Capt Lane

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

1. (8, MCM) *O'Callahan v. Parker*, Considered. Court-Martial Had Jurisdiction Over Conspiracy Charge. Court-Martial Lacked Jurisdiction Over Offense Of Larceny Committed Off Base. *United States v. Safford*, No. 21,929, 17 Oct. 1969. Accused was convicted of one specification of larceny of a United States Treasury check (Charge I) and two specifications of conspiracy to violate 18 U.S.C. §§ 793(c), (e) (Charge II). The charges were preferred under articles 121 and 134, respectively. Review was granted to determine the validity of accused's conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-18 JALS 1).

Since accused pleaded guilty as charged, no evidence was presented on the merits. There was, however, a stipulation of fact which reflected that accused conspired with another serviceman (Harris) to obtain and pass information relating to the national defense to agents of a foreign government. During this period, accused was a member of the Strategic Army Communications Command.

As noted by the Court, it considered the "service connection" of Charge II, which alleged a conspiracy to commit espionage against the United States, in *United States v. Harris*, 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-24 JALS 6). Harris, as stated above, was accused's co-conspirator and was similarly charged and convicted in a separate trial. In sustaining court-martial jurisdiction in *Harris*, the Court said:

> Jurisdiction to try offenses within the purview of section 793, Title 18, United States Code, is cognizable in the Federal district courts of the United States. Ordinarily the matter would be tried there. In this case, however, the documents involved were inner-working papers of the military establishment and, while not containing a security classification, one was marked for official use only. They were not generally available to the civilian populace. The security and integrity of these documents rests exclusively within the military establishment.
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> There can be little doubt but that the charged offense of conspiracy between senior noncommissioned officers and representatives of a foreign power for the purpose of obtaining and receiving certain information connected with the national defense directly offends "against the government and discipline of the military state." Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, pages 723-724. Especially is this so when, as here, the information is immediately connected with the operation of the military establishment.

In this case, as in *Harris*, the Court found the offenses under Charge II to be "service connected" within the meaning of *O'Callahan v. Parker*, *supra*, and held that the court-martial had jurisdiction to try this offense.

The same was not true, however, of the charge of larceny. The facts reflected that the

*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 69-26 JALS [page number] (DA Pam 27-69-26).

offense was committed in the civilian community while accused was working at a part-time job. Accused was not performing any military duties, the victim was civilian company, and the crime was cognizable in the state court. Citing *O'Callahan v. Parker, supra*; *United States v. Prather*, 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-22 JALS 4); and *United States v. Armes*, 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested 69-25 JALS 3), the Court held "absent evidence of 'service connection,' the court-martial was without jurisdiction to proceed thereon."

The finding of guilty of Charge I was reversed and the charge and its specification ordered dismissed. The Court of Military Review may reassess the sentence on the basis of the remaining finding of guilty of Charge II. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (concurring in part and dissenting in part) would also have affirmed the finding of guilty of Charge I on the basis of his opinion in *United States v. Borys*, 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-22 JALS 3).

2. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Had Jurisdiction Over Offense Of Unpremeditated Murder Committed On A Military Reservation.** *United States v. Allen*, No. 21,922, 17 Oct. 1969. Accused was convicted of unpremeditated murder (art. 118). Review was granted to determine the validity of his conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1).

The facts reflected that accused and another serviceman were engaged in an argument while riding a commercial bus from the city of Norfolk, Virginia, to the Norfolk Naval Station. Accused then took a pistol from his jacket and shot and killed his victim. According to a map, stipulated by appellate defense and government counsel, the offense occurred on the base at the naval station. In holding that the offense was sufficiently "service connected" to vest jurisdiction in the court-martial, the Court stated:

> In view of the military interest in and responsibility for the activities of military personnel in those areas under its care and control, it is apparent that a crime committed on base, by a serviceman, is one "committed under such circumstances as to have directly offended against the government and discipline of the military state." Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, pages 723-724. (See footnote 19, O'Callahan v Parker, supra.) United States v Shockley, 18 USCMA ——, 40 CMR —— [1969, digested 69-24 JALS 4]; United States v Smith, 18 USCMA ——, 40 CMR —— [1969, digested 69-24 JALS 2]; United States v Crapo, 18 USCMA ——, 40 CMR —— [1969, digested 69-24 JALS 3]; United States v Paxiao, 18 USCMA ——, 40 CMR —— [1969, digested 69-24 JALS 3]. Since it is the military duty of a serviceman to obey the laws of the military community when he is physically located within the confines of that community, the "service connection" of the offense charged in this case is apparent. *O'Callahan*, supra. We hold, therefore, that the court-martial had jurisdiction to try this case.

Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

3. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Had Jurisdiction Over Off-Base Robbery Of Another Serviceman.** *United States v. Nichols*, No. 22,211, 24 Oct. 1969. Accused, in accord with his plea, was convicted for the robbery of Private G and absence without leave (arts. 122 and 86, respectively). He was sentenced to a bad-conduct discharge, total forfeitures, confinement at hard labor for one year, and reduction to the lowest enlisted grade. In this appeal, the sole issue presented to the Court was whether the court-martial had jurisdiction to try accused on the charge alleging robbery in light of the Supreme Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1).

The facts revealed that accused and Private *B* decided to rob Private *G*. When the victim allowed accused and his companion to enter his room at an off-base motel, accused struck *G* over the head and took $5.00 from his victim's wallet.

In holding that the court-martial had jurisdiction over this offense, the Court stated:

> The robbery of one soldier by another is triable by court-martial. United States v Plamondon, 19 USCMA ——, 41 CMR —— [1969, digested 69-25 JALS 5]; see also O'Callahan v Parker, supra, footnotes 14 and 19; United States v Rego, 19 USCMA —, 41 CMR — [1969, digested 69-25 JALS 1]; United States v. Cook, 19 USCMA —, 41 CMR — [1969, digested 69-25 JALS 2]; United States v Camacho, 19 USCMA ——, 41 CMR —— [1969, digested 69-25 JALS 2]. On these authorities, we sustain the court-martial's jurisdiction to try this accused for his robbery offense.

Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson (concurring in part and dissenting in part) agreed with the affirmance of accused's conviction for being absent without leave, but disagreed with the majority's holding that the court-martial had jurisdiction over the robbery charge. Judge Ferguson was of the belief that the *status* of both the accused and his victim, as members of the United States Army, was not a sufficient nexus to meet the "service connection" test enunciated in *O'Callahan v. Parker*. He found the fact that the victim of the robbery was another serviceman to be too remote to justify an incursion of federal authority into an area that is essentially a concern of the state. Judge Ferguson cited his dissents in the cases relied on in the above quoted portion of the majority's opinion.

4. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Had Jurisdiction Over Forgery Offense Where Accused Used His Military Standing To Facilitate The Crime.** *United States v. Frazier*, No. 22,290, 17 Oct. 1969. Convicted of several offenses on his plea of guilty, accused petitioned for review on the issue of whether his conviction of forgery was valid in light of the Supreme Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1).

The offense in question involved a stolen United States Treasury paycheck payable to the order of *C*, endorsed in the name of the payee and accused, and cashed by accused at a bus terminal in New York City. The check was cashed after accused told the assistant terminal manager that he had run out of cash and "had no way to get back to base that night" and that he had the check of a "fellow serviceman" who had endorsed the instrument over to accused because he owed the latter money. After accused showed his service identification card the check was "O.K.'d" for cash.

The Court, in holding that the military had jurisdiction over this offense, cited its recent decisions in *United States v. Peak*, 19 U.S.C.M.A. —, 41 C.M.R. — (1969, digested 69-25 JALS 3); and *United States v. Morisseau*, 19 U.S.C.M.A. —, 41 C.M.R. — (1969, digested 69-25 JALS 4). These decisions stand for the proposition that "where the accused's military standing facilitates the deception of his intended victim and permits him to obtain his desired goal the resulting offense is 'service connected' within the meaning given that term by the Supreme Court in O'Callahan v Parker, supra, and is triable by courts-martial."

The Court noted that accused's forgery was service-connected for another reason. The Court stated:

> [*C*], who suffered an apparent legal prejudice as the payee, is a Marine Corps Sergeant. Because of the possible consequences flowing from the accused's act, his relationship to the Sergeant can be likened to that of a thief and is, therefore, "service connected."

Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Darden.)

Chief Judge Quinn concurred in the result for the reasons set out in his opinion in *United States v. Morisseau, supra.*

Judge Ferguson (concurring in part and dissenting in part) disagreed with the majority opinion that the forgery offense was "service connected." In his opinion, the record of trial disclosed no circumstances surrounding the offense of forgery to relate it specifically to the military. Judge Ferguson noted that since one's *status* as a serviceman is not an element of the offense of forgery, the matter was simply irrelevