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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. TJAG Actions Under Article 69, UCMJ.

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VII. Miscellaneous.

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

1. (8, MCM; UCMJ art. 134) ***O'Callahan v. Parker* Considered. Use Or Possession Of Marihuana Is "Service - Connected." Court-Martial Lacked Jurisdiction Over Offenses Alleging Importation And Transportation Of Marihuana.** *United States v. Beeker*, No. 21,787, 12 Sep. 1969. In accord with his pleas, accused was convicted by a general court-martial of the following offenses:

1. Importing marihuana into the United States contrary to 21 USC § 176a (specification 1).

2. Concealment and facilitation of the transportation of marihuana contrary to 21 USC § 176a (specification 2).

3. Wrongful possession of marihuana at Fort Sam Houston, Texas (specification 3).

4. Wrongful use of marihuana while en route from Laredo, Texas, to San Antonio, Texas (specification 4).

5. Wrongful use of marihuana at Fort Sam Houston, Texas, (specification 5).

In *United States v. Borys*, 18 U.S.C.M.A. —, 40 C.M.R. — (5 Sep. 1969, digested 69-22 JALS 3), the Court of Military Appeals considered the constitutional limitation on the power of a court-martial to try certain kinds of offenses in light of the Supreme Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-18 JALS 1). The Court, in the instant case, stated that the separate opinions in *Borys* indicated the following conclusions for the disposition of this appeal.

In holding that the court-martial had jurisdiction over the offenses alleged in Specifications 4 and 5, the Court noted that the offenses alleged did not constitute a federal civilian crime. Moreover, it appeared that the use of marihuana, as distinguished from the possession of marihuana, was not a crime cognizable in the Texas courts. Use of marihuana is, however, an offense against the Uniform Code of Military Justice. *United States v. Williams*, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957). The Court then went on to state that apart from the specifics of federal and state law, "use of marihuana and narcotics by military persons on or off a military base has s p e c i a l military significance." In *United States v. Williams, supra*, the Court noted that the use of these substances had "disastrous effects . . . on the health, morale and fitness for duty of persons in the armed forces" and held that the triers of the facts could find "that under the circumstances, the conduct of the accused [by such use] was to the prejudice of good order and discipline in the armed forces." Relying on *Williams*, the Court held that the circumstances of "no military significance," described in *O'Callahan, supra*, as an essential condition for the limitation on court-martial jurisdiction, was not present as to the offenses alleged in Specifications 4 and 5. The military, therefore, had jurisdiction to try accused for these offenses.

*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 69-23 JALS [page number] (DA Pam 27-69-23).

Next, the Court held that: "Like wrongful use, wrongful possession of marihuana and narcotics on or off base has singular military significance which carries the act outside the limitation on military jurisdiction set out in the *O'Callahan* case." Therefore, the military had jurisdiction to try accused for the offense alleged in Specification 3.

Finally, the Court held that the offenses alleged in Specifications 1 and 2 were not triable by court-martial inasmuch as a federal civilian court has cognizance of these offenses. The Court noted that the record of trial disclosed no circumstances surrounding the commission of the offenses to relate them specially to the military.

Accordingly, the decision of the board of review as to Specifications 1 and 2 was reversed and those specifications were ordered dismissed. The record of trial was returned to The Judge Advocate General for submission to the Court of Military Review for redetermination of the sentence upon the basis of the remaining findings of guilty. (Opinion by Chief Judge Quinn in which Judges Ferguson and Darden concurred.)

2. (70*b*, MCM) **Failure Of Law Officer To Delineate The Essential Elements Of Accused's Offense And To Determine The Factual Basis Of His Plea Was Not Reversible Error. *United States v. Care* Considered.** *United States v. Gremillion*, No. 22,039, 12 Sep. 1969. In this case the Court was asked to evaluate the adequacy of the law officer's inquiry into the providency of accused's plea of guilty to wrongfully possessing marihuana (art. 134).

As noted by the Court, the law officer's inquiry was deficient in that it did not delineate the elements of the offense. The omission, however, did not result in reversible error. *United States v. Care*, 18 U.S.C.M.A. —, 40 C.M.R. — (29 Aug. 1969, digested 69-22 JALS 1). The Court was satisfied that the inquiry — as a whole — met requisite demands. The Court did point out, however, that the procedure followed in this case would not meet the standard that must apply to cases tried thirty days after the decision in *Care, supra*. (Opinion by Judge Darden in which Chief Judge Quinn concurred. Judge Ferguson concurred in the result.)

Accord: *United States v. Aldridge*, No. 22,149, 19 Sep. 1969; *United States v. Astor*, No. 22,247, 19 Sep. 1969; *United States v. Cade*, No. 22,118, 12 Sep. 1969; *United States v. Callahan*, No. 22,156, 12 Sep. 1969; *United States v. Cantrell*, No. 22,152, 12 Sep. 1969; *United States v. Carter*, No. 21,993, 12 Sep. 1969; *United States v. Dillahay*, No. 22,258, 19 Sep. 1969; *United States v. Ellis*, No. 22,012, 12 Sep. 1969; *United States v. Green*, No. 22,157, 12 Sep. 1969; *United States v. Graan*, No. 22,183, 19 Sep. 1969; *United States v. Hartsfield*, No. 22,065, 12 Sep. 1969; *United States v. Henryes*, No. 22,079, 19 Sep. 1969; *United States v. Hunnell*, No. 22,147, 19 Sep. 1969; *United States v. Lish*, No. 22,121, 19 Sep. 1969; *United States v. McCann*, No. 22,104, 19 Sep. 1969; *United States v. Ojeda-Vega*, No. 22,282, 19 Sep. 1969; *United States v. Perry*, No. 21,948, 19 Sep. 1969; *United States v. Romero*, No. 22,073, 19 Sep. 1969; *United States v. Scaglione*, No. 22,008, 19 Sep. 1969; *United States v. Smith*, No. 22,158, 19 Sep. 1969; *United States v. Tamplin*, No. 21,977, 19 Sep. 1969; and *United States v. Westberg*, No. 22,140, 19 Sep. 1969.

3. (70*b*, MCM) **Perfunctory Inquiry By Law Officer Into The Providence Of Accused's Plea Was Reversible Error. *United States v. Care* Distinguished.** *United States v. Orr*, No. 22,030, 12 Sep. 1969. In this case the Court held that the inquiry of the president into the providence of accused's plea of guilty to charges of disobedience, use of provoking words, assault, and absence without leave (arts. 90, 117, 134, and 86, respectively) were perfunctory. Since the record of trial contained no evidence to offset this deficiency, the Court held that there was reversible error. *Cf. United States v. Care*, 18 U.S.C.M.A. —, 40 C.M.R. — (29 Aug. 1969, digested 69-22 JALS 1).

Accordingly, the decision of the board of review was reversed and the record returned to The Judge Advocate General. A rehearing may be ordered. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

Accord: *United States v. Littlejohn,* No. 22, 238, 19 Sep. 1969.

4. (8, 70, MCM) ***United States v. Care* Considered. Possession Or Use Of Marihuana Is "Service-Connected."** *United States v. Boyd,* No. 22,120, 19 Sep. 1969. In accord with his plea, accused was found guilty of desertion, wrongful possession of marihuana at a Naval Air Station, and wrongful use of marihuana, heroin, and cocaine, in the Haight-Ashbury District, San Francisco, California (arts. 85 and 134, respectively).

