means of an illegal wiretap or eavesdropping operation might never be used to further a specific prosecution, either directly or indirectly, especially in cases where investigations are conducted jointly by various investigative agencies.

Army Reg. 381-17, dated 11 December 1967, limits nonsecurity wiretaps conducted in the United States to cases where consent is obtained by one party in advance, and where approval is obtained from The Provost Marshal General. Probable cause is also required. Eavesdropping accomplished by physical trespass is prohibited, and non-emergency, nontrespass eavesdropping must be approved in advance by the Attorney General. Elaborate reporting procedures are also required by the regulation.

Seven days after this regulation became effective, the Supreme Court decided in Katz v. United States, 389 U.S. 347 (1967), that a warrant issued by a magistrate based on probable cause was constitutionally required for nontrespass electronic surveillance. There have been no military cases decided since Katz concerning the use to be made of wiretap and electronic surveillance evidence.

Hence, it is an open question whether the procedures outlined in Army Reg. 381-17 now comply with the constitutional requirement of a prior authorization based on probable cause by an independent magistrate. This question is further complicated by the absence of any formal warrant procedure in the military.

The regulation establishes a third category of evidence--that obtained by "investigative monitoring." This is different from wiretapping since it involves listening to a telephone conversation (1) at the request of the subscriber-user [not further defined], in (2) cases involving obscenity, harassment, extortion, bribery or threat of bodily harm, and (3) over a telephone located on an installation under the jurisdiction of the Department of the Army. Permission for this type of electronic or direct interception must be received from the provost marshal, or his equivalent, of the local installation involved. There is no probable cause requirement.

Although the regulation purports to limit "investigative monitoring" only to cases of a specified type, its protection is more illusory than real, for apparently the violation of this regulation will not render the evidence so seized inadmissible or even tainted. Paragraph 152, Manual for Courts-Martial, United States, 1969 (Revised edition) provides that evidence is inadmissible if it was obtained in violation of 18 U.S.C. § 2515 (1964) (amended 19 June 1968) (certain wire and other oral interception) or in violation of Section 605 of the Communications Act of 1934, 47 U.S.C. § 605 (1964). But the Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised Edition) (DA Pamphlet 27-2, July 1970) points out that "this section does not apply to communications over a self-contained military communications system, nor does it apply to communications over an unlicensed, private communications system." The analysis cites as authority for this proposition United States v. Noce, 5 USCMA 715, 19 CMR 11 (1955) and United States v. Gopaulsingh, 5 USCMA 772, 19 CMR 68 (1955).

It may be questioned whether the rationale of those cases is currently viable. In Noce, supra, the Court

held that "wiretap evidence in a criminal case is not prohibited by the Constitution" and that a self-contained phone system does not come within the purview of the Communications Act. But in Katz, supra, the Supreme Court ruled that a nontrespass electronic eavesdrop did violate a constitutional right to privacy and constituted a "search and seizure" under the fourth amendment. The Court specifically overruled the Olmstead rationale (Olmstead v. United States, 277 U.S. 438 (1928)) upon which the Court of Military Appeals decision in Noce, supra was based.

In short, there is little that is certain in the area of military wiretaps and eavesdropping, and counsel are advised to inquire in depth into current federal cases whenever a wiretap question arises.

Whenever there is reason to believe that information against one's client has been obtained by wiretap or eavesdropping devices,<sup>2/</sup> a motion for production of a transcript of the conversation should be made at the Article 39a session, assuming, of course, the requisite standing, under Alderman v. United States, 394 U.S. 165 (1968). The transcript must be made available both to the defense and the judge, Alderman, supra. Presumably the judge could fashion a protective order to prevent wider distribution. Compare Rule 16(e), Fed. R. Crim. P. If such illegally obtained evidence tainted any other evidence sought to be used by the prosecution, a motion to suppress should be made.

The area of military wiretaps is a difficult one and requires more analysis than the current Manual affords. Counsel who encounter such problems at trial should be expected to contribute to the required analysis so that the trial judge will be guided to the proper result.

