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JUDGE ADVOCATE LEGAL SERVICE*

This issue contains opinions and other material in the following categories:

I. Opinions of the U. S. Court of Military Appeals.

II. Court of Military Review Decisions.

III. Grants and Certifications of Review.

IV. Miscellaneous Military Justice.

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I. OPINIONS OF THE U. S. COURT OF MILITARY APPEALS.

1. (169*b*, MCM; UCMJ art. 90) Law Officer Properly Considered Secretary Of The Air Force's Ruling. Accused Was Not Prejudiced By Board Of Review's Decision. Secretary's Denial Of Accused's Application For Separation Was Lawful. *United States v. Noyd,* No. 21,642, 15 Aug. 1969. Accused was convicted of willful disobedience of an order by Colonel *H*, his commanding officer, to fly as instructor in an F-100 aircraft with a student pilot. He faces dismissal, forfeiture of all pay and allowances, and confinement at hard labor for one year. The F-100 is a fighter plane used in Vietnam, and accused believed it would have been an "affront to . . . [his] conscience" to obey the order.

After voluntarily serving in the Air Force for a number of years accused developed a belief in "humanism," and described himself as a selective or discriminating conscientious objector, that is, one who is "not a universal pacifist." He is not opposed to all war, but he believes that the conflict in Vietnam is an unjust war and for that reason he cannot participate in it.

Accused's first assignment of error was that the law officer and the board of review erred in ruling that "there was no jurisdiction by either a general court-martial or a Board of Review . . . to determine whether the order was rendered unlawful by the prior erroneous action by the Secretary of the Air Force in denying the accused's application for separation or reassignment on grounds of conscientious objection." So far as the first assignment of error was concerned, the Court found no merit in the attack on the law officer's trial rulings. The record, contrary to accused's contention, demonstrated that the law officer considered the Secretary's ruling several times during the trial. He did not rule, as accused contended, that he had no authority to judge the legality of the Secretary's action as affecting the legality of Colonel *H*'s order. On the contrary, he specifically noted that he not only had the power, but would not hesitate to assert it, if it appeared that the Secretary's action invalidated Colonel *H*'s order.

As to the attack on the board of review in the first assignment of error, the Court perceived no prejudice to accused. The Board in its opinion indicated that the staff judge advocate had considered 18 of the 19 assignments of error presented to him; and it expressly "adopt[ed] his conclusions." As noted by the Court, since the staff judge advocate inquired into the correctness of the Secretary's disposition of accused's application for the purpose of determining the legality of Colonel *H*'s order, it appeared that the board of review also accepted "jurisdiction" to determine that question. The board, however, then referred to its opinion in *United States v. Dunn,* 38 CMR 917 (1968), in which it held that the Uniform Code of Military Justice did not "grant . . . jurisdiction to military tribunals to review such administrative de-

*Communications relating to the contents should be addressed to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Copies of the materials digested in this pamphlet are not available from the School. This pamphlet may be cited as 69-21 JALS [page number] (DA Pam 27-69-21).

terminations." Despite this conflict, the Court noted that at this stage of the proceedings, the exact basis for the board of review's decision was not really important inasmuch as the remaining judicial act was to determine whether, as a matter of law, the Secretary's ruling rendered illegal Colonel *H*'s order to accused. Since the Court had the material facts before it to decide this question, the first assignment of error afforded no reason to return the case to the board of review.

In his second assignment of error, accused contended that the Secretary of the Air Force "erroneously denied" his application for separation or reassignment "as a conscientious objector." Exemption from military service for any reason is a matter of legislative grace, *United States v. Macintosh*, 283 U.S. 605 (1931), and the Constitution neither confers upon, nor preserves to, the individual a right to avoid military service because of compulsions of his conscience. While Congress has provided certain exemptions from the obligation of service, the issue in this case was whether the Constitution commands that accused, a person who entered the military service voluntarily, and who voluntarily extended his tour, be allowed to cast off his military status because Congress authorized a class of persons to claim exemption from involuntary military service. Answering this question in the negative the Court stated:

> . . . [T]he person who voluntarily assumes the military status, but later develops conscientious scruples against such service or participation in armed conflict, is in a radically different position from the person who has such scruples when called to serve in the military and asserts them as a basis for exemption from service. In the case of the latter, the claim can be tested in appropriate ways without endangering a basic requirement of the military establishment; in the case of the former, until determination of the claim, the individual must either be accorded the right of private judgment of obedience to orders, which is unthinkable and unworkable, or the military need for his services must be compromised, at least to the extent of assigning him to duties he regards as consonant with his conscience. In our opinion, these differences between a civilian seeking to avoid military service on the ground of conscience and a military person claiming relief from military duty on the ground of conscience justify different treatment by Congress. We reiterate, therefore, that because Congress has accord civilians subject to the draft a right of exemption from induction on the grounds of conscience, it has no constitutional duty to grant a serviceman the right to be separated from the service or to demand reassignment to duties unrelated to combat to satisfy his scruples of conscience.

For reasons that are apparent, the Secretary of Defense promulgated a directive to authorize separation of in-service conscientious objectors. DOD, 1300.6, 21 Aug. 1962, revised 10 May 1968. This directive was effectuated in the Air Force by the provisions of AFR 35-24, 8 Mar. 1963. Paragraph 3 of that regulation provided: "Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standard." The Secretary of the Air Force, argued appellate defense counsel, erroneously assumed the regulation included the conscientious objector opposed to all war, but excluded the selective objector opposed to an "unjust" war such as the Vietnam conflict. This mistaken assumption, they contended, led the Secretary to deny accused's application for separation from the service.

Since Colonel *H* testified that he gave accused the order only after accused's application for separation had been turned down, if the Secretary's decision was illegal, the order it generated was also illegal. *United States v. Gentle*, 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966). The Court assumed *arguendo* that the congressional exemption from military service would apply to selective conscientious objectors. The congressional exemption, however, applies only to civilians; and neither its language nor its intention contemplates inclusion of persons already in the military. As the Court noted, however, the Air Force regulation applies only to the conscientious objector opposed to all war. Since accused conceded he was only a selective objector, he did not fall within the regulation and consequent-

ly the Secretary's denial of his application for separation was lawful.

The Court next rejected accused's contention that the different treatment of in-service conscientious objectors deprived him of equal protection of the laws. His argument, stated the Court, took no account of his status as a person already subject to military orders and discipline.

Concluding that the Secretary's ruling on accused's application for separation was legally unassailable, the Court held that Colonel *H*'s order was lawful. Accordingly, the decision of the board of review was affirmed. (Opinion by Chief Judge Quinn in which Judge Darden concurred. Judge Ferguson concurred in the result.)

2. (56*b*, MCM) **Rehearing Before A General Court-Martial Was Invalid Because It Lacked Jurisdiction. Convening Authority Did Not Have Good Cause To Withdraw Charges.** *United States v. Fleming*, No. 21,861, 22 Aug. 1969. Following his plea of guilty to a charge of desertion, with intent to shirk important service, at a rehearing before a general court-martial, convened at Camp Pendleton, California, on 21 February 1968, accused was sentenced to a bad-conduct discharge, total forfeitures, and confinement at hard labor for one year. The convening authority, while he approved the sentence, suspended execution of all portions thereof for fifteen months, with provision for automatic remission. Inasmuch as accused expressed a desire to serve in Vietnam, the convening authority ordered accused restored to duty as of the date of his court-martial. Accused is now serving in Vietnam.

Accused's original conviction at Camp Pendleton was reversed by the board of review for errors in the record. At the time of the board's decision, accused was confined at the U.S. Naval Disciplinary Command, Portsmouth, New Hampshire. Pursuant to the direction of the board of review, The Judge Advocate General of the Navy referred the case to the convening authority. The latter forwarded the record to the Commandant, First Naval District, Boston, Massachusetts, and recommended that a rehearing be held. The Commandant, First Naval District, referred the matter to trial by a general court-martial.