The law officer's inquiry into the providence of accused's pleas of guilty did not cover the elements of the offenses charged. The Court held, however, that under the standards announced in *United States v. Care,* 18 U.S.C. M.A. —, 40 C.M.R. — (29 Aug. 1969, digested 69-22 JALS 1), accused's pleas to each of the marihuana and narcotics offenses and to unauthorized absence were provident. However, his plea of guilty to desertion did not meet the *Care* standard inasmuch as there was no evidence or implication of his intent to remain away permanently; consequently, his conviction of it was set aside.

Relying on *United States v. Beeker,* No. 21,787 (12 Sep. 1969, digested *supra*), wherein the Court held that the possession or use of marihuana and narcotics by military persons on or off base has special military significance, the Court held that the court-martial had jurisdiction to try accused for his use of narcotics off post.

The findings of guilty to desertion were set aside. A rehearing may be ordered on the original charge or the Court of Military Review may affirm the lesser included offense of unauthorized absence and reassess the sentence. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

Accord: *United States v. DeRonde,* No. 21,973, 19 Sep. 1969.

5. (8, 70*b*, MCM) ***United States v. Care* Considered. *O'Callahan v. Parker* Considered.** *United States v. Cochran,* No. 22,236, 19 Sep. 1969. In accord with his plea, accused was convicted of several offenses including a charge of larceny of a blank money order, belonging to a civilian, at Newport, North Carolina (art. 121).

Relying on *United States v. Care,* 18 U.S.C. M.A. —, 40 C.M.R. — (29 Aug. 1969, digested 69-22 JALS 1), the Court first held that accused's plea was provident, even though the procedure followed by the law officer would not meet the standard that must apply to cases tried thirty days after the decision in *Care.*

Next, the Court held that the court-martial lacked jurisdiction over the charge of larceny since "it is one that gives no appearance of being 'service connected' within the meaning given that term in O'Callahan v. Parker, 394 U.S. 258 . . . [1969, reported in 69-13 JALS 1]. See also United States v Borys, 18 USC MA —, 40 CMR — [5 Sep. 1969, digested 69-22 JALS 3]."

Accordingly, the larceny charge was dismissed. The Court of Military Review may reassess the sentence on the remaining charges and specifications. (Opinion by Judge Darden. Judge Ferguson concurred in the result.)

Chief Judge Quinn dissented, citing his dissent in *United States v. Borys, supra.*

6. (75, MCM) **Accused's Service In Vietnam And A Letter Of Commendation Should Have Been Before Court On Mitigation.** *United States v. Pointer,* No. 22,217, 19 Sep. 1969. In accord with his plea, accused was convicted of unauthorized absence for a period of forty-eight days. During the sentencing procedure accused, testifying in his own behalf, stated that he desired to remain

in the Navy and, if he did, would like overseas duty. The court, however, imposed a sentence extending to a bad-conduct discharge.

The Court, in considering whether accused had been denied the effective assistance of counsel as to the sentence, noted that references in the convening authority's action indicated that accused served in Vietnam and was the recipient of a letter of commendation as a member of the crew of the USS NAVASOTA. Neither of these matters was presented to the court members. In reversing the decision of the board of review as to the sentence, the Court relied on *United States v. Rowe*, 18 U.S.C.M.A. 54, 39 C.M.R. 54 (1968), wherein the Court held that an accused's Vietnam service and awards could have materially influenced the court members and, therefore, the failure of defense counsel to inform the court members of these matters denied accused effective representation to that extent.

The record was returned to The Judge Advocate General for reference to the Court of Military Review. In its discretion, the Court of Military Review may redetermine the sentence without including a punitive discharge, or direct a rehearing of the sentence by a court-martial. (Opinion by Chief Judge Quinn in which Judge Ferguson concurred.)

Judge Darden (dissenting) doubted that the court would have reduced the sentence if it had known that a ship of which accused was a crew member served off the coast of Vietnam and was commended for this service. *United States v. McAlister*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-21 JALS (dissenting opinion)).

17. (76, MCM; UCMJ arts. 121, 108) Law Officer's Instruction That Each Of Accused's Offenses Were Separately Punishable Was Error Since The Offenses Were Committed In A Single Integrated Transaction. *United States v. Murphy*, No. 22,142, 12 Sep. 1969. Accused, in accord with his plea, was convicted of one specification of larceny of fragmentation vests and one specification of wrongful disposition of the same vests (arts. 121 and 108, respectively). At trial, the law officer instructed the court members that each offense was separately punishable. It appeared from the evidence, however, that accused was solicited by a Korean national to obtain the property and turn it over to him. Accused acceded to the solicitation and procured and delivered the vests in a single integrated transaction. Citing *United States v. Payne*, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961), and *United States v. Brown*, 8 U.S.C.M.A. 18, 23 C.M.R. 242 (1957), the Court held that in these circumstances the offenses were single for the purpose of punishment. The law officer's instructions were, therefore, erroneous.

On initial review, the convening authority reduced the adjudged sentence, but the reduction was to conform the punishment to that provided for in a pretrial agreement with accused. The instructional error, therefore, remained uncorrected.

Accordingly, the decision of the board of review as to sentence was reversed. The record was returned to The Judge Advocate General for reference to the Court of Military Review for reassessment of the sentence. (Per curiam.)

II. COURT OF MILITARY REVIEW DECISIONS.

1. (8, MCM) *O'Callahan v. Parker*. Considered. Court-Martial Had Jurisdiction. *United States v. White*, CM 420140, 12 Aug. 1969. Conviction: unpremeditated murder (art. 118). Sentence: DD, TF, and CHL for life. The convening authority reduced the period of CHL to 30 yrs, but otherwise approved the sentence.

After reviewing the record, the Court of Military Review concluded that all elements of the offense for which accused was convicted were established beyond a reasonable doubt. The court was also of the opinion that the law officer's instructions were sufficiently tailored to the theories of the defense. Furthermore, it found no error on the law officer's part in not instructing on the offense of involuntary

manslaughter inasmuch as the evidence did not raise any issue with respect to that type of an offense.

Next, the court considered the application of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS 1) to this case inasmuch as the offense was committed off post. Holding that the court-martial had jurisdiction to try accused, the court stated:

> The victim was a fellow-soldier and the crime was committed in the presence of other members of the military service; hence, clearly service-connected. Moreover, as I [Judge Nemrow] indicated in CM 420339, *Taylor*, — CMR — (17 January 1969), we are not dealing with a peacetime offense. (Judge Kelso does not, however, concur with the significance of that observation).

Finally, the court, after considering the clemency factors in this case, concluded that a reduction of the sentence was not warranted. Accordingly, the findings of guilty and the sentence were affirmed. (Nemrow, J., Kelso, J., concurring; Stevens, C.J., not participating.)

2. (8, MCM) ***O'Callahan v. Parker* Considered: Court-Martial Had Jurisdiction.** *United States v. Vipond*, CM 420264, 23 Jul. 1969. Conviction: unauthorized absence (art. 86); larceny of an automobile (art. 121); larceny at Fort Hood of a wallet containing credit cards belonging to SP5 *W* (art. 121); larceny of eight wallets belonging to certain named enlisted men (art. 121); and forgery of two gasoline invoices, one at Buffalo, Texas, and the other at Corsicana, Texas, by falsely making the signature of SP5 *W* (art. 128). Sentence: DD, TF, and 18 yrs and 7 mos CHL. The convening authority reduced the period of CHL to five yrs, but otherwise approved the sentence.