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<sup>2/</sup>It may be argued that the government has an affirmative duty to disclose whether any of its evidence was obtained by wiretap or eavesdropping devices. See United States v. Desist, 384 F.2d 889 (2d Cir 1967), aff'd, 394 U.S. 244 (1969); 18 U.S.C. § 2518 (9) (1964).

## THE PSEUDO-NOT GUILTY PLEA

If your client pleads not guilty, and then stipulates to all material issues except intent, or sanity, does the judge have any obligation to inquire into the "providency" of his actions? Or, more commonly, does the judge have any Care-type obligation if the accused pleads not guilty to AWOL, and then fails to object to the morning report or to present a defense? In some military jurisdictions, this appears to be a common practice.

Some guidance might be gained from United States v. Brown, \_\_\_ F.2d \_\_\_ (D.C. Cir. 3 June 1970). There, the accused stipulated that he committed all acts charged in the indictment, but he reserved for litigation the issue of his mental responsibility. The stipulation thus made out a prima facie case for the government and shifted the burden to the accused to produce "some evidence" to overcome the presumption of his sanity. The Court of Appeals, per curiam, ruled that although Rule 11, Fed. R. Crim. P. was inapplicable, "no reason appears why the Rule 11 procedure of addressing the defendant personally should not be required." Thus, where the defendant seeks to waive all issues except sanity, the judge must personally address the defendant to determine that the waiver is made voluntarily and with understanding of the consequences of his act. See McCarthy v. United States, 394 U.S. 459 (1969).

If the rationale of this case is applied to current military practice, the trial judge would have to inquire of the accused who pleads not guilty to AWOL whether he intends to object to the morning report or otherwise to offer a defense. If the accused plans to do neither, the judge should then inquire personally of the accused whether he knows that his actions amount to a guilty plea, and whether they are otherwise knowing and voluntary.

A corollary of this problem was discussed recently by the Court of Military Appeals in United States v. Wilson, No. 22,776 (COMA 28 August 1970). There, the

accused charged with desertion stipulated to the unauthorized absence and to some facts from which an inference of intent to remain away permanently could be drawn. Paragraph 154b, Manual for Courts-Martial, United States, 1969 (Revised edition) provides that where a not guilty plea remains, a stipulation which practically amounts to a confession should not be received in evidence. Nevertheless, the Court affirmed because the stipulation did not "compel" an inference of guilt, especially in light of the accused's testimony that he did not intend to remain away permanently. Had the stipulation compelled such an inference, or had the accused not presented any defense, the court would have been faced with deciding whether the Manual provision was a mandatory one or, if not, what the trial judge's Care obligation was in that situation.

#### TRANSFERS OF CONVICTED SERVICEMEN

Recently a number of convicted servicemen whose cases are undergoing appellate review have been transferred subsequent to their request for appellate representation. Since no regulations require that a copy of the transfer orders or any other notice of the transfer be forwarded to the Defense Appellate Division, a few clients have been "lost."

Trial defense attorneys are encouraged to help solve this problem in two ways:

1. Whenever possible, notify the Chief, Defense Appellate Division, U.S. Army Judiciary, Washington, D.C. 20315, by letter, of any transfer of a client who has requested appellate representation; and,
2. Determine whether your local command is complying with that part of Paragraph 2-5(c), Army Reg. 190-4, dated 12 June 1969, which requires commanders to notify The Judge Advocate General of transfers involving a prisoner under sentence to confinement and punitive discharge or dismissal.

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SPECIAL FINDINGS

Once again we urge counsel to request the military judge, in judge-alone cases, to make special findings of all factual matters reasonably in issue-- both before and after findings of guilty. Although Paragraph 74i, Manual for Courts-Martial, United States, 1969 (Revised edition) now authorizes special findings on request of counsel, we continue to find that most counsel rarely take advantage of this device. Counsel need not submit proposed findings to the judge, and one written request will suffice for all issues in a single trial.