Trial of accused proceeded through the presentation of the charge and specifications to the court. Defense counsel then requested an out-of-court hearing at which time it was divulged that accused intended to plead guilty. The law officer, however, in inquiring into the providency of the plea, discovered that the only reason accused wanted to plead guilty was because he did not want to go back to Camp Pendleton for the retrial of his case. He therefore did not accept accused's plea. A continuance was then granted inasmuch as neither side was prepared to go forward on the merits of the case.

Thereafter, the Commandant, First Naval District, withdrew the case from the court. His action, in pertinent part, was as follows:

> ". . . [I]t appearing that, after the accused . . . had assured the trial counsel that a guilty plea would be entered . . . the law officer . . . announced that he would not accept the proffered guilty plea, and it futher appearing that the evidence necessary to establish the offense charged is not available locally but is available at the situs of the original trial . . . the entire record is returned to . . . Camp Pendleton, California for consideration and appropriate disposition."

The issue before the Court was whether the general court-martial, convened at Camp Pendleton, had jurisdiction in this case. In *United States v. Williams*, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960), the Court stated:

> ". . . [W]e hold that, once a court-martial has been convened to try previously referred charges, they may not be withdrawn by the convening authority *without good cause*." (Emphasis supplied by the Court.)

The Court, in holding that good cause was not demonstrated in this case, referred to paragraph 56*b*, Manual for Courts-Martial, which in pertinent part, provides:

"Proper grounds for the withdrawal of a specification include . . . *insufficiency of available evidence to prove the specification.* . . ." (Emphasis supplied by the Court.)

After reviewing a stipulation of facts, the Court concluded that the Government had not demonstrated that there was material evidence available at Camp Pendleton that was not available to the First Naval District. The Court, therefore, held that since good cause was not shown for withdrawing this case, the subsequent trial at Camp Pendleton was invalid.

Since accused is currently serving in Vietnam, the Court did not believe that further proceedings in this case were warranted. The decision of the board of review was reversed and the charges dismissed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) considered the action of the Commandant of the First Naval District justifiable, and not in derogation of the rights of accused. He believed the procedures followed in this case were consistent with the direction of the Court in *United States v. Smith*, 16 U.S.C.M.A. 274, 36 C.M.R. 430 (1966), and *United States v. Robbins*, 18 U.S.C.M.A. 86, 89 C.M.R. 86 (1969, digested 69-2 JALS 3).

3. PM (140*a*(2), (6), MCM) Unlawfully Adduced Statement Improperly Admitted In Evidence. *United States v. Attebury*, No. 21,896, 22 Aug. 1969. Accused was convicted of striking a Vietnamese national in the head with a rifle and violating a regulation prohibiting consumption of alcoholic beverages in an Army vehicle (arts. 128 and 92, respectively).

Accused was interrogated three times in a four-day period by an agent from the Criminal Investigations Detachment. On the first occasion, accused indicated a reluctance to speak about the alleged offenses. At the second interrogation he specifically refused to make any statement and the interview was terminated. At the third interview, after preliminary advice as to his right to remain silent and right to counsel, accused engaged in conversation with the agent and this conversation led to an incriminating written statement. This statement was admitted in evidence at trial.

While not deciding whether an accused's assertion of his right to remain silent at one interrogation insulates him from further interrogation in the course of an investigation, the Court here was satisfied that "accused's repeated reliance upon his right to remain silent made it incumbent upon the agent to desist in his attempts to get the accused to talk." The Court therefore held that the pretrial statement was improperly admitted in evidence.

The Court next rejected the Government's argument that the admission of the statement was not prejudicial because accused's testimony at trial constituted a judicial confession of the offenses charged. Inasmuch as the record provided no assurance that accused would have testified as to these offenses if his statement had not been admitted in evidence, the Court was unable to conclude that his trial testimony was not impelled by the error. *United States v. Bearchild*, 17 U.S.C.M.A. 598, 38 C.M.R. 396 (1968).

Since the period of confinement for the offense had expired and since no punitive discharge had been imposed, the Court could perceive no useful purpose in prolonging the proceedings by a rehearing. Accordingly, the decision of the board of review was reversed and the charge dismissed. (Opinion by Chief Judge Quinn in which Judges Ferguson and Darden concurred.)

4. PM (140, MCM; UCMJ art. 31) Failure To Properly Warn Accused Of His Rights Was Prejudicial Error. *United States v. Arnold*, No. 21,858, 22 Aug. 1969. Accused was convicted of involuntary manslaughter, wrongful appropriation of a government vehicle, and fleeing the scene of an accident (arts. 119, 121, and 134, respectively). He was sentenced to a bad-conduct discharge, total forfeitures, and confinement at hard labor for [illegible]

termediate appellate authorities affirmed the findings and sentence without change.

The facts indicated that on 28 April 1969, Agent *G*, of the Office of Special Investigations, was informed that a serviceman had been found dead in a field about four and one-half miles from the base. Physical evidence in the area indicated that the victim had been run over by a car. Numerous ruts were found in the field leading to and from the spot where the body was found. Agent *G* learned from the local sheriff that a passerby had earlier observed a 1954 or 1955 Ford, with a light top and dark colored body, stuck on the situs where the body was discovered. Later, when he again passed, the vehicle was gone.

After returning to the base, *G* learned that the victim had been with accused and two other airmen on the previous day. He also learned that accused owned a 1953 or 1954 Ford, which was blue or black with a white top. *G* summoned accused to the orderly room and, without any kind of warning, proceeded to question accused. He learned that accused had last seen the victim on the previous day in a pool hall in a nearby community. *G* then asked accused if he owned a 1953 or 1954 Ford which was lighter on the top than on the bottom, and whether it had been stuck the previous evening. After receiving an affirmative answer, *G* stopped the questioning because, as he testified, "I had reason to believe that . . . [accused] could be a suspect, and I didn't want to infringe on his rights." At this point *G* took accused to his office for further interrogation.

Subsequently, after proper warning, accused answered further questions by Agent *G* and then gave an incriminating pretrial statement to Agent *B* who questioned him in *G*'s presence. According to accused, he answered their questions because: "I felt that I was already in too deep to change the story." The statement was admitted into evidence over defense counsel's objection.

There was no question that no warning was given accused prior to the initial interrogation. Thus, if *G* had reason to suspect accused at that time, any statements to him were inadmissible in evidence. Article 31, UCMJ. And, since neither *G* nor *B* informed accused that his prior unwarned statement could not be used against him, the statement to *B* would likewise be inadmissible. *United States v. Bennett*, 7 U.S.C.M.A. 97, 21 C.M.R. 223 (1956).

Under the circumstances of this case, the Court felt that it was unreasonable to conclude that *G* did not at the time he initially interrogated accused, at least, suspect accused of having left the scene of an accident without rendering assistance to the victim and without notifying the proper authorities. If he did not, the Court believed that he should have and accused was entitled, by law, to a proper warning under article 31. Failure to warn resulted in prejudicial error. *United States v. Reynolds*, 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966). Accordingly, the decision of the board of review was reversed. A rehearing may be ordered. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) felt that the facts were not so overwhelming as to conclude that Agent *G* suspected accused when he first started to interrogate him. Since the evidence was susceptible of different interpretations, final determination of the conflict should have remained with those who had the fact-finding power. *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

5. (73, MCM) **Failure Of President To Tailor Instructions Constituted Reversible Error.** *United States v. McAlister*, No. 22,162, 22 Aug. 1969. Though several matters were presented on accused's behalf in mitigation and extenuation, the court-martial president failed to draw the attention of the court members thereto in any manner while delivering his presentencing instructions. Such was error and, under the circumstances, prejudiced accused. *United States v. Wheelen*, 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967); *United States v. Wysingle*, 18 U.S.C.M.A. 314, 40 C.M.R. 26 (1969, digested 69-11 JALS 8). Accordingly, the decision of the board of review was

reversed. The Court of Military Review may reassess the sentence or order a rehearing thereon. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) did not believe that the president's failure to draw attention to the mitigating evidence harmed accused, for had the court been so informed, he did not believe they would have lessened the punishment in favor of accused.