In this appeal, the Board was concerned with the application of the holding in *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-18 JALS 1) to the forgery offenses committed in Buffalo and Corsicana, Texas. In holding that the court-martial had jurisdiction, the Board stated:

> As to the forgery specifications, we note the following facts: a fellow soldier, Specialist [*W*] was the owner of the credit card which enabled appellant to purchase the gasoline covered by the forged gasoline invoices; appellant stole the wallet containing the credit card in the barracks at Fort Hood, Texas; although the offenses were committed at commercial facilities in civilian communities, the forged documents operated to the legal prejudice of a member of the armed forces. See CM 420339, *Taylor*, — CMR — (17 June 1969). Moreover, as I indicated in that case, we are not dealing with peacetime offenses. (Chief Judge Stevens and Judge Kelso do not, however, concur with the significance of that observation).

The Board of Review found the findings of guilty and the sentence, as approved, correct in law and fact. Accordingly, the findings of guilty and the sentence were affirmed. (Nemrow, J.; Stevens, C.J., and Kelso, J., concurring.)

3. (UCMJ, art. 67(f)) **On Remand Case To Be Referred To Original Convening Authority.** *United States v. Hart*, CM 416145, 12 Jun. 1969. Conviction: unpremeditated murder and three specifications of assault with a dangerous weapon (arts. 118 and 128, respectively). Accused was originally convicted by a general court-martial convened in Vietnam. Sentence: CHL for life, DD, TF, and red E-1. The convening authority approved sentence. Thereafter, a board of review reduced the confinement to 20 yrs, but otherwise approved the findings and sentence. On 10 May 1968, the Court of Military Appeals reversed the decision of the board of review, returned the record to The Judge Advocate General, and provided that "a rehearing may be ordered" (*United States v. Hart*, 17 U.S.C.M.A. 524, 38 C.M.R. 822 (1968)).

Subsequently, The Judge Advocate General transmitted the record of trial to the Commanding General, Fort Leavenworth, Kansas, requesting the Commanding General to take action in accordance with the opinion and mandate of the Court of Military Appeals and the provisions of Article 67(f) of the Uniform Code of Military Justice. A rehearing was held at Fort Leavenworth before a

general court-martial convened by the Commanding General of that installation. Accused was again convicted as charged and was sentenced to DD, 20 yrs CHL, TF, and red E-1. The convening authority reduced the confinement portion of the sentence to 19 yrs and 7 mos, but otherwise approved the sentence.

As noted by the Board, the record in this case in no way indicated any action by the original convening authority following reversal of the case by the Court of Military Appeals. Furthermore, the record did not disclose "good cause" why the record was transmitted to a convening authority other than the original convening authority in Vietnam. Citing *United States v. Robbins*, 18 U.S.C.M.A. 86, 39 C.M.R. 86 (1969, digested 69-2 JALS 3), the Board held that the rehearing was a nullity.

In view of the serious nature of the charges in this case, the Board found that dismissal was not warranted. Accordingly, the record was returned to The Judge Advocate General for further proceedings in compliance with the Court of Military Appeals' mandate in *Robbins, supra*, and article 67(f), UCMJ. (Rouillard, J.; Thomas, J., concurring; Westerman, C.J., not participating.)

[Editor's Note: On 8 September 1969, The Judge Advocate General certified this case to the Court of Military Appeals for review under article 67(b)(2), UCMJ. It was requested that action be taken with respect to the following issue: "Was the Board of Review correct in its determination that failure to transmit the case for rehearing to the convening authority who originally referred the case to trial resulted in jurisdictional error thereby rendering the rehearing proceedings null and void?"]

4. (UCMJ art. 67(f)) On Remand Case To Be Referred To Original Convening Authority. *United States v. Condron*, CM 415026, 12 Jun. 1969. Accused was originally tried in Vietnam and convicted of one specification each of premeditated and unpremeditated murder of two Vietnamese nationals (art. 118). He was sentenced to DD, TF, red E-1, and CHL for life. The convening authority approved the sentence and a board of review affirmed the convening authority's action on 2 June 1967.

On 2 February 1968, the Court of Military Appeals reversed the decision of the board because of errors in the instructions at trial. A rehearing was authorized. (*United States v. Condron*, 17 U.S.C.M.A. 367, 38 C.M.R. 165 (1968)).

Subsequently, The Judge Advocate General requested the Commanding General, Fort Leavenworth, Kansas, to take appropriate action in the case. Pursuant thereto, a rehearing was held at Fort Leavenworth before a general court-martial convened by the Commanding General of that military reservation. Accused was convicted by the Commanding General of that military reservation. Accused was convicted only on two counts of unpremeditated murder and sentenced to 50 yrs' CHL with accessory penalties as in his original trial. There was nothing in the record before the Board indicating any referral of the case back to the original convening authority in Vietnam for his determination regarding a rehearing of accused's case.

Citing *United States v. Robbins*, 18 U.S.C.M.A. 86, 39 C.M.R. 86 (1969, digested 69-2 JALS 3), as dispositive, the Board held that the rehearing *sub judice* was a nullity. The Board held that the appropriate remedy was to trasmit the case to The Judge Advocate General for further proceedings in compliance with the Court of Military Appeals mandate in *Robbins, supra*, and article 67(f), UCMJ. (Rouillard, J.; Thomas, J., concurring; Westerman, C.J., not participating.)

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case to trial resulted in jurisdictional error thereby rendering the rehearing proceedings null and void?"]

5. (UCMJ art. 34) **Charges Against Accused Which Had Been Dismissed Were Never Properly Referred To Trial.** *United States v. Motes*, CM 420728, 11 Aug. 1969. Conviction: eight specifications of wrongful sale of military property of the United States, two specifications of larceny of the same government property, and one specification of housebreaking (arts. 108, 121, and 130, respectively). Sentence: DD, TF, one yr CHL, and red E-1. The convening authority approved only so much of the sentence as provided for BCD, TF, one yr CHL, and red E-1.

Pursuant to article 34, UCMJ, the staff judge advocate reviewed the evidence of this case and advised the convening authority as follows:

> "I recommend that Specifications 1, 4, 7, 8 and 9 of Charge I be dismissed for the reasons stated above and that the remaining specifications and charges be tried by general court-martial."

Directly following this, in the section of the staff judge advocate's advice entitled "Direction of the Convening Authority," was a notation by the staff judge advocate that the convening authority approved this recommendation on 27 March 1969. At this juncture then Specifications 1, 4, 7, 8, and 9 of Charge I were dismissed, but the remaining charges and specifications were to be tried by general court-martial. Accordingly, the case was referred to trial by the convening authority on 1 April 1969.

On 2 April 1969, accused signed a pretrial agreement in which he agreed to plead guilty to *all* charges and specifications with the exception of Specification 8 of Charge I. The agreement was approved by the convening authority on 4 April 1969. At trial, although Specifications 1, 4, 7, 8, and 9 of Charge I had been lined out on the charge sheet, accused was arraigned on *all* charges and specifications, with the exception of Specification 8. As noted by the Court of Military Review, the record of trial and allied papers were barren to show when, if ever, the dismissed specifications were properly referred to trial by the convening authority as required by article 34, UCMJ. Under these circumstances, the court stated that the "glaring absence of compliance with Article 34 constitutes error, and cannot be permitted to withstand appellate scrutiny." Consequently, the court held that Specifications 1, 4, 7, and 8 of Charge I were never properly referred to trial, notwithstanding the provisions of the pretrial agreement, and therefore the findings of guilty must be set aside.