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UNJUST CONVICTION

Under a little known remedial statute, any person unjustly convicted of an offense against the United States and imprisoned can present a claim for damages to the U.S. Court of Claims. 28 U.S.C. § 1495 (1964).

This section has been held specifically to apply to wrongful conviction by court-martial, and the Court of Claims has assumed jurisdiction to reexamine court-martial decisions. Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966); Compare Augenblick v. United States, 393 U.S. 348 (1969). The district court has concurrent jurisdiction over cases arising from wrongful conviction by court-martial if the case does not sound in tort, and if the claim does not exceed \$10,000.00. Cox v. United States, 112 F. Supp. 494 (N.D. Calif. 1953).

In order to recover, one must allege and prove that (1) his conviction was reversed or set aside on the ground that he was not guilty of the offense of which he was convicted, or on a new trial or rehearing he was found not guilty, or that he has been pardoned on the ground of innocence, and (2) that he did not commit any of the acts charged or his acts, deeds or omissions in connection with such charge constituted no offense and he did not by misconduct or neglect cause his own prosecution. In addition, the requisite facts must be proved by a certificate of the court wherein such facts are alleged to appear. Forma pauperis pleadings are permitted, and the maximum amount of damages is \$5,000.00. Attorneys fees may not be recovered. 28 U.S.C. § 2412 (1964).

It has been held that The Judge Advocate General or a reviewing authority is a court for the purpose of issuing a certificate of unjust conviction. McLean v. United States, 73 F. Supp. 775 (W.D.S.C. 1947).

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\* It has come to our attention that some  
\* trial defense counsel are erroneously  
\* advising their clients after conviction  
\* that they will spend only one third  
\* of their sentence in confinement, and  
\* that they will be released from confine-  
\* ment as soon as the punitive discharge  
\* is executed. As a result of this advice,  
\* many prisoners arrive at the US Disci-  
\* plinary Barracks under the mistaken  
\* impression that their release from  
\* confinement is imminent. Counsel are  
\* warned against advising their clients  
\* that a reduction in the term of  
\* confinement will be made automatically  
\* at the Disciplinary Barracks. Good  
\* behavior time is governed by regulation,  
\* and other clemency actions are strictly  
\* controlled. See THE ADVOCATE, April 1970;  
\* Army Reg. 190-26. Moreover, execution  
\* of a punitive discharge does not effect  
\* a release from confinement.  
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## ARMY LAWYERS IN FEDERAL COURT--A PARTIAL RESOLUTION

In THE ADVOCATE, July-August 1970, we noted that the question whether an Army lawyer may represent his criminal client in a collateral action in a federal court was currently under study by The Judge Advocate General. Since that time, there have been two developments in this area. On 17 August 1970, all commands were notified by DA Message 964784 that henceforth all requests for civilian court appearance should be forwarded with recommendations to The Judge Advocate General, to the attention of Chief, Litigation Division, and that prospective applicants should be advised that federal courts will not generally entertain collateral actions until all military remedies have been exhausted.

When it appeared that counsel might be forced by this procedure to disclose information which would violate the attorney-client privilege, the message was amended by a subsequent DA Message 96940, dated 15 September 1970. The amendment provided that henceforth, all requests for civilian court appearance would be delivered to the local staff judge advocate. He would then forward the request together with certain information concerning the status of the case directly to The Judge Advocate General. At the same time, counsel are to forward a full analysis of the case to the Chief, Defense Appellate Division, including information as to the venue, the nature of the relief to be requested, facts and legal authorities relied upon, and reasons for requesting authority to appear in civil court. This communication will be regarded as privileged, and no staff judge advocate may request or require disclosure of its contents. The Chief, Defense Appellate Division will then consider the information received, and without breaching confidential relationships, will furnish an evaluation of the request to The Judge Advocate General from the viewpoint of senior defense counsel.

The question whether anyone from Defense Appellate Division will join the trial defense counsel and enter an appearance along with him whenever a request has been granted has not yet been resolved. However, whenever a negative evaluation of the request is made by the Chief, Defense Appellate Division, counsel are assured that in the event the case reaches direct military appellate review, those in the Defense Appellate Division who have taken a position inconsistent with the position of trial defense counsel in this matter will not participate in the appellate processing of the case.

#### A NEW GUIDE FOR ARTICLE 32 INVESTIGATORS

Defense counsel should note that DA Pamphlet 27-17, Procedural Guide for Article 32(b) Investigating Officer, has recently been published and is now being disseminated in the field. This publication is intended as a procedural outline for Article 32 investigating officers. The pamphlet is, of course, advisory only and cannot contravene the Uniform Code of Military Justice, relevant case law, or the Manual for Courts-Martial, United States, 1969 (Revised edition).

Certain provisions contained in DA Pamphlet 27-17 may tend to mislead the appointed officer in the performance of his investigating duties. Accordingly, trial defense counsel should be careful to insure that the investigating officer does not misconstrue his function to the prejudice of the accused.

Paragraph 2-2e of the new pamphlet advises that the investigating officer may communicate by telephone or otherwise with prospective witnesses to determine the extent of their knowledge concerning the case, whether he will interview them as witnesses, whether they are in possession of relevant documentary evidence or physical objects which should be produced at the investigation, or whether they are aware of other witnesses or evidence that should be examined during the investigation. This paragraph would seem to indicate

that the investigating officer may make a preliminary investigation out of the presence of the accused and his counsel to determine which evidence will be presented during formal investigation. Although the same paragraph in the pamphlet goes on to caution that the investigating officer must not consider such informal communications in making his recommendations, prejudicial information passed to the investigating officer through these informal means may be impossible to disregard completely. Furthermore, since the Article 32 investigation in the military is regarded as a discovery tool of defense counsel, it would seem that the accused and his counsel should be afforded the opportunity to interview all potential witnesses whether or not the investigating officer, a layman usually, considers their testimony relevant and material to the case. The problem is compounded in a case in which a prospective witness has passed information to the investigating officer informally and then become unavailable for formal investigation. In such an instance the accused is denied his right to confrontation, cross-examination, and discovery of information possessed by that witness. In our view, counsel should consider asking the investigating officer for the names of all witnesses he contacted informally, and for a synopsis of all information so obtained.

Paragraph 1-2d of the publication states that counsel may be detailed to represent the government and that if such counsel is detailed he may present evidence, cross-examine witnesses, and argue for such disposition of the matter as he considers appropriate. The only reference to participation of government counsel in an Article 32 investigation in the Manual is Paragraph 34d which authorizes representation for the government if the accused is represented by counsel. That authority makes no mention of what functions the role of government counsel encompasses. DA Pamphlet 27-17's dictum that government counsel may affirmatively enter the inquiry by presenting evidence and

cross-examining witnesses may be an indication that the Article 32 investigation is now to be considered an adversary proceeding as well as an investigative one, at least when government counsel is present. See United States v. Weaver, 13 USCMA 147, 32 CMR 147 (1962).

While such advice contained in DA Pamphlet 27-17 is not erroneous per se, it may be misread by a lay investigating officer and in an extreme case result in a denial of military due process to an accused. Trial defense counsel should take care to insure that investigating officers do not use this new publication as justification or authority for unwarranted procedures which may serve to prejudice an accused.

#### THE MISCELLANEOUS DOCKET

In Hurt v. Cooksey, COMA Misc. Docket No. 70-53 (decided 27 July 1970), the Court of Military Appeals remained adamant in rejecting applications for relief from what are deemed administrative decisions. The Court refused to upset the Army's decision not to pay the petitioner while he was being held beyond his ETS awaiting a rehearing. A related claim that the applicable pay provisions denied the petitioner equal protection and a fair trial (thus depriving the Army of jurisdiction to retry him) was summarily rejected.