6. (48b, MCM) Availability Of Requested Counsel Is Decision To Be Made By The Convening Authority. *United States v. Williams*, No. 21,845, 22 Aug. 1969. Non-lawyer counsel was appointed by the convening authority, to defend accused before a special court-martial on charges of possession, use, and attempted sale of marijuana (arts. 134 and 80, respectively). When accused expressed interest in obtaining a lawyer he was taken to the base legal officer. That individual informed accused that lawyer-counsel was not reasonably available. The question, apparently, was never submitted to the convening authority. Thereafter, accused was advised by his appointed counsel that he did not believe that the services of a lawyer were necessary.

The determination of the availability of legal counsel is not one to be made by the base legal officer. As was stated in *United States v. Cutting*, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964):

> The Manual for Courts-Martial, United States, 1951, indicates that this "*initial* determination of the availability of requested counsel shall be made by the convening authority—and further provides that this decision is 'subject to revision by his next superior authority on appeal by or on behalf of the accused'." (Emphasis supplied.) United States v Vanderpool, 4 USCMA 561, 565, 16 CMR 135; Manual, supra, paragraph 48b. The Manual interpretation of Code, supra, Article 38, is supported by review of similar questions on petition of *habeas corpus*. Hiatt v Brown, 339 US 103, 94 L Ed 691, 70 S Ct 448 (1950); Henry v Hodges, 171 F 2d 401 (CA 2d Cir) (1948). . . . While the burden is normally on the aggrieved party to support his contention of abuse, we are loath so to charge one represented by untrained counsel when considering a matter of basic statutory entitlement.

The Court, citing *United States v. Kelley*, 7 U.S.C.M.A. 485, 23 C.M.R. 48 (1957), refused to invoke the doctrine of waiver of legal counsel since accused had not been represented by trained counsel. Because the facts were sufficiently similar to those found in *United States v. Cutting*, *supra*, the Court held that reversal was required. Inasmuch as accused had been restored to duty a rehearing was not deemed warranted. The findings of guilty were set aside and the charges dismissed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) was of the view that after accused was informed of the procedure for requesting a lawyer to defend him, he made a deliberate decision to keep his appointed counsel.

7. (140, MCM) Admission of Incriminating Statement In Evidence Was Prejudicial Error Where Proper Warning Was Not Given Accused. *United States v. Phifer*, No. 22,052, 15 Aug. 1969. Contrary to his plea, accused was convicted for desertion (art. 85) and was sentenced to a dishonorable discharge, forfeiture of $50 per month for 18 months, and confinement at hard labor for the same period. A board of review ordered a rehearing because it was of the belief that accused was subjected to an incriminating custodial interrogation by an agent of the FBI without first having received the benefit of the proper warnings.

FBI agents testified that they contacted a building superintendent and were told that a person residing in a second floor apartment "resemble[d] . . . [accused's] photograph." Upon entering the apartment the agents discovered accused asleep. Awakened and told that the intruders were agents, accused was asked to identify himself. His response was "James Dale." To the question "what is your true name?" his answer was "James Phifer."

Accused was placed under arrest. Agent *A* further testified that accused would have been placed under arrest even if he had not given his true name.

The board of review, relying on *United States v. Allison*, CM 419542 (1969, reported in 69-9 JALS 8), held that the admission of this evidence was prejudicially erroneous. The Board stated:

> . . . We are of the view that where a law enforcement officer confronts a suspect whom he reasonably believes to be the person he intends to arrest, a custodial situation requiring appropriate warnings exists from that moment on, even though the suspect is formally placed under arrest subsequent to the initial confrontation.

The Court had no doubt that the Board had resorted to its fact-finding power and made a factual determination of the issue before it. The Court stated that under these circumstances:

> ". . . [W]e are bound by purely factual determinations of the board of review. . . . *unless such conclusions are arbitrary and capricious, so as to amount to an abuse of discretion. . . .*" [*United States v. Baldwin*, 17 U.S.C.M.A. 72, 77, 37 C.M.R. 336 (1967).] (Emphasis supplied by the Court.)

On the facts before the Court, it was unable to say that the board of review's factual interpretation was arbitary and capricious. The decision of the board was therefore affirmed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

8. (UCMJ arts. 10, 33, 98) **Accused Held In State Jail On Behalf Of The Government Was Denied Right To Speedy Trial.** *United States v. Keaton*, No. 21,874, 15 Aug. 1969. In accord with his plea, accused was convicted for absence without leave (Art. 86), and was sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for one year, and reduction to the lowest enlisted grade. The convening authority reduced the period of confinement to 11 months. The board of review then reduced the dishonorable discharge to a bad-conduct discharge.

At the beginning of trial and before entering a plea, the defense moved for a dismissal of the charge on the basis that accused had been denied a speedy trial. An out-of-court hearing revealed that on 1 March 1968 accused had been apprehended by civil authorities in Florida on an armed robbery charge. He remained in a Florida jail until 14 March 1968. On that day he was released on bail. His Army status was then unknown. On 27 March 1968, however, accused was taken into custody by agents of the FBI as a military absentee and was returned to the Florida prison. On 29 March 1968 a hearing was held on the robbery charge. The case was continued until 5 July 1968. Accused was returned to confinement.

The counsel who had defended accused on the state charge testified that on the day accused was arrested by the FBI, appropriate notification was immediately given to a Florida Shore Patrol unit, including the release of accused on bail on the state charge, and that an assistant state's attorney had indicated a *nolle prosequi* of the state case. It was also suggested that accused be picked up so that military charges could be disposed of. Later, accused's counsel made further calls to the Shore Patrol and to the FBI in attempting a release of his client. On 24 June 1968 this counsel told the Shore Patrol that if accused was not picked up the next day he would file for a writ of habeas corpus. On 25 June 1968 accused was taken into custody by the Shore Patrol. On 2 July 1968 a *nolle prosequi* was entered on the state charge.

At trial the law officer ruled adversely on the defense motion to dismiss for lack of speedy trial.

Relying on *United States v. Williams*, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961), the board of review held that accused was not denied a speedy trial. In *Williams* it was stated that detention of an accused by civil authorities for a civil offense, before preferment of any military charge, cannot properly be charged against the Government as part of the time for which it is accountable in determining

whether it acted with reasonable dispatch in prosecuting an offense." The decision of the board of review stressed that under Florida law accused's release on bail still amounted to civil detention because he was not at liberty to leave the state in this status.

The Court, however, was of the opinion that *United States v. Garner*, 7 U.S.C.M.A. 578, 23 C.M.R. 42 (1957) was more closely akin to this case than was *Williams, supra*. In *Garner*, the accused was apprehended as an absentee by a Tennessee deputy sheriff for the Department of Defense. A majority of the Court in *Garner* agreed that:

> "Military control can be exercised directly by military personnel, or, for certain purposes, indirectly, by civilian officials acting for and on behalf of the Armed Forces. . . . A detention effected in accordance with such a notice is a detention on behalf of the military and under the authority granted by Congress for that purpose."