In light of accused's plea of guilty and his acceptance of the pretrial agreement, the court found that a reassessment of the sentence was in order. Accordingly, only so much of the sentence as provided for a BCD, TF, six mos CHL, and red E-1 were approved. The findings and sentence, both as modified, were affirmed. (Per curiam.) (Before Stevens, C.J., and Nemrow, J., Kelso, J., absent.)

6. (62, MCM) **Undisclosed Bias Of Court Member Deprived Accused Of Fair Trial.** *United States v. Metz*, CM 419381, 23 Jul. 1969. Conviction: involuntary manslaughter (art. 119), contrary to plea. Sentence: dismissal from the service, TF, and one yr CHL. The convening authority approved only so much of the sentence as provided for dismissal from the service and F $175 pay per mo for nine mos, and further suspended the execution of that portion thereof adjudging dismissal from the service for nine months, with provision for automatic remission. Subsequently, the convening authority remitted the unexecuted portions of the sentence to dismissal from the service and all uncollected forfeitures.

In this appeal, the Board found that a court member's undisclosed bias, based upon knowledge that he gained from his duty assignment (*i.e.*, that one officer-witness (who was a passenger in accused's car at the time of the fatal accident) was a user of hallucinogens), deprived accused of a fair trial by impartial

court members. The court member had not disclosed that he possessed the illicit information to the court or counsel. His "outside" information only became known when he discussed with the convening authority the fact that he had been prejudiced against accused in voting on sentence. The member, however, emphatically disclaimed any bias whatsoever against accused in reaching the findings of guilty.

As a minimum, the Board felt that a rehearing on sentence was required, based on the member's admission alone, for it knew of no reliable gauge by which to measure the prejudice to accused's right to have his sentence adjudged fairly and impartially by the court members. Furthermore, the Board found totally unacceptable the court member's disclaimer that his vote on the findings of guilty were uninfluenced by his "secret" information. The Board could only speculate as to whether the member was improperly influenced, albeit it unconsciously, and this it refused to do. Accordingly, the Board was constrained to set aside the findings and sentence. A rehearing may be ordered. (Rouillard, J.; Westerman, C.J., and Hagopian, J., concurring.)

7. (12, 39, 171, MCM) **Court-Martial Had Jurisdiction Over Drug Offense; *O'Callahan* Distinguished. AR 600-50 Valid, Lawful Regulation, And Not Unconstitutional Delegation Of Authority. Not Necessary For Government To Prove Knowledge. Maximum Sentence For Article 92 Violation Not Limited To Lesser Maximum For Similar Offense Punishable Under Different Statute. Specifications Alleging Possession Of Different Drugs At Same Time And Place Multiplicious For Sentencing.** *United States v. Elwood,* CM 419489, 15 Jul 1969. Conviction: two counts: wrongful possession of marihuana (art. 134), despite plea; three counts: violation of AR 600-50 by possessing LSD, Eskatrol, and Dexamyl (art. 92), despite pleas. Sentence: DD, TF, and five yrs CHL. Convening authority reduced CHL to four yrs.

First, the Board of Review dismissed the attack on the jurisdiction of the court-martial. Distinguishing *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported in 69-13 JALS 1), the Board noted that four offenses were committed on post and therefore "service-connected." As to the off-post offense, Judge Kelso held that the court-martial had jurisdiction, relying on the views expressed by Judge Stevens in *United States v. Konieczko,* — C.M.R. — (1969, digested 69-20 JALS 9). Judge Nemrow preferred to base his conclusion of jurisdiction on the fact that it was not a peacetime offense. *United States v. Taylor,* — C.M.R. — (1969, digested 69-20 JALS 17).

Accused next claimed that par. 18.1, AR 600-50, the regulation which he was found to have violated (art. 92), was unlawful on its face in that it referred for coverage of unlawful drugs, to those drugs specified as depressant, stimulant, or hallucinogenic by the Department of Health, Education, and Welfare (HEW). Accused claimed that it was an unlawful delegation of authority to have the Secretary of HEW determine what was criminal conduct. Holding AR 600-50 lawful, the Board stated that the prohibition against using such drugs, contained therein, was sufficient to apprise accused of what constituted criminal conduct in that regard. The Board further stated that pleading or proof of accused's knowledge of the regulation or the nature of LSD, eskatrol, or dexamyl was not a prerequisite for a conviction of violating a lawful regulation. *United States v. Watson,* — C.M.R. — (1969, digested 69-9 JALS 9). The designations by HEW noted the Board, were published in the *Federal Register,* hence accused was charged with knowledge of them. Furthermore, the Board stated that HEW could properly be delegated executive authority to effectuate legislative policy in relation to dangerous drugs. The Board was persuaded that there was sufficient basis for the Secretary of the Army's decision to accept HEW's designations as part of his definition of "depressant, stimulant, or hallucinogenic drugs." The Board also stated that the results which should flow from HEW's designations were

determined by the Secretary of the Army and not by HEW; therefore, there was not an improper delegation of authority.

The Board also denied accused's claim that the maximum penalty for violating a lawful regulation prohibiting use of dangerous drugs (art. 92), though listed as two years (par. 127*c*, MCM), should be only one year, because the offense was substantially similar to the article 134 violation, which carried a maximum sentence of one year, and because it substantially restated 21 U.S.C. §§ 321(v), 388(a), and 360, which carried a maximum of only one year. In denying these claims, the Board stated that the similarity of the article 134 offense would not limit the maximum for the article 92 violation, and that AR 600-50 goes beyond the federal statutes quoted. *United States v. Watson, supra; United States v. Culley,* 12 U.S.C.M.A. 704, 31 C.M.R. 260 (1962).

At trial, the law officer informed the court that the maximum punishment for all offenses was 16 years. The staff judge advocate, however, in his review, stated that the two article 134 offenses were multiplicious, so that the maximum sentence was 11 years. The Board stated that the article 134 specifications were not in fact multiplicious, since they occurred at different times and places, but that the three article 92 specifications were multiplicious for sentencing purposes, because they occurred at the same time and place. Accordingly, the findings of guilty for all five specifications were affirmed. Reassessing the sentence in light of the entire record, it was reduced to a BCD, TF, and one yr CHL. (Nemrow, Markelo, J., concurring; Stevens, C.J., absent.)

S, [illegible], 127*c*, MCM) Arraignment And Trial After 1 January 1969 Covered By New Manual Although Crime Committed Before 1 January 1969 But Purged By Convening Authority's Action Dismissal Of Part Of Specification Erroneously Precluded Court From Determining Controverted Issues Of Fact. *United States v. [illegible]*, 20 Jul. 1969. Convictions of [illegible] and 121; [illegible] spite plea. Sentence: BCD, one yr CHL, and TF (one previous special court-martial conviction considered). Convening authority reduced CHL to nine mos.

Accused claimed that the law officer erred in instructing the court that the maximum sentence for larceny was DD, TF, and five yrs CHL. Although the government conceded error, it claimed that the convening authority's reduction rendered it harmless. The Board cited *United States v. Sonnenschein,* 1 U.S.C.M.A. 64, 1 C.M.R. 64 (1951), for the proposition that since accused was not arraigned until after the new Manual for Courts-Martial became effective, it was error for the law officer to instruct that the table of maximum punishments contained in the 1951 Manual were applicable. Under the new Manual, the maximum sentence for larceny over $50.00 but under $100.00 is BCD, TF, and one yr CHL. The Board held, however, that the error was purged by the relatively lenient sentence of the court and the subsequent reduction by the convening authority. *United States v. Peters,* 8 U.S.C.M.A. 520, 25 C.M.R. 24 (1957).