Extraordinary relief remains difficult to obtain in situations where the Court feels adequate relief can be obtained at trial. Thus, where a petitioner sought to enjoin a particular individual from serving as assistant trial counsel in a potential general court-martial, alleging that such individual had theretofore aided the defense, the Court held that should the case be referred to trial any alleged conflict of interest could be adequately aired at that point. MacDonald v. Flanagan, COMA Misc. Docket No. 70-49 (decided 28 July 1970).

A similar rationale seems to have dictated the decision in Herrod v. Convening Authority, COMA Misc. Docket No. 70-45 (decided 23 July 1970). There, in

a complaint for writ of prohibition, the petitioner was seeking a change of venue and postponement of trial, in addition to making a rather broadly based attack upon various pretrial and trial procedures contained in the Uniform Code of Military Justice and the Manual for Courts-Martial. Categorizing some of the requests for relief as administrative matters, the Court disclaimed jurisdiction thereon. The Court stated, "All the matters complained of . . . can be raised by appropriate motion or objection at the trial or before an authority having jurisdiction to act in advance of trial."

The language employed raises the intriguing question for defense counsel whether denial of pretrial relief by a proper authority might not be appealable to the Court of Military Appeals as an interlocutory matter. This would seem especially appropriate where the requested relief is necessary to an adequate defense at trial. In this regard, the Court stated: "[I]t would appear that the petitioner should have access in advance of trial to pretrial statements and previous testimony by probable Government witnesses. See United States v. Heinel, 9 USCMA 259, 26 CMR 39 (1958)."

The ability of an accused to receive a fair trial has been held to be yet another matter left best initially to factual determination at trial. In Cobb v. United States, COMA Misc. Docket No. 70-55 (decided 18 August 1970), the petitioner was charged with several allegations of filing false official statements. The allegations were that petitioner, working in military intelligence, failed to conduct the security interviews assigned to him, but instead reported results of fabricated interviews. In a petition for writ of mandamus, petitioner sought to have his case removed to a command not dominated by military intelligence personnel. His rationale was that such a command could not fairly judge him. The Court opined that "[A]ll matters raised . . . may be more appropriately raised and disposed of in the trial

forum." Whether or not an issue in the nature of command influence can be best disposed of by the allegedly tainted court seems a matter open to dispute, but there is apparently no independent forum wherein the issue can be litigated before trial. A thorough voir dire procedure at trial would be the best method of litigating the issue under current law. Counsel similarly situated should prepare extensive and searching questions to potential court members with an eye toward ferreting out any real bases for challenge. See generally Holdaway, Voir Dire--A Neglected Tool of Advocacy, 40 Mil. Law Rev. 1 (1968). If bias appears pervasive, a motion for a change of venue would properly lie.

Eaton v. Laird, et al., COMA Misc. Docket No. 70-47 (decided 27 July 1970) seems to raise some fundamental questions concerning the Court's readiness to assert its extraordinary relief powers and to teach the importance of seeking the proper relief. The petitioner was apprehended on 1 December 1968. Charges were preferred three months later, and petitioner's enlistment expired on 8 July 1969. Charges were referred to trial two days thereafter, but because of interim delays and illness, the case has yet to be tried. On 1 June 1970, petitioner asked the convening authority to dispose of his case promptly. When no response was received a month later, the petitioner sought relief from the Court of Military Appeals.

The petition was summarily denied "without prejudice to the right of petitioner to raise the issue herein presented at the trial." It seems that since charges had already been preferred on the date of the petitioner's ETS, holding him beyond that date was not unlawful and, thus, habeas corpus did not properly lie. See Paragraph 1ld, Manual for Courts-Martial, United States, 1969 (Revised edition). Petitioner, moreover, failed to show any specific prejudice suffered by the delay which could not be ameliorated by proper motion at trial.

In MacDonald v. Hodson, et al., COMA Misc. Docket No. 70-48 (decided 27 July 1970), the Court of Military Appeals held that the Article 32 Investigating Officer did not abuse his discretion in ordering the Article 32 hearing to be closed. The Court reasoned that such an action is legitimate to protect the interests not only of the petitioner, but of third persons against whom prejudicial evidence might appear during the course of the investigation.