Since the views expressed in *Garner* applied to the instant case, the Court held that the beginning date for determining whether accused received a prompt trial was 27 March 1968, the day he was confined on behalf of the Federal Goverment, even though he was held on bail pursuant to state charges. The Court believed that the delay from 27 March to 25 June 1968 was the result of the mistaken belief that so long as the state charge had not been finally disposed of, the Government was under no obligation to determine whether it could reassert control over accused. The frequent and unheeded requests of accused's counsel that the Government attempt to remove him from the Florida jail for the long period convinced the Court that articles 10, 33, and 98 of the Uniform Code of Military Justice had not been met. Accordingly, the decision of the board of review was reversed and the charge dismissed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

2. (UCMJ arts. 118) Inaccurate Reading Of Article 32 Report In Evidence Did Not Prejudice Accused; Defense Of Justifiable Homicide Was Not Raised By The Evidence. Accused Was Not Prejudiced By Law Officer's Failure To Instruct On Other Acts Of Misconduct. *United States v. Butler*, No. 21,786, 15 Aug. 1969. Accused was convicted of the murder of a fellow marine (art. 118). For his first assignment of error, accused relied on certain inaccuracies by trial counsel in reading into the record testimony taken at the article 32 investigation; the witness had died between the investigation and trial. In holding the first assignment of error unmeritorious, the Court found the reading mistake to be inconsequential.

Accused's second assignment of error dealt with the law officer's instructions before findings. The court members were instructed on self-defense. On this appeal, accused contended that the law officer erred by failing to instruct on "justifiable homicide as distinguished from self-defense." This argument was predicated upon the principle that "a person authorized by law to detain another is not criminally responsible for the death of that person if death results from the use of reasonable force to prevent his escape. See United States v. Evans, 17 U.S.C.M.A. 288, 243, 38 C.M.R. 36 [1967]." The Court, however, found that the record of trial demonstrated beyond all doubt that accused shot his victim without any thought of continuing the restraint. Under these facts, there was no obligation to instruct on this theory of defense. *United States v. Tobin*, 17 U.S.C.M.A. 625, 38 C.M.R. 423 (1967).

Next, it was contended that the law officer erred to accused's prejudice by failing to include an instruction to the court members to disregard evidence of other misconduct in his instruction as to sentence. Considering the nature of accused's offense, and its maximum punishment, the Court was convinced that the alleged misconduct in issue did not influence the court members to adjudge a more severe punishment. The decision of the board of review was affirmed. (Opinion by Chief Judge Quinn in which Judges Ferguson and Darden concurred.)

10. (UCMJ art. 31) Testimony Relative To Search Made Incidental To A Lawful Arrest Was Admissible. *United States v. Coakley*, No. 22,058, 15 Aug. 1969. Convicted of desertion (art. 85), accused was sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for 18 months, and reduction to the lowest enlisted grade.

In an out-of-court hearing, an agent of the FBI testified that having been assigned to accused's case, his investigation carried him to the residence of accused's mother. The mother's husband gave him a description of the car accused drove, its license number, a description of the girl who accompanied accused, the clothes that accused would be wearing, that accused had a bandage on his hand, and the specific area of the city where he would likely be discovered.

Arriving at the designated area, the agent saw accused and the girl. The testifying agent then identified himself and asked if accused was Coakley. Coakley responded in the negative but nevertheless was placed under arrest. The agent testified that regardless of the name given, the arrest would still have been made, there being "sufficient probable cause."

Once placed under arrest, accused was instructed to produce identification. He produced no identification bearing his true name. It was conceded that no article 31 warnings or *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings were given accused at this time.

In court, the agent repeated his story up to the point where he asked accused if he were Coakley. The court was then told of the arrest and of the *absence* of anything showing active military status and that accused carried no document showing his true name.

The Court held that this evidence was admissible since the agent's testimony reflected the immediate search made incident to a lawful arrest. *United States v. Drucher*, 7 U.S.C.M.A. 439, 22 C.M.R. 229 (1956). As pointed out in *United States v. Rushing*, 17 U.S.C.M.A. 298, 38 C.M.R. 96 (1967), warnings under article 31, the Fifth Amendment to the Constitution, and *Miranda* are not a prerequisite to a valid search. Therefore, the testimony as to the *absence* of true identification was obviously admissible. Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

11. (8, MCM) Accused's Conviction For Violating A Regulation Could Not Stand Since The Regulation Did Not Apply To Him. *United States v. Baker*, No. 21,910, 15 Aug. 1969. Accused was convicted of violating MACV Directive 65-50, dated 11 June 1966, by unlawfully making monthly purchases of Treasury checks in excess of his monthly pay. He was sentenced to 15 months confinement at hard labor, total forfeitures, and reduction to E-1.

The pertinent part of the directive, which is entitled "POSTAL SERVICE, MONEY ORDER SERVICE," is quoted below:

"4. *POLICIES.*

a. No individual will purchase in any month more postal money orders, treasury checks, banking instruments, or any combination thereof than he draws in MPC during that month. Under exceptional circumstances, unit commanders may authorize individuals to purchase additional quantities of postal money orders. The unit commander will certify that the excess money was legitimately accrued by the individual. Postal clerks will append this certificate to the application."

The Court in reversing accused's conviction, held that the directive did not apply to him. As noted by the Court, when the entire directive was analyzed, it was clear that it was keyed to the creation of procedures which would effectively regulate the postal service and postal money order transactions within it. The Court's task was to reconcile the whole of the directive with that portion of paragraph 4a, which provided "No individual will purchase in any month more postal orders, *treasury checks*, banking instruments, or any combination thereof than he draws in MPC during that month." (Emphasis supplied by the Court.) To achieve this end, the Court looked

to the rules of statutory construction and held that the pertinent portion of paragraph 4a, previously quoted, was "no more than information provided to the postal clerk so that he will know how to properly limit the amount of money orders purchased by an individual."

Relying on *United States v. Webber,* 18 U.S.C.M.A. 536, 33 C.M.R. 68 (1963), the Court concluded that where, as in this case, the charged conduct of an accused is beyond the scope of the prohibitive regulation, his conviction under that regulation is error. Accordingly, the decision of the board of review was reversed and the charge dismissed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

12. (152, MCM) ***Chimel v. California* Considered.** *United States v. Goldman,* No. 21,732, 22 Aug. 1969. This was a petition for rehearing. Case digested in 69-16 JALS 3. In this petition, the defense urged that the recent decision of the Supreme Court in *Chimel v. California,* 89 S. Ct. 2034 (1969, digested 69-19 JALS 11), required reversal of this case. See *United States v. Goldman,* 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969). Disagreeing, the Court stated:

> Not only was our decision not premised solely upon the legality of a search incident to an arrest but the search here involved was not so unlimited in scope and reasonableness as to offend against constitutional authority. The agents here acted both upon probable cause and necessity. It is one thing to construe the scope of police operations narrowly within the calm and orderly atmosphere of this nation, another to delimit them in a foreign and strife torn city.
>
> Moreover, the defense contention that the military may not try the accused for these offenses committed by him while on active overseas duty in a zone of conflict finds no support in O'Callahan v Parker, 395 US 258 . . . [1969, reported in 19013 JALS].

Therefore, the Court perceived no reason to reconsider its former opinion and consequently adhered to the results contained therein. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson (dissenting) was of the opinion that *Chimel v. California, supra,* made the search of room 6 " 'unreasonable' under the Fourth . . . Amendment." Furthermore, in light of *O'Callahan v. Parker, supra,* the accused should have been returned to the United States and tried in a federal district court.

13. (174*c*, MCM; UCMJ art. 95) **Petition For Habeas Corpus Showed No Ground For Relief.** *Jones v. Lemond, Christopher, Walker, Chafee, and Laird,* Misc. Doc. 69-29, 15 Aug. 1969. Petitioner applied for writ of habeas corpus, writ of error coram nobis, and injunctive relief. In May 1969, petitioner was convicted of unauthorized absence and missing movement of his ship by neglect. He was sentenced to a period of confinement but later escaped. He now faces trial by court-martial for his escape and unauthorized absence.