Additionally, the Board on its own initiative disapproved the law officer's dismissal of a portion of the original specification, alleging larceny of a $100.00 bill. The Board stated that such was a proper charge under article 121. By granting that motion, continued the Board, the law officer precluded the court members from hearing evidence and determining controverted issues of fact. *United States v. Leech,* 18 U.S.C.M.A. 130, 39 C.M.R. 129 (1969). This also precluded appropriate findings by exception and substitution (par. 74*b*, MCM, 1969). The Board also noted that the trial counsel's deletion of the relevant words from the specification was improper, as he could not make any substantial change in the allegation without the direction of the convening authority. *United States v. Ellsey,* 16 U.S.C.M.A. 136, 36 C.M.R. 292 (1966); *United States v. [illegible],* 17 U.S.C.M.A. 75, 37 C.M.R. 339 (1967). Accordingly, findings of guilty as to [illegible] were affirmed. (Per curiam opinion.)

III. GRANTS AND CERTIFICATIONS OF REVIEW.

1. *United States v. Papenheim,* A C M 20448, petition granted 15 Sep. 1969. On 26 November 1968, a civilian guard at Aviano Air Base, Italy, entered the consolidated mail room and saw accused sitting on a radiator. Accused made a downward movement with his hand and left the building. The guard became suspicious, looked under the radiator, and found several items of mail. He thereupon pursued and caught accused. A search of accused's quarters disclosed two letters. All the items of mail were addressed to persons other than accused and would have, in normal circumstances, been delivered to the addressees' mailboxes in the consolidated mail room. None of the mail had reached the addressees.

Accused was charged with six specifications in violation of article 134. Specifications 1, 2, 3, and 4 alleged the wrongful taking, on 26 November 1968, of mail matter from the mailboxes of four individuals before it was received by the addressee. These four specifications involved the mail found on the floor of the mail room by the guard. The two letters found in the search of accused's quarters were alleged in Specifications 5 and 6 as having been stolen from the U. S. Post Office, Aviano Air Base (consolidated mail room), between 19 and 26 November 1968, before they were received by the addressees.

Accused pleaded not guilty to all specifications but was found guilty of each. The Court will consider whether the evidence is insufficient in law and fact to establish the guilt of accused of specifications 1, 2, 3, and 4 of the charge.

2. *United States v. Paxiao,* CM 420025, petition granted 25 Aug. 1969. Accused was convicted by general court-martial of an unauthorized absence and wrongful appropriation of a motor vehicle (additional Charge II) (arts. 86 and 121, respectively). While on a minimum custody work detail near a post housing area he took a civilian-owned truck which was parked in one of the driveways and used it to flee the post and effectuate his unauthorized absence. The Court will consider whether the court-martial lacked jurisdiction to try accused for the non-military offense alleged under Additional Charge II and its specification.

3. *United States v. Hallahan,* CM 420251, petition granted 25 Aug. 1969. Accused was convicted by general court-martial of larceny of a check book, falsely and wrongfully making a signature to a social security card, wrongfully making applications for military identification cards, and making and uttering a number of checks (Specifications 4, 5, 6, 7, and 8 of Charge III) (arts. 121, 134, and 123a, respectively). Four of the checks were negotiated to civilian airlines. In three of these transactions accused used his military identification card. The fifth check was cashed at the Fort Gordon Branch of the Georgia Railroad Bank. Accused used his civilian driver's license for identification. The Court will consider whether the court-martial had jurisdiction over the offenses alleged in Specifications 4, 5, 6, 7, and 8 of Charge III.

4. *United States v. Safford,* CM 418239, petition granted 12 Aug. 1969. Accused was convicted by general court-martial of larceny of a United States Treasury check and conspiracy to wrongfully receive and obtain information relating to the national defense (arts. 121 and 134, respectively). The Treasury check was the property of Air Products and Chemicals, Inc., and was taken while accused was off post and working in his off-duty time as a private detective. Accused's fellow conspirators were another sergeant and a Russian national. The conspiracy took place from March 1966 to August 1967 at various places, both on and off post, and was alleged as a violation (under article 134) of Section 793c of Title 18, United States Code. Issue granted: whether under the circumstances of this case the court-martial had jurisdiction over the offenses charged.

5. *United States v. Blalock,* CM 416279, petition granted 12 Aug. 1969. Accused was convicted by general court-martial of aggra-

vated assault, assault with intent to commit rape, assault and battery, and communicating indecent language to a female (arts. 128 and 134, respectively). These crimes were committed off post in Germany, and the victims were civilians. The Court will consider whether the court-martial had jurisdiction of the offenses charged and whether accused was prejudiced by failure of the convening authority to grant him credit for the period of confinement served between 8 March 1968 (date of board of review decision setting aside results of first trial and ordering rehearing) and 28 August 1968 (date of rehearing).

6. *United States v. Respess*, CM 420040, petition granted 11 Aug. 1969. Accused was convicted by general court-martial of willful disobedience of a superior officer (art. 90). He was tried in common with Private *H*. There was no concert of action between them, and the offenses occurred at different times. *H* moved to sever on the grounds he expected to plead guilty. The motion was denied. *H* pled guilty, and accused pled not guilty. During the cross-examination of a witness testifying against accused, the legality of the order involved was questioned. *H* withdrew his guilty plea and entered a plea of not guilty. Neither accused testified, and no pretrial statement of either was introduced. The Court will consider whether the law officer erred to the prejudice of accused by failing to grant the motion for severance.

7. *United States v. Fields*, CM 418646, petition granted 11 Aug. 1969. Accused was convicted by general court-martial of appropriation of a pistol and premeditated murder (Charge II) (arts. 121 and 118, respectively). He killed his wife with a weapon he had taken from a U.S. Government supply room. The crimes were committed on post in the family housing area while accused was off duty. The Court will consider whether the court-martial lacked jurisdiction over the offense alleged in Charge II.

IV. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Conviction of wrongful possession set aside since the marihuana admitted in evidence was the fruit of a search and seizure not based on probable cause and no competent evidence was introduced to show substance was marihuana. Laboratory report, inadmissible hearsay, was erroneously received in evidence. JAGVJ SPCM 1969/110.

2. Conviction of officer for being drunk and disorderly in a public place set aside since the offense was committed off-post in the U.S. while in civilian clothes and the accused was apprehended by civilian police for a traffic offense resulting in a conviction by a civilian court. (O'Callahan v. Parker, 395 US 258 (1969)) JAGVJ SPCM 1969/174.

3. A specification which does not allege that the offeree has a relationship to the service he renders or is to render in exchange for the remuneration promised fails to allege bribery. Lesser offense of disorder upheld and sentence reassessed by TJAG. JAGVJ SPCM 1969/212.

4. Failure of special court-martial president to inquire into the providency of the accused's plea of guilty resulted in setting aside conviction for failing to obey orders where the record establishes that the accused had been given a medical profile which prohibited long standing. JAGVJ SPCM 1969/273.

5. Conviction set aside since the court's findings of guilty of communicating a threat, by exceptions and substitutions, are not supported by the evidence. Sentence reassessed on the remaining findings of guilty. JAGVJ SPCM 1969/276.

6. Conviction of wrongful possession of marihuana set aside and guilty plea held to be improvident, since the marihuana was found during a search not based on probable cause and the summary court erroneously denied the accused's motion to suppress the fruits of the illegal search and seizure. JAGVJ SUMCM 1969/318.

7. Conviction of wrongfully possessing beer in violation of a lawful general regulation as a lesser offense of wrongfully consuming beer set aside, since the evidence fails to establish requisite "possessing," and sentence reassessed on the remaining findings of guilty. JAGVJ SPCM 1969/372.