A convicted accused seems to have no enforceable right to have his sentence immediately acted upon by the convening authority. In Silvero v. Chief of Naval Air Basic Training, COMA Misc. Docket No. 70-57 (decided 28 August 1970), the petitioner had a pretrial agreement wherein the convening authority agreed to approve no sentence in excess of total forfeitures and dismissal. Sentenced on 10 August 1970 to be dismissed and to be confined at hard labor for three years, petitioner alleged that he had been in confinement since 19 June 1970 and asked the convening authority for immediate release and action on his sentence pursuant to the agreement. The convening authority refused to act before the record of trial or review was prepared. The petitioner filed for a writ of habeas corpus. The petition was denied, apparently because the convening authority was within the limits of his proper discretion in delaying his action. Judge Ferguson would have issued a show cause order against the convening authority. Though the petitioner failed in this case, we remind counsel of the proven value of extraordinary relief in compelling convening authorities to fulfill their legal obligations. See, e.g., Montavan v. United States, COMA Misc. Docket No. 70-3 [THE ADVOCATE, May 1970]. Had the record of trial been prepared and ready for the convening authority's action, the result in Silvero would presumably have been different.

## RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

ARREST -- PROBABLE CAUSE -- The police who arrested the defendant were seeking, in a bar, a narcotics suspect by another name who resembled the defendant and who was said to be carrying "balloons of heroin" in his mouth. The police observed the defendant doing a "little dance," and swallowing something in the bar. They stopped the defendant and made a flashlight examination of his eyes. The United States District Court for Northern California held that there was no probable cause for the arrest. Mere presence and conversation in a public place frequented by drug users was not incriminating behavior in itself. The dancing does not reasonably relate to criminal activity and there are numerous normal explanations as to why a person would swallow something. The Court indicated that it could not conclude that "the possibility of a criminal motive negates the possibility of an innocent motive." The examination of the defendant's eyes was held to be an intrusion upon the person and "certainly as abhorrent to the individual as a 'pat down' search." The Court noted that the search or arrest of an individual on the contention that he resembled another person was open to grave abuse. It indicated that from the number of bulletin descriptions police receive each day, they can always find a description to match that of any suspect they might pick up. The Court also held inadmissible an admission to the police by the defendant that he had a "fix" earlier that day, as this statement was made after the unconstitutional flashlight examination of the defendant's eyes. Garcia v. Nelson, \_\_\_ F. Supp. \_\_\_ (N.D. Cal. 15 June 1970); 7 Crim. L. Rep. 2327.

DISCOVERY -- POLICE INVESTIGATION REPORT -- The sole claim of a defendant on trial for robbery was one of mistaken identity by several eyewitnesses. The defense was denied permission to see the particular portions of the police report containing the descriptions

given by the victims to the police at the time of the original investigation. The Missouri Supreme Court held that the trial court should have granted this request. "The descriptions noted by the police when they first investigate and talk to the victims are likely to be the most accurate record available of what the victims recalled as to how the person looked when the matter was freshest in their minds." The Court expressly overruled an earlier decision which held that before a defendant could examine a police report, he must demonstrate an inconsistency between the testimony of the eyewitnesses at the trial and what they told the police at the time of the investigation. The Court indicated that "the production of the police report is the sine qua non for the discovery of an inconsistency." The Court further indicated that "access to impeaching information of this sort, if it does exist, is actually part of the right to ask challenging questions by cross-examination, one of the fundamental rights of a defendant in any criminal trial." State v. Cannon, S.W.2d \_\_\_\_\_ (Mo. Sup. Ct. 13 July 1970); 7 Crim. L. Rep. 2383.