Petitioner contended that his initial unauthorized absence was an act of "desperation" and his subsequent escape from confinement was for the purpose of obtaining counsel to help him in processing his application for discharge as a conscientious objector. In denying the petition, the Court cited *United States v. Noyd,* No. 21,642 (15 Aug. 1969, digested *supra,* wherein it was held that the development of scruples of conscience by a person already in the armed forces does not terminate his obligation to serve. Assuming *arguendo,* as petitioner contended, that all the persons named in this petition interfered with his right to file the application, the Court nevertheless stated that this assumption did not impugn the legality of the special court-martial conviction or provide justification for his escape. Since the pendency of an application for discharge as a conscientious objector confers no authority to absent one's self from his unit and provides no justification for an escape from unlawful confinement, see *United States v. Hangsleben,* 8 U.S.C.M.A. 320, 24 C.M.R. 130 (1957), the petition, on its face, presented no ground for the relief sought. (Memorandum opinion of the Court.)

14. (UCMJ art. 67) **Court Of Military Appeals Lacked Jurisdiction To Hear Accused's**

Case. *United States v. Snyder*, Misc. Doc. 69-23, 14 Aug. 1969. Tried by special court-martial, accused was found guilty of adultery (art. 134) and was sentenced to detention of $50 per month for two months and reduction to the grade of sergeant. The convening authority approved only so much of the sentence as provided for reduction to the grade of sergeant. Thereafter, accused submitted an appeal to The Judge Advocate General of the Air Force under the provisions of article 69, UCMJ. The Judge Advocate General denied accused's claim for relief.

Subsequently, accused filed a "Petition for Review and Writ of Coram Nobis" with the Court of Military Appeals alleging that the court-martial lacked jurisdiction to try him. The Court, however, did not reach the merits of this case since it was faced "with a more serious question, *i.e.*, that of our own jurisdiction to entertain an 'appeal' from a decision of the Judge Advocate General, taken pursuant to the provisions of Code, supra, Article 69."

Article 67, UCMJ, empowers the Court of Military Appeals to review cases in three categories. In the ordinary course, the Court hears appeals from decisions of the Courts of Military Review (formerly designated boards of review). Those bodies' jurisdiction, in turn, depends upon the sentence in particular cases, Article 66, UCMJ. Since accused's sentence extended only to reduction to the grade of sergeant and as he was tried only by special court-martial, the record was neither reviewable as a matter of right by a court of military review under article 66, nor was he entitled to have it "examined" by The Judge Advocate General under the provisions of article 69. He was however, entitled to appeal the conviction to The Judge Advocate General and to seek the invocation of the latter's powers under article 69 for the reasons therein set forth. This is the course accused pursued, and it is its unsuccessful termination which accused desired to be reviewed by the Court.

Referring to *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968), accused asserted that the case stood for the proposition that the Court of Military Appeals could review a special court-martial even if the approved sentence therein did not require that the case be reviewed by a Court of Military Review. The Court, however, held that accused's interpretation of that case was overbroad.

In holding that there was no basis which would permit it to review a special court-martial in which the adjudged and approved sentence extended only to reduction, the Court stated:

> There can be no doubt of the fact that this Court does possess the authority to resort to extraordinary writs under the All Writs Act, 28 USC § 1651. Noyd v. Bond, 395 US — [1969, reported in 69-18 JALS 4] . . . specifically recognizes our authority in this statute, *in aid* of the exercise of our jurisdiction over cases properly before us or which may come here eventually. Our jurisdiction to hear appeals, no matter how well-founded, is set out by Congress in Code, supra, Article 67. We cannot by judicial fiat enlarge the scope of our appellate review to embrace those cases which Congress thought justified no remedy beyond the powers it so recently confided to the Judge Advocate General under Code, supra, Article 69.

Accordingly, the petition was dismissed. (Memorandum opinion of the Court.)

15. (UCMJ art. 67(b)) Court Of Military Appeals Lacks Jurisdiction To Hear Cases Completed Prior To 31 May 1951: *United States v. Homcy*, Misc. Doc. 69-86, 15 Aug. 1969. Accused was convicted by general court-martial for misbehavior before the enemy on 19 October 1944. His approved sentence consisted of dismissal, total forfeitures, and confinement at hard labor for ten years. The board of review affirmed the sentence, and the Commanding General, Medeterranean Theater, confirmed it.

Petitioner has initiated several efforts to obtain a new trial or to have the Army Board for the Correction of Military Records sub-

stitute an honorable discharge for the dismissal imposed by the general court-martial. None of these efforts succeeded.

In this petition, petitioner alleged that the general court-martial which convicted him in 1944 lacked jurisdiction for several reasons. As stated by the Court, however, the fact that the court-martial proceedings were finalized long before 31 May 1951, the effective date of the Uniform Code of Military Justice, presented a bar to consideration of the case by the Court upon direct review by articles 67(b), UCMJ. In both *United States v. Sonnenschein*, 1 U.S.C.M.A. 64, 1 C.M.R. 64 (1951), and *United States v. Musick*, 3 U.S.C.M.A. 440, 12 C.M.R. 196 (1953), it was held that whenever court-martial proceedings are completed prior to the effective date of the Uniform Code, *supra*, the Court of Military Appeals has no power to review them.

The provisions of the All Writs Act, 28 U.S.C. § 1651 do not give the Court the authority to grant petitioner relief, inasmuch as the powers granted by this Act are to be used "'*in aid* of the exercise of our jurisdiction over cases properly before us or which may come here eventually.' United States v. Snyder, . . . [1969, digested *supra*]."

Since the Court would be powerless to act on petitioner's case under article 67(b), it could not do so under the All Writs Act. Accordingly, the petition was dismissed. (Memorandum opinion of the Court.)

II. COURT OF MILITARY REVIEW DECISIONS.

1. (152, MCM) Admission Of Documents Seized From Accused Into Evidence Was Error Where Accused Had Not Been Properly Warned. *United States v. Rodriguez*, CM 419824, 3 Jul. 1969. Conviction: absence without leave, in accord with plea; possession of a false identification card and a false military vehicle operator's identification card, both with intent to deceive, contrary to plea. Sentence: F $100 per mo for 24 mos, 24 mos CHL, and red E-1. Convening authority approved only so much of the sentence as provided for 18 mos CHL, F $70 per mo for 18 mos, and red E-1.

At trial, the following facts were developed: Specialist *D*, a military policeman in Vietnam, and his partner were ordered to set up a check point at a specified road intersection and check all vehicles for accused, who was believed to be absent without leave. After checking vehicles for about two hours, a Vietnamese Army vehicle stopped at the check point. Both military policemen recognized a passenger in the truck as fitting the description of accused. The suspect, however, was wearing a new-looking uniform with the name tag "MENDOZA." Having recognized accused, Specialist *D* apprehended him and requested identification. Accused handed him a military ID card and a driver's license, both in the name of "MENDOZA." These two items were confiscated and each was admitted into evidence by the law officer. No *Miranda v. Arizona*, 384 U.S. 436 (1966), nor *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) warnings were given accused at the time of the seizure.

The Government argued that no *Miranda-Tempia* warnings were required since Specialist *D* did not inquire "as to any facts pertinent to the crime in which the . . . [accused] was thought to be involved" (*i.e.*, absence without leave). The Board, in rejecting this argument, stated that it was being asked to ignore the logical conclusion that Specialist *D* must have drawn when he recognized accused as meeting the description of Rodriguez in a brand-new uniform with the nametag "Mendoza." The Court believed that Specialist *D* suspected accused of possessing false documents, in order to buttress his assumed identity, in addition to the offense of absence without leave.

In view of the suspicions that *D* must reasonably have developed, the Board held that absent the *Miranda-Tempia* warnings the law officer erred to accused's prejudice by admitting into evidence the ID card and driver's license proffered by accused in response to

Specialist *D*'s request for identification. Accordingly, the possession of false documents charge was dismissed and the sentence reassessed. Only so much of the sentence as provided for red E-1, F $70 per mo for six mos, and six mos CHL was approved. The findings of guilty and the sentence, as modified, were affirmed. (Rouillard, J.; Hagopian, J., concurring; Westerman, C.J., not participating.)