8. Evidence that merely established that the accused borrowed a pair of skis from Special Services, failed to return them on time, and paid $17.00 in overtime charges, held insufficient to support conviction of wrongful appropriation. JAGVJ SPCM 1969/373.

9. Conviction of wrongful possession of marihuana set aside since the evidence failed to establish that the officer who authorized the search had been delegated authority to authorize searches. JAGVJ SPCM 1969/378.

10. Conviction of failing to obey a lawful general regulation set aside since the directive purporting to proscribe being in an off-limits area held not to apply to the accused, as it is not punitive in nature, and its stated purpose is to establish policies and procedures for the utilization and control of MP's. Sentence reassessed on the remaining findings of guilty. JAGVJ SPCM 1969/380.

V. MISCELLANEOUS MILITARY JUSTICE.

1. Military Judge Memorandum Number 49—Guilty Plea Procedure.

1. On 29 August 1969, the U. S. Court of Military Appeals, in United States v. Care, No. 21,983, — USCMA —, — CMR —, reiterated present requirements for the military judge's inquiry into the providence of a guilty plea, and delineated certain new requirements. The court directed that, in any court-martial involving a guilty plea, convened more than thirty days after the date of the opinion, the military judge must explain to the accused the elements of each offense charged, and question the accused about "what he did or did not do, and what he intended (where this is pertinent) . . . ." The military judge must also advise the accused that by his plea he waives his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against him, and then "must make a finding that there is a knowing, intelligent, and conscious waiver in order to accept the plea."

2. Inclosed is a draft of an extensive revision of Chapter 3, Guilty Plea Cases, of DA Pamphlet 27-9, Military Judges' Guide. It reflects the requirements of the *Care* case and the provisions of the Manual for Courts-Martial, 1969 (Revised edition), and AR 27-10, Military Justice. The requirements of the *Care* case must be put into effect on and after 29 September 1969; however, it is suggested that they be followed immediately.

3. While comments are not solicited, any expression of your views concerning this draft material will be appreciated.

4. *Proposed Guilty Plea—Procedure.*

a. When a plea of guilty is contemplated in a trial before a court-martial with members, an inquiry should be held at the Article 39 (a) session at which the military judge may determine the providence of the plea. In a trial before a judge alone such a hearing is held during the course of the trial. The proceedings should be conducted as a frank but dignified colloquy between the participants rather than a formalized ritual. Any doubts or questions raised by the accused should be fully resolved. If the accused appears to lack understanding as to any point, suitable explanation should be made before proceeding further. The following procedure will ordinarily be appropriate:

DC: Your Honor, the accused (intends to plead) (has pleaded) guilty to (all) (the) Specification (s) and Charge (s) [the Specification of Charge II and Charge II] [———], and requests that you inquire into the providence of his pleas.

Although an accused may plead guilty to a lesser included noncapital offense, a plea of guilty to an offense punishable by death may not be accepted. If an accused persists in any such plea, or any other irregular pleading, a plea of not guilty shall be en-

tered in the record and the trial shall proceed as though he had pleaded not guilty. If the plea is one which may lawfully be accepted, the following procedure is suggested:

MJ: (To accused) It is my purpose to explain fully the meaning and effect of your (proposed) plea, and to conduct an inquiry so that I may determine whether you fully understand its meaning and effect. I suggest that you hold a copy of the Specification(s) and Charge(s) in your hand so that you may refer to them readily during this hearing. Your plea of guilty will not be accepted unless you understand its meaning and effect. You are legally entitled to plead not guilty even though you believe you are guilty, and thus place upon the prosecution the burden of proving your guilt beyond reasonable doubt.

A plea of guilty is equivalent to conviction and is the strongest form of proof known to the law. On your plea alone, without receiving any evidence, this court can find you guilty of the offense(s) to which you plead guilty. Your plea will not be accepted unless you realize that by your plea you admit every act or omission and every element with respect to the offense(s) to which you plead guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow any other consideration to influence you to plead guilty.

MJ: Do you understand what I have just told you?

ACCUSED: ———.

MJ: Do you have any questions at this time?

ACCUSED: ———.

MJ: By your plea of guilty you waive—and by "waive" I mean give up—certain important rights. However, you will waive these rights only as to the findings of the offense(s) to which the plea is entered. You retain these rights as to (offense(s) to which you plead not guilty and) other proceedings in this case. Do you understand what I have just told you?

ACCUSED: ———.

MJ: These rights are:

First, the right against self-incrimination—that is, the right to say nothing at all. Second, the right to a trial of the facts by this court—that is, the right to have this court decide whether or not you are guilty based upon evidence which the prosecution will present, and on any evidence you may introduce.

Third, the right to be confronted by and to cross-examine any witnesses against you.

MJ: Do you understand what these rights are?

ACCUSED: ———.

MJ: Do you further understand that by pleading guilty you no longer have these rights?

ACCUSED: ———.

In order to confirm the existence of a factual basis for the plea, the elements of each offense charged *must* be explained to the accused, and additional specific inquiry *must* be made of the accused and should be made of counsel for both sides. Also, documentary and other physical evidence may be examined.

MJ: I am going to list the elements of the offense(s) to which you (propose to) plead guilty. These are the facts which the prosecution must prove beyond reasonable doubt before the court can find you guilty if you plead not guilty. As I state each of these elements, ask yourself whether it is absolutely true and whether you wish to admit that it is true, and then be prepared to discuss each of these essential facts with me when I have finished. The elements of the offense(s) which your plea of guilty would admit are: (*Read the elements of the offense(s). These should be specific as to alleged names, dates, places, amounts, and acts.*)

MJ: Do you understand each of the elements of the offense(s)?

ACCUSED: ———.

MJ: Do you have any questions about any of them?

ACCUSED: ———.

MJ: Do you understand that your plea of guilty would admit that each of these elements accurately describes what you did?

ACCUSED: ————.

MJ: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACCUSED: ————.

Here the military judge should elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s) and other matters leading to his guilty plea. Such questions should be aimed at developing the accused's version of what happened in his own words, and determining if his acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates.

MJ: Does the prosecution expect to present evidence of previous convictions that would affect the maximum permissible punishment?

TC: The prosecution [has no evidence of previous convictions that would affect the maximum sentence] [expects to present evidence of two previous convictions adjudged within three years immediately preceding (the) (an) offense(s) charged] [expects to present evidence of three previous convictions adjudged within the year immediately preceding (the) (an) offense(s) charged] [————].

MJ: (to DC) What advice have you given the accused as to the maximum punishment?

DC: ————.

MJ: (To TC) Do you agree?

TC: ————.

Note 1. The maximum punishment for an offense committed prior to 1 January 1969 is governed by the maximum penalty in effect at the time of its commission or time of trial, *whichever is the lesser.*

MJ: (*State the accused's name*), on your plea of guilty alone, you could lawfully be sentenced to the maximum punishment authorized. In this case, the maximum punishment for the offense(s) to which you (propose to) plead guilty is (dishonorable discharge) (bad conduct discharge) (dismissal), forfeiture of (all pay and allowances) (— dollars per month for — months), confinement at hard labor for — (months) (years), (and reduction to the lowest enlisted grade). [In addition, if the court finds you guilty of (the Specification of Charge II and Charge II) (—), you may be sentenced to a bad conduct discharge, as well as the punishments otherwise authorized for (both) (all) of these offenses.] [Further, the law permits increased punishment in certain cases when there are previous convictions. Accordingly, if this court receives evidence of (two or more convictions adjudged during the three years before any offense to which you plead guilty, you could be sentenced to a bad conduct discharge, forfeiture of all pay and allowances, confinement at hard labor for — (months) (years) (and reduction to the lowest enlisted grade)) (and) (three or more convictions during the year, computed by excluding periods of unauthorized absence, just before (any) (the) offense of which you are found guilty at this trial, you could be sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for — (months) (years) (and reduction to the lowest enlisted grade)).]