#### INDECENT LANGUAGE -- FAILURE TO STATE AN OFFENSE --

The accused was charged with communicating indecent and obscene language to a female by stating, "Meet me at the Downtowner Motel." The Air Force Court of Military Review held that, as a matter of law, the words allegedly spoken, neither expressly nor by fair implication constitute an indecent communication. The Court indicated that "lustful purpose is one of myriad possible motivations which may have prompted the accused to communicate the language alleged. Indecency of thought on the part of the accused is not, however, the yardstick by which the sufficiency of the specification is to be measured. We must rather look to the plain and ordinary meaning of the words themselves, taking into account all commonly accepted variables of interpretation thereof, for the gravamen of the offense is the indecency of the communication itself, and not the subjective motivation

of the accused." The Court also noted that although indecency can be communicated by implication or innuendo as well as by express declaration, such implication or innuendo must be clearly discernible from the four corners of the specification. United States v. Wainwright, \_\_\_ CMR \_\_\_ (AFCMR 1970).

MENTAL RESPONSIBILITY -- DEFENSE REQUESTED PSYCHIATRIST -- The prosecution, in a trial for robbery, had the defendant psychiatrically examined under 18 U.S.C. § 4244 (1964) with regard to his competency to stand trial, but not to his capacity to commit the charged act. The defense motion for independent medical evaluation under 18 U.S.C. § 3006A(e) (1964), a part of the Criminal Justice Act of 1964, was denied. The Eighth Circuit overruled this denial in a decision which it stated was one of first impression as it was unable to find a similar case where a federal court of appeals had considered a trial court's denial with finality of an accused's request for such services. The Court indicated that since the issue of mental competency, like most other issues, is presented to the jury in an adversary context, the "adversary system cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in the presentation of this issue to the jury." The Court indicated that the trial court need not authorize an expenditure under § 3006A(e) for a mere "fishing expedition," but "it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." United States v. Schultz, F.2d \_\_\_ (8th Cir. 17 July 1970); 7 Crim. L. Rep. 2397. [Note: The inapplicability of § 3006A(e) to the military and the related question of defense-requested private investigators was discussed by the Court of Military Appeals in Hutson v. United States, 19 USCMA 437, 42 CMR 39 (1970).]

NARCOTICS -- PUNISHMENT FOR BEING ADDICT -- The United States Court of Appeals for the District of Columbia Circuit, in an en banc opinion, discussed but left undecided, whether Robinson v. California, 370 U.S. 660 (1962), which barred the punishment of an addict for being an addict, may also bar the punishment of an addict for possession of drugs for his own use. The defendant in the instant case, a heroin addict, was charged with possession of 13 heroin capsules, one-half of his daily usage. The Court noted that the federal statute lumped together the non-addict dealer in large quantities of narcotics with the addict who possesses narcotics solely for his own use. The majority of the Court stated that, if Robinson meant anything, it must also mean that Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or its effort to do so is unconstitutional as was California's attempt to punish the status of being an addict in Robinson. The Court, however, was unwilling to reach this issue in the instant case because it was not raised at the trial level and "it is vital that a person . . . who defends on those grounds should do so clearly and unequivocally in the trial court, to the end that a record can be made of the facts upon which they rest." Watson v. United States, \_\_\_ F.2d \_\_\_ (D.C. Cir. 15 July 1970); 7 Crim. L. Rep. 2328.

SEARCH AND SEIZURE -- AUTHORIZATION BY COMMANDING OFFICER -- The Chief of Staff of a military installation had been delegated, by the Commanding General, the authority to order, on probable cause, the search of bachelor officers quarters. The Chief of Staff authorized the search of the appellant's quarters after receiving a telephone report from the Provost Marshal that a dope party was in progress at the quarters in question. The Chief of Staff relied solely on the information related to him by the Provost Marshal and did not know the identity of the informer who was the actual source of the information. He had

no independent corroboration or verification of the facts made known to him. The Court of Military Review held that the authorization of the search was not based on probable cause as the Chief of Staff failed to "personally weigh the evidence and determine whether probable cause existed." The Court stated that the Commanding General delegated the authority to authorize searches on a finding of probable cause to his Chief of Staff and not to his Provost Marshal. On the facts of the instant case, the Court also concluded that the search could not be sustained on the theory of prevention of disposition of criminal goods. United States v. Armstrong, \_\_\_ CMR \_\_\_ (ACMR 1970).

SEARCH AND SEIZURE -- INCIDENT TO PRETRIAL CONFINEMENT -- The appellant's commanding officer recommended pretrial confinement for the appellant on a charge of possessing a loaded weapon in the barracks. His personal effects were then inventoried and marihuana and LSD were found in his wall locker. Army Reg. 190-4 authorizes such an inventory upon pretrial or post-trial confinement. In the particular command in question, pretrial confinement could be authorized only by the staff judge advocate. Confinement was never actually authorized in this case although the company commander, when he performed the inventory, believed in good faith that incarceration would be accomplished. The Court of Military Review held that the seizure of the items in the locker was illegal since the accused was not ordered into confinement as the regulation clearly requires before an inventory can be undertaken, and the search and seizure could not be legitimized on any other basis. United States v. Klis, \_\_\_ CMR \_\_\_ (ACMR 1970).

SEARCH AND SEIZURE -- PRESENCE IN AUTOMOBILE -- The accused was a passenger in an automobile driven by a person suspected of illegal possession of a weapon and marihuana. The vehicle was stopped while entering a military installation, both individuals were searched, and marihuana was found on the accused. The Court of

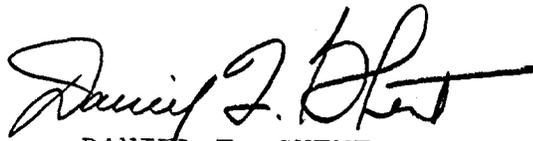
Military Review held that the search was illegal as the military police possessed no information implicating the accused in any criminal act prior to the time that he was apprehended. When the vehicle was stopped, the occupants did not try to escape, were not involved in any "act visibly criminal," and were not acting "surreptitiously." The Court stated that evidence of his presence in the automobile was just as consistent with innocent conduct on his part as it was with criminal conduct since the accused may have been merely a hitch-hiker given a ride back to the post by the driver of the automobile. "[A] person by 'mere presence in a suspected car' does not lose immunities from search of his person to which he would otherwise be entitled." United States v. Mehalek, \_\_\_ CMR \_\_\_ (ACMR 1970).

UNCHARGED MISCONDUCT -- PLAN OR DESIGN -- The accused was convicted of one specification of possession of marihuana and was acquitted of specifications alleging use and transfer of marihuana. The accused testified on the merits and the trial counsel, during his cross-examination, elicited an admission by the accused that he had used marihuana on two occasions not charged. The military judge informed the court members that they could consider such evidence as tending to establish a "plan or design" on the part of the accused. It was subsequently established that the uncharged misconduct occurred two years earlier while the accused was serving in Thailand. (The accused was currently being tried in Puerto Rico.) The Air Force Court of Military Review held that the military judge misunderstood the "plan or design" exception to the general rule barring evidence of other offenses. When evidence of uncharged offenses tends to establish the existence of a common scheme or plan embracing both charged and uncharged offenses in an interwoven pattern of conduct, such evidence is admissible for that limited purpose. Paragraph 138g(2), Manual for Courts-Martial, United States, 1969 (Revised edition). However, "uncharged offenses do not become admissible on the

strength of nothing more than their generic likeness to the charged offenses." The uncharged offenses must bear "some logical relevance" to the charged acts and must be "so closely connected with the latter as to be considered individual steps in a plan or system of illicit activity." United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954). In the instant case, there was no discernible relationship between the charged and uncharged offenses and the uncharged offenses were "entirely too remote in point of time to be indicative of a common course of conduct embracing the charged offenses as well." United States v. Mueller, \_\_\_ CMR \_\_\_ (AFCMR 1970).

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\* On 21 September 1970, Colonel Ghent stepped up to the United States Army Court of Military Review. He has been replaced as Chief, Defense Appellate Division by Colonel George J. McCartin, Jr. Our best wishes to both in their new assignments.

The Editors