2. (174*c*, *d*, MCM) **Accused Was Improperly Convicted Of Escape From Custody. Proper Charge Would Have Been Escape From Confinement.** *United States v. Westbrooks*, CM 420860, 18 Jul. 1969. Conviction: two unauthorized absences and escape from custody, in accord with pleas. Sentence: BCD, 12 mos CHL, and F $100 per mo for a like period. The convening authority reduced F to $50 per mo for 12 mos but otherwise approved the sentence.

After findings, the law officer admitted into evidence a fact stipulation concerning "how . . . [accused] escaped from custody." The stipulated facts established that on the date of the offense, accused was in lawful pretrial confinement in a stockade. In order to empty a trash can into a "demsy-dumpster" located approximately ten feet outside the main gate, accused was permitted to leave the compound momentarily, accompanied by a guard from whose restraint he then escaped.

The Board held that the improvidency of accused's guilty plea to the offense of escape from custody was readily apparent. Clearly, in this factual situation accused's offense was escape from confinement rather than escape from custody. *United States v. Ellsey*, 16 U.S.C.M.A. 456, 37 C.M.R. 74 (1966). As the two offenses are mutually exclusive in that they deal with different types of restraints, proof of one will not support conviction of the other. Accordingly the Board set aside the conviction of escape from custody and reassessed the sentence on the basis of the remaining findings of guilty. (Collins, J.; Chalk, C.J., and Stevens, J., concurring.)

3. (152, MCM) **Search Of Accused's Wall Locker Not Based On Probable Cause.** *United States v. Johnston*, CM 419705, 3 Jul. 1969. Conviction: wrongful possession of "trace amounts" of marijuana (art. 134). Sentence: F $70 per mo for six mos, six mos CHL, and red E-1.

On the morning of 26 July 1968, accused's commanding officer, Captain *S*, was advised by the CID that four of his men, including accused, had been arrested by civilian authorities on suspicion of possession of marijuana. It appeared that the arresting civilian police officer had relayed the information to a military police desk sergeant, whose police report was the basis of the CID information. Captain *S* granted permission to search accused's billets based on the information furnished him by the CID. The subsequent search of accused's wall locker revealed a brass pipe, the bowl of which contained a black residue later identified as an "active principle of marijuana."

Trial defense counsel, following arraignment, moved to suppress the evidence on the ground that the search was illegal because based upon information derived from a previous illegal search and seizure by civilian authorities and because of the lack of probable cause to conduct the search. The law officer denied the motion.

It is axiomatic that a search authorized by a commanding officer of an individual's personal effects which is founded upon mere suspicion is illegal and the fruits of such a search are inadmissible in evidence. *United States v. Dollison*, 15 U.S.C.M.A. 595, 36 C.M.R. 93 (1966); *United States v. Price*, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968). Furthermore, as noted by the Court of Military Appeals in *United States v. Westmore*, 14 U.S.C.M.A. 474, 34 C.M.R. 254 (1964), the mere addition of the factor of an arrest of the suspect does not satisfy the requirement of probable cause.

In this case, the Board held that the record demonstrated the inadequacy of the basis up-

on which Captain *S* authorized the search of accused's effects. In view of the inadmissibility of the evidence produced as a result of the illegal search and the absence of indication of other admissible evidence of accused's guilt, the Board held that a rehearing would not be appropriate. The charges were ordered dismissed. (Stevens, C.J.; Newrom, J., concurring; Kelso, J., absent.)

4. (UCMJ art. 134) ***O'Callahan v. Parker* Considered.** *United States v. Mueller*, CM 420837, 24 Jul. 1969. Conviction: wrongfully possessing and transferring marihauna in the City of Leavenworth, Kansas, in accord with plea. Sentence: BCD, TF, 12 months' CHL, and red E-1. The convening authority approved only so much of the sentence as provided for a BCD, forfeiture of $50 pay per month for 12 months, 12 months' CHL, and red E-1.

Relying on *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS), accused now claims that the court-martial lacked jurisdiction to try him because the charges involved civilian - type, off - post - committed crimes having no military significance. The Board, in rejecting accused's contention, noted that there were several features in this case which distinguished it from *O'Callahan*. In *O'Callahan*, the offenses directly involved a civilian victim, whereas in this case accused transferred the marihuana to another soldier. Moreover, the soldier to whom the marihuana was transferred was in fact performing a duty on behalf of the military by participating in the transfer. Finally, for the reasons stated in *United States v. Konieczko*, CM 419706 (1969, digested in 69-20 JALS 9), the mere possession of marihuana imports service connection:

> . . . His offense [possession of marihuana] "did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." It did however, at least potentially, involve the good order, discipline, and reputation of the Armed Forces. Wrongful possession of marihuana has been consistently recognized by the United States Court of Military Appeals as conduct to the prejudice of good order and discipline in the Armed Forces and of a nature to bring discredit upon them, violative of Article 134 of the Code. United States v Nabors, 10 USCMA 27, 29, 27 CMR 101, 103 (1958), and cases cited. The reason the severe penalty of dishonorable discharge, total forfeitures, and confinement at hard labor for five years may be imposed by a court-martial for the wrongful possession of marihuana [footnote omitted] is not only because Federal and State criminal law may be violated but, more importantly, because of the potential impact of the offense upon military order, discipline, and reputation. Possession of marihuana by a soldier is but one step away from his use of it and his transfer of it to other soldiers for them to use or transfer. See United States v Alvarez, 10 USCMA 24, 26, 27 CMR 98, 100 (1958); United States v Nabors, *supra*.

Finding that service connection was amply demonstrated by the record, the Board held that the court-martial that tried accused had jurisdiction. The findings of guilty and sentence were affirmed. (Chalk, C.J.; Stevens, J., concurring; Collins, J., absent.)

5. (48, MCM) **Defense Counsel Did Not Error In Conceding That A Punitive Discharge Was Appropriate. Nonetheless Prejudice Found.** *United States v. Shields*, CM 420970, 28 Jul. 1969. Conviction: striking a superior officer and willfully disobeying a superior officer, in accord with plea. Sentence: DD, TF, 5 years' CHL. The convening authority reduced the confinement to one year, but otherwise approved the sentence.

After accused informed the law officer that he desired a punitive discharge, the defense counsel, in argument, stated:

> . . . Gentlemen, I think that it's forseeable [sic] that a discharge will be given in this case. I'm not even going to argue against one. . . .

The Board noted that under the circumstances of this case it was not error for the defense counsel to concede that a punitive discharge was appropriate. He did, however, error to accused's prejudice because his remarks were broad enough to encompass a dis-

honorable as well as a bad conduct discharge. *United States v. Smith*, CM 419750 (1969, digested in 69-5 JALS 6).

The findings of guilty and only so much of the sentence as provided for BCD, TF, and one year CHL were affirmed. (Chalk, C.J.; Stevens and Collins, J.J., concurring.)

6. (75*b*(2), MCM) **Accused's Previous Conviction Held Inadmissible Because It Was Not Clear What Offense The Previous Conviction Involved.** *United States v. Richards*, CM 420848, 10 Jul. 1969. Conviction: unauthorized absence, in accord with plea. Sentence: DD, TF, 12 months' CHL, and red E-1. The convening authority approved only so much of the sentence as provided for BCD, F $50 per month for nine months, nine months' CHL, and red E-1.

As noted by the Board, accused's record of trial pointed up the need for more carefully prepared service record entries of courts-martial convictions. An Extract of Military Records of Previous Convictions (DOD Form 493) was received into evidence which indicated that accused had been convicted for violating articles 91 and 92, UCMJ. The record, however, did not reflect what the specific violation was. When questioned by the president of the court about the prior conviction, the law officer replied, "I'm afraid we're all in the dark as to what the specific violation is."