Do you have any questions as to the sentence that could be imposed as a result of a plea of guilty?

ACCUSED: ————.

MJ: (To DC) Have you as defense counsel had ample time and opportunity to discuss the case with the accused?

DC: ————.

MJ: (*State the accused's name*), have you had ample time and opportunity to discuss the case with your defense counsel?

ACCUSED: ————.

MJ: Have you, in fact, consulted fully with your defense counsel and received the full benefit of his advice?

ACCUSED: ————————.

MJ: Are you satisfied that your counsel's advice is to your own best interest?

ACCUSED: ————————.

MJ: Are you satisfied with your defense counsel?

ACCUSED: ————————.

MJ: Are you pleading guilty voluntarily and of your own free will?

ACCUSED: ————————.

MJ: Has any one made any threat or tried in any other way to force you to plead guilty?

ACCUSED: ————————.

Note 2. When the accused pleads guilty after a motion for appropriate relief has been denied, the military judge should inquire as to whether his plea was prompted by the denial of the motion. In appropriate cases, the accused and his counsel should be reminded that a plea of guilty may preclude appellate review of the military judge's action in denying the motion.

MJ: (To DC) Is there a pretrial agreement in connection with the plea?

DC: ————————.

Note 3. If there is a pretrial agreement, the military judge should inquire into its terms, its legality, and the accused's understanding thereof. Such a pretrial agreement should be appended to the record as an appellate exhibit. Normally, sound practice indicates that in a trial before a military judge alone, the military judge in inquiring into the providence of the plea should defer consideration of the provisions of the agreement relating to the quantum of the agreed punishment until after announcing the sentence. For orderly presentation, the quantum provisions could be contained in a separate appendix to the agreement signed by the parties to the agreement and referred to therein. If after considering the quantum provisions the military judge determines for any reason that the plea was improvident, he must take appropriate corrective action.

MJ: (To accused) Are you pleading guilty (not only in the hope of securing a lenient sentence but) because you feel in your own mind that you are guilty?

ACCUSED: ————————.

MJ: Do you understand that even though you feel that you are guilty, you have a legal and a moral right to plead not guilty and place the burden on the Government to prove your guilt by legal and competent evidence beyond reasonable doubt?

ACCUSED: ————————.

Note 4. In the event accused has pleaded guilty to a lesser offense, add the following question:

MJ: Do you understand that your plea of guilty to the lesser included offense of (absence without leave) (—) constitutes a judicial confession of all the elements of the offense charged with the exception of (the intent to remain away permanently) (—), and no further proof is necessary to establish those elements admitted by your plea?

ACCUSED: ————————.

Note 5. In the event the statute of limitations has apparently run against a lesser offense to which the accused proposes to plead guilty (*e.g.*, unlawful entry (Art 134) when housebreaking (Art 130) is alleged), add:

MJ: Do you understand that the lesser included offense (of unlawful entry) (—) is barred by the statute of limitations and by pleading guilty to that offense you will have waived the right to interpose the statute in bar of punishment in the event you are found guilty of the lesser included offense? In other words, if you are found guilty of (unlawful entry) (—) after pleading guilty to (unlawful entry) (—), you will be punished for that offense. However, if you plead not guilty to the entire specification of (housebreaking) (—) but are found guilty only of the lesser offense of (unlawful entry) (—) you will not be punished if you ask for no punishment.

ACCUSED ————————.

The military judge should request that stipulations, prosecution and defense documents and the findings and sentence work

sheets be marked as exhibits for identification and appellate exhibits respectively. He should conduct necessary inquiry to ascertain the accused's understanding of stipulations, and the views of counsel for both sides concerning other prospective evidence. Any objections to such material should be considered and ruled upon during this Article 39(a) session.

MJ: (To TC) Have you acertained the response you may expect from the accused when asked whether the data on the first page of the Charge Sheet is correct?

TC: _____.

MJ: (To DC) Have you explained to the accused and does he understand his rights to introduce evidence, and to testify or to remain silent, both on the merits and in mitigation and extenuation?

DC: _____.

MJ: (To accused) Do you have any further questions as to the meaning and effect of a plea of guilty?

ACCUSED: _____.

MJ: Do you understand the meaning and effect of your plea of guilty?

ACCUSED: _____.

MJ: Take time now to consult with your counsel again, and then advise me whether you understand the things we have discussed and still desire to plead guilty.

ACCUSED: _____.

A plea of guilty is not provident and will not be accepted unless the military judge makes findings that the plea of guilty is made voluntarily and with full knowledge of its meaning and effect, and specifically that the accused has knowingly, intelligently, and consciously waived his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against him. If the plea of guilty would be improvident, the military judge should advise the accused to plead not guilty as the guilty plea will not be accepted. He should further advise the accused that if the accused persists in entering a guilty plea, it will be rejected, a plea of not guilty will be entered in the record by the court, and the trial will proceed as though the accused had pleaded not guilty. If the plea is provident, the military judge should announce his findings as follows:

MJ: I find that the plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further specifically find that the accused has knowingly, intelligently, and consciously waived his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against him. Accordingly, the plea is provident and (will be) (is) accepted.

However, you are advised that you may request a withdrawal of such plea at any time before sentence is announced, and if you have any sound reason for your request, I will grant it.

At this time the military judge should ask the accused to enter his plea if he has not already done so.

MJ: (State the accused's name), (I ask you again,) how do you plead?

ACCUSED: _____.

MJ: Your plea is accepted.

References:

Article 39(a) (8), UCMJ

Paragraph 39b(2), MCM, 1969 (Revised edition)

Paragraph 53d(1), MCM, 1969 (Revised edition)

Paragraph 65a, MCM, 1969 (Revised edition)

Paragraph 70 MCM, 1969 (Revised edition)

Paragraph 75a, MCM, 1969 (Revised edition)

Appendix 8a, MCM, 1969 (Revised edition)

Paragraph 2-18, AR 27-10 (Change 3)

McCarthy v. United States, 394 U.S. 459 (1969)

Halliday v. United States, 394 U.S. 831 (1969)

Boykin v. Alabama, 395 U.S. 238 (1969)

United States v. Care, ——— USCMA ———, CMR ——— (1969)
United States *v.* Vaughn, 17 USCMA 520, 38 CMR 318 (1968)
United States *v.* Hollins, 17 USCMA 542, 38 CMR 340 (1968)
United States *v.* Heagy, 17 USCMA 492, 38 CMR 290 (1968)
United States *v.* Vance, 17 USCMA 444, 38 CMR 242 (1968)
United States *v.* Boberg, 17 USCMA 401, 38 CMR 199 (1968)
United States *v.* Cummings, 17 USCMA 376, 38 CMR 174 (1968)
United States *v.* Chancelor, 16 USCMA 297, 36 CMR 453 (1966)
United States *v.* Drake, 15 USCMA 375, 35 CMR 347 (1965)
United States v. Griffin, 15 USCMA 135, 35 CMR 107 (1964)
United States *v.* Hamil, 15 USCMA 110, 35 CMR 82 (1964)
United States *v.* Politano, 14 USCMA 518, 34 CMR 298 (1964)
United States *v.* Thompson, 13 USCMA 395, 32 CMR 895 (1962)
United States *v.* Bruner, 11 USCMA 658, 29 CMR 474 (1960)
United States *v.* Shell, 7 USCMA 646, 23 CMR 110 (1957)
United States *v.* Trede, 2 USCMA 581, 10 CMR 79 (1953)
CM 416715, Thomas, 38 CMR 595 (1967)
CM 414276, Taylor, 37 CMR 506 (1966)
Executive Order 11476 (1969), prescribing the MCM, 1969 (Revised edition)

3-2. Findings.

In a case in which the accused has pleaded guilty providently to an alleged offense, such plea is sufficient basis for conviction of the offense to which it relates. A finding of guilty may be entered immediately without vote when a plea of guilty is accepted by a military judge or the president of a court-martial consisting of members only. The announcement may be made as follows:

MJ: (State the accused's name), it is my duty as military judge to inform you that, in accordance with your plea of guilty, this court finds you, [of (all) (the) Specification(s) and Charge(s): Guilty] [of Specification(s) ——— (and ———), Charge ———: Guilty; of Charge ———: Guilty].

Note 1. If two or more accused are tried jointly, and each has providently pleaded guilty, separate findings must be made as to each accused.

Note 2. See paragraph 2-3, Lesser Included Offenses, for suggested instructions when an accused pleads not guilty to an alleged offense, but guilty to a lesser included offense. Findings will not be entered by the military judge when the accused pleads not guilty to an alleged offense even though he pleads guilty to a lesser included offense.

References:

Article 39(a)(3), UCMJ
Paragraph 39b(2), MCM, 1969 (Revised edition)
Paragraph 53d(1), MCM, 1969 (Revised edition)
Paragraph 65a, MCM, 1969 (Revised edition)
Paragraph 70, MCM, 1969 (Revised edition)
Appendix 8b, MCM, 1969 (Revised edition)
Paragraph 2-18, AR 27-10 (Change 3)
Paragraph 2-19, AR 27-10 (Change 3)
United States v. Thompson, 11 USCMA 5, 28 CMR 229 (1959)

3-3. Announcement of Findings to Court Members.

In a trial before a court with members, the plea and findings should be announced to the members at the appropriate point in the trial, using the following procedure:

MJ: The accused was arraigned at a session of this trial conducted on (date) without the presence of the members. [The trial counsel will now distribute copies of the charge(s).] At that time the accused entered the following pleas: ———. I explained to the accused the meaning and effect of his guilty plea and determined to my satisfaction that he fully understands its meaning and effect and that such plea was made providently.

I accepted the accused's plea, and in accordance with his plea (a) finding(s) of Guilty [of (all) (the) Specification(s) and Charge(s)] [of Specification(s) —— (and ——), Charge ——, and of Charge ——] (was) (were) entered.

If the accused pleaded not guilty to one or more charges or specifications, the following instruction should be given:

MJ: The court is advised that findings by the court members will not be required regarding the Charge(s) and Specification(s) of which the accused has already been found guilty pursuant to his plea. Findings will be required, however, as to the Charge(s) and Specification(s) to which the accused has pleaded not guilty. The trial will now proceed.

Note 1. If several offenses are alleged but the accused has pleaded guilty to less than all of the specifications and charges, the military judge may be required, in an appropriate case, to instruct the court that admissions implicit in a plea of guilty to one offense cannot be used as evidence to support findings of guilty of an essential element of a separate and different offense. Additionally, the military judge should insure, by appropriate supplemental instructions, that an accused is not otherwise prejudiced in his defense of a contested specification by a plea of guilty to another offense.

Note 2. If during the trial, either before or after findings, any *matter* inconsistent with a plea of guilty is received or if it appears from any *matter* received that a plea of guilty was entered improvidently, the military judge should call the discrepancy to the attention of the accused and his counsel, and conduct such further inquiry into the providence of the accused's plea as is necessary under the circumstances. Unless the contradictory matter is clarified consistent with the plea, or is voluntarily retracted (*e.g.*, comment by defense counsel in argument), the plea of guilty should be withdrawn and a plea of not guilty substituted therefor. Also, if findings of guilty were announced, they must be revoked. In this regard, although *any* inconsistent matter warrants inquiry, an otherwise provident plea should not be set aside unless such matter *negatives* accused's guilt. If the trial proceeds as though the accused had initially pleaded not guilty, a plea of not guilty must be entered and the strongest possible curative instruction must be given to the court to disregard the prior plea in any subsequent determinations. However, when the military judge considers that the impact of the prior guilty plea cannot be eradicated from the minds of the court members, or if evidence has been received which would ordinarily be inadmissible prior to findings (*e.g.*, pre-sentence evidence of previous convictions), declaration of a mistrial may be manifestly appropriate.

References:

Paragraph 70b, MCM, 1969 (Revised edition)

Appendix 8b, MCM, 1969 (Revised edition)
United States v. Caszatt, 11 USCMA 705, 29 CMR 521 (1960)

2. Change to AR 600-50, 18 August 1969. Some questions have been raised concerning prosecutions for violation of paragraph 18.1, AR 600-50, which proscribes the use, possession or transfer of drugs found by the Secretary of Health, Education, and Welfare, to be habit-forming or to have a potential for abuse. Because the responsibility of HEW for the preparation of the list of such drugs has been transferred to the Department of Justice, some doubt has arisen concerning the continuing validity of the proscription contained in the Army regulation. The HEW list has been superseded by a Department of Justice list published at 21 CFR 320 (1968), 33 Fed. Reg. 14842 (1968). The replacement of the HEW list by that prepared by the Department of Justice has been acknowledged in Change 4, AR 600-50, 18 August 1969, which amends the regulation to define proscribed drugs as including those listed by the Department of Justice in the current listing. This change is being distributed to the field and should be available shortly. JAGJ 1969/8048, 10 Sep. 1969.

VI. CLAIMS.

Federal Medical Care Recovery Act (FMCRA) Letter No. 569. The Department of Justice has informed the Tort Branch, Liti-

gation Division, that effective 1 September 1969 the new rates prescribed pursuant to Executive Order 11060 applicable to the Federal Medical Care Recovery Act are as follows:

Hospital care per in-patient day—$53.00

Out-patient visit—$11.00

This change in rates will be published in the Federal Register and as a change to AR 27-38. JAGL-T, 10 Sep. 1969.

VII. MISCELLANEOUS.

1. Assignment of EM to Eighth United States Army. Staff Judge Advocate are requested to forward, as soon as possible, two copies of orders assigning enlisted personnel (Legal Clerks—PMOS 71D) to units within Eighth US Army. Such orders should be addressed to the Staff Judge Advocate, ATTN: SSM, Eighth US Army, APO San Francisco 96301. EUSA, EAJA, 12 Sep. 1969.

2. 1969 Manuals, Binders, And Dividers. All active duty judge advocates, reserve judge advocates, and legal personnel are entitled to an official copy of the Manual for Courts-Martial, 1969 (Revised edition). Most of you should have received your copy by now, in addition to the maroon, three-ring binder which accompanied the original edition of the 1969 Manual.

If for some reason you did not receive your new Manual or binder, please contact the Publications Division of The Judge Advocate General's School. For your convenience, subject dividers are also available from the School's Bookstore at $2.50 per set, plus 25 cents postage. JAGS/PB, 25 Sep. 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

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Specifications 4 and 5.
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for these offenses.

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