Inasmuch as a court-martial is required to know the nature of an offense and not merely the bare fact of conviction, the Board held that the record of accused's previous conviction was inadmissible because it left the court uninformed and thus free to speculate as to what offense the previous conviction involved. Accordingly, the Board reassessed the sentence to cure any prejudice to accused. (Chalk, C.J.; Collins, J., concurring; Stevens, J., absent.)

III. GRANTS AND CERTIFICATIONS FOR REVIEW.

1. *United States v. Armstrong*, CM 418384, petition granted 1 Aug. 1969. Accused was convicted of unpremeditated murder while perpetrating a felony (art. 118). He had previously been tried for premeditated murder, murder while perpetrating a felony, and robbery, based on the same incident. He was found guilty of the first two offenses and not guilty of the third. The board of review ordered a rehearing on the two offenses of which he was found guilty. The evidence of record revealed that accused, on 18 November 1965, while in an AWOL status, robbed a gasoline station in Midway, Texas, and shot and killed the attendant. On 18 November, accused returned to military control. He was then surrendered to civilian authorities who kept him in confinement until 1 August 1966, at which time they returned him to the military. The civilian court had granted defense's motion to suppress the weapon found with accused's belongings (on the basis that the search and seizure were illegal) and accused's confession (which was oral and, therefore, not admissible) and had dismissed the charges. While accused was AWOL, his commander, in accordance with applicable regulations had inventoried his personal effects and, in the course of so doing, discovered a pistol. This weapon was turned over to the local police. It was the same caliber as that used to kill the gasoline station attendant and was subsequently admitted in evidence at accused's military trials. Shortly after accused had been turned over to the civilian authorities, he asked the sheriff for permission to speak to the victim's mother. Accused was permitted to speak to the woman, and a meeting was arranged in the sheriff's office. He made inculpatory statements to her in the sheriff's presence. Both testified to the statements at trial.

On 1 August 1966, charges were preferred against accused and, shortly thereafter, the article 32 investigation began. The defense requested delays from 23 August to 2 September and from 1 November to 6 December, on which date the trial began.

While preparing his instructions on findings, the law officer refused to grant the trial counsel's request to define the expression,

"better right of possession," which pertained to the elements of robbery in the felony murder charge. The attendant who had been killed did not own the station and the money but was a hired worker in possession. After the court had deliberated for approximately forty minutes, the law officer changed his mind, reopened the court and gave the requested definition. The Court will consider: (1) whether the law officer erred in not dismissing specification two of charge one; (2) whether the law officer erred in admitting evidence obtained by an unlawful search and seizure; (3) whether the law officer erred in permitting two prosecution witnesses to testify as to certain inculpatory statements allegedly made by the accused; (4) whether the law officer erred in giving additional instructions to the court after the court had been deliberating its verdict approximately forty minutes; and (5) whether the failure on the part of the military authorities to bring accused to trial until one year and three months after the commission of the offenses charged constituted a denial of accused's right to a speedy trial. The Court will also consider whether the court-martial lacked jurisdiction to try a member of the Army, who was charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post, during nonduty hours, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court.

2. *United States v. Harrison*, CM 419405, petition granted 28 Jul. 1969. Accused was convicted of malingering by intentionally shooting himself in the foot in order to avoid duty in the field (art. 115). The offense occurred within the continental limits of the United States. The convening authority had promulgated a directive (Appellate Exhibit III) in which he took cognizance of the substantial number of self-inflicted gunshot wounds in the command. He attributed this primarily to the failure of commanders to resolve the problem of low morale of the troops. He exhorted them to do their utmost to correct this situation. In the event that corrective measures failed, however, "flagging action" would be initiated in any case involving a self-inflicted gunshot wound. In all "in-country" incidents, commanders were to insure the return of soldiers to their units—after hospitalization—for completion of disciplinary action. In other cases commanders were to prevent favorable personnel actions from taking place prior to the gaining commander's taking appropriate disciplinary action. The convening authority concluded his directive by asserting he would personally review all reports of such incidents and would pay particular attention to indications that commanders had not done their jobs properly.

Evidence was adduced which tended to show that accused was under the influence of morphine at the time he was informed of his rights under article 31, UCMJ. On the issue of voluntariness, the Government had the burden of establishing accused was mentally able to understand the explanation of his rights under article 31 and, if the court found as a fact that accused, as a result of taking morphine, was unable to understand his rights, they should find a failure to comply with article 31 and give no weight to accused's statement. The Court will consider whether the directive of the convening authority (Appellate Exhibit III) constituted improper command influence or otherwise improperly limited the exercise of independent discretion of subordinate commanders as contemplated by paragraph 32*d*, MCM, 1951. The Court will also consider whether the law officer's instructions on voluntariness were sufficient to cover that issue, especially in view of the fact that the court-martial was required to find accused "mentally able to understand his rights" under article 31, only.

3. *United States v. Payne*, ACM 20872, petition granted 31 Jul. 1969. Accused was charged with and convicted of a lewd act specification alleging a lewd and lascivious act upon a female under 16 years of age (art. 134). He pleaded not guilty. The 10-year old child lived

with her mother and NCO father in off-base quarters in England. The offense allegedly occurred at the child's home where accused was a guest at a party. The victim was in her upstairs bedroom which she shared with two sisters. She testified that accused came into the bedroom and asked her if she was sleeping. She did not reply but feigned sleep. The accused then pulled down her covers and underclothing and touched her in the genital area. The victim did not complain after the party, though she had an opportunity, but did tell her parents the following afternoon.

At trial, defense council requested an instruction based upon paragraph 153*a*, MCM, to the effect that a conviction cannot be based on the testimony of a victim of a sexual offense if that testimony is self-contradictory, uncertain, or improbable. The law officer declined to give the requested instruction. The Court will consider whether the law officer erred by not granting the special instruction requested by the defense.

4. *United States v. Thornton*, CM 419858, petition granted 18 Jul. 1969. Accused was convicted of assault with a dangerous weapon (art. 128). The evidence adduced by the prosecution indicated that accused, while at a post dance, tried to "cut in" on the victim and his girl friend. The victim pushed accused away and then turned around. Accused, approaching the victim from the rear, struck him on the side of the head with his fist, backed off, and then drew a knife from his pocket. The victim tried to escape but, being surrounded by accused's friends, could not. Accused struck him several times with his fist while holding a knife in his other hand. During the melee that followed, the victim was stabbed in the side by accused. Accused testified that he had merely been walking across the dance floor and had walked between the victim and his girl. The victim knocked him down and walked off. Infuriated, he struck the victim on the head with his fist and then a struggle ensued. Accused denied stabbing the victim. The Court will consider whether the law officer erred to the substantial prejudice of accused by failing to instruct the court that when voting on proposed sentences, it should begin with the lightest proposal and continue in this manner until a sentence is adopted by the concurrence of the required number of members. The Court will also consider whether the law officer erred in not giving an instruction on self-defense.

5. *United States v. Williams*, CM 418628, petition granted 31 Jul. 1969. Accused was convicted by general court-martial of willful disobedience of an order and three bad check offenses (arts. 90 and 123, respectively). Two of the checks were cashed on base at the post exchange and the third was uttered off base at the accused's home. The Court will consider whether the court-martial had jurisdiction over the offenses set out in the specifications of Charge III.

6. *United States v. Belarge*, NCM 69-0452, petition granted 18 Jul. 1969. Accused was convicted by special court-martial of three offenses of unauthorized absences (art. 86). Immediately following arguments on sentence, the president announced that a five-minute recess would be held to discuss a point brought up by the trial counsel. The record of trial reflected that at this stage of the proceedings both the trial and the defense counsel approached the bench. Issue granted: "The record of trial is not verbatim and hence a bad conduct discharge cannot be approved."

7. *United States v. Przybycien*, NCM 69-0385, petition granted 14 Jul. 1969. Accused was convicted by general court-martial of desertion terminated by apprehension (art. 85). He was confined on 10 July 1968, immediately after being apprehended, and remained in confinement for some 117 days until he was tried on 5 November 1968. Because of the lengthy absence involved—over thirty months—some delay was encountered in locating accused's records and forwarding them to his command. An incorrect service number and a name difficult to spell aggravated the problem of locating the records. The Court will determine whether accused was denied his right to a speedy trial.

IV. MISCELLANEOUS MILITARY JUSTICE.

Military Judge Memorandum Number 47—Trial Before A Military Judge Only.

1. Under the provisions of paragraphs (1) (B) and (2) (C), Article 16 of the Military Justice Act of 1968, an accused may be tried before a general court-martial consisting of "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves." In special courts-martial an accused may similarly be tried before a military judge only provided the convening authority has detailed a military judge to the court. The purpose of this memorandum is to suggest standards to guide the military judge in exercising his statutory responsibility to rule on requests for trial by a military judge only in both general and special courts-martial.

2. The Supreme Court of the United States has spoken on whether there is a right to trial before a judge alone as a constitutional corollary to the right to trial by jury as afforded in Section 2, Article III and Amendment VI of the Constitution of the United States. In Singer v. United States, 380 U.S. 24, 85 S. Ct. 783 (1965), reviewing a refusal by the prosecution to agree to a waiver of jury under Federal Rules of Criminal Procedure 23(a), the Court stated:

> "We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."

The Court found no significance in the failure of the prosecuting attorney to state reasons for vetoing trial before the judge alone. It was, however, expressly not determined "whether there might be circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would result in the denial to the defendant of an impartial trial." Moreover, the Court emphasized in United States v. Jackson, 380 U.S. 24, 88 S. Ct. 1209 (1967), that the authority to reject waivers of jury trials does not imply "that all defendants may be required to submit to a full dress jury trial as a matter of course." Thus the prosecution or, presumably, the federal district judge, may oppose a waiver without stating reasons and this will be upheld provided the action was not taken pursuant to a policy of opposing waiver as a matter of course and compelling circumstances did not suggest that a denial of the waiver would result in an impartial trial.

3. Against this background, Congress amended Article 16, Uniform Code of Military Justice, through the Military Justice Act of 1968. In placing the responsibility of approving a request for waiver of trial by court members on the military judge, the military judge was ostensibly placed in a position similar to that of a federal district judge and prosecutor in federal courts under Rule 23(a) of the Federal Rules of Criminal Procedure. This similarity, however, is only apparent. The legislative history of Article 16 suggests that the discretion afforded a military judge is much more limited than that of a federal judge and prosecutor under Rule 23(a). He may not refuse a request for trial by a military judge only to save himself from the pressures of embarrassment or harrassment which may be involved in sitting in judgment on a difficult case. The mere existence of such pressures without the patent danger that justice will be distorted is an insufficient ground for denying a waiver of trial by members. This departure from the practice under Rule 23(a) is appropriate for, unlike the result in a civilian court, the denial of the request of a military accused results in a trial by members and does not result in affording him a constitutionally blessed trial by jury. See Singer v. United States, *supra*; Patton v. United States,

281 U.S. 276, 50 S. Ct. 253 (1930). Nor is the departure radical; the American Law Institute Code of Criminal Procedure and eight of the States have adopted the practice of permitting waiver by the defendant alone. See 8 Criminal Procedure under the Federal Rules 65.

4. The lack of discretion in the military judge in denying requests for trial by the judge alone does not in any way dilute his responsibility to establish on the record that the accused knew of his right to request trial by the judge alone, and, in the event the accused has submitted such a request, to satisfy himself of the accused's knowledge and understanding of this request. Such an inquiry must take place prior to the assembly of the court and may proceed as follows:

MJ: (To Defense Counsel) Have you discussed fully with the accused (his right to and) the implications of trial by a military judge alone?

DC: _____.

MJ: Have you delineated for him the differences between a court-martial with members and one composed of a military judge alone?

DC: _____.

MJ: (To Accused) Have you discussed the (right to and) meaning of trial by a military judge only with your counsel?

ACCUSED: _____.

MJ: Are you satisfied that you understand what it means?

ACCUSED: _____.

MJ: Do you have any questions about what you discussed with your defense counsel?

ACCUSED: _____.

MJ: Do you understand that you may be tried by a court consisting of at least (five) (three) officers (or request to be tried before a military judge alone)?

ACCUSED: _____.

MJ: Has it been explained to you that at your request at least one-third of a court consisting of members will be enlisted men?

ACCUSED: _____.

MJ: Do you realize that in a trial before members, two-thirds of the members, voting by secret written ballot, must concur in all findings of guilty?

ACCUSED: _____.

MJ: Do you also understand that (two-thirds) (or) (three-fourths) of the members, voting by secret written ballot, must concur in a sentence should you be found guilty?

ACCUSED: _____.

MJ: Now, in a trial before me alone, do you understand that I alone will determine your guilt or innocence?

ACCUSED: _____.

MJ: Do you also understand that I alone will sentence you should you be found guilty?

ACCUSED: _____.

MJ: Knowing and understanding the difference between trial before members and trial before me, as explained by your defense counsel and me, do you wish to be tried before me alone?

ACCUSED: _____.

MJ: Very well, [the request is (approved) (disapproved) and the court is assembled.] [the court is assembled.]

5. It is advisable for the military judge to proceed cautiously in denying a request for trial before the judge alone. If the above inquiry reveals shallowness of understanding or misconceptions, every effort should be made to explain more deeply and clear up confused areas. And if the military judge finds such "unusual circumstances," as, under Paragraph

9-5c, AR 27-10, would justify denial of a request for trial before the judge alone, he should, on the record or in a memorandum attached to the record, articulate such circumstances and explain how, in his opinion, they could result in a distortion of justice. JAGVA, 13 Aug. 1969.

V. MILITARY AFFAIRS OPINIONS.*

(Enlisted Men 77) **Recommendation Of Board Of Officers In Addition To Authorized Recommendation Does Not Invalidate Board Action.** Pursuant to AR 635-206, 15 Jul. 1966, a board of officers was convened to consider the separation of an enlisted man by reason of a civilian conviction and his confinement in a civilian facility for one year. The board recommended that the enlisted man be separated from the service and issued a General Discharge. The board, however, also recommended that the discharge be suspended as provided in par. 18, AR 635-206, and par. 1-5, AR 635-200, 15 Jul. 1966. The cited paragraphs allow a convening authority to suspend execution of a discharge to afford a "highly deserving" member an opportunity to demonstrate rehabilitation. After a probationary period, the convening authority may cancel execution of the discharge or, if appropriate, take other action. The Judge Advocate General's opinion was requested as to whether the board's recommendation to the convening authority to exercise his power of suspension was proper, and if so, whether it was binding on the convening authority.

The Judge Advocate General rendered an opinion that paragraph 10*d*, AR 635-206, *supra*, apparently does not contemplate that a board make an ancillary recommendation as it did in this case. However, as the convening authority is granted express authority to suspend the execution of an approved discharge, such an ancillary suggestion may be made by the board if it is not inconsistent with the recommendation for retention or separation. Ancillary recommendations, however, are not binding on the convening authority. JAGA 1969/4165, 3 Jul. 1969.

By Order of the Secretary of the Army:

W. C. WESTMORELAND
General, United States Army,
Chief of Staff

Official:

KENNETH G. WICKHAM
Major General, United States Army
The Adjutant General

***Frequently military affairs opinions hinge on the particular facts of the case at hand, and because of space limitations it is not always possible to restate all of the operative facts in a digest. Accordingly, judge advocates should exercise caution in applying decisions digested herein to other factual situations. As a general rule, copies of JAGA opinions will be furnished judge advocate offices by the Military Affairs Division, JAGO, upon request. JAGA 1963/5156, 16 Dec. 1963.**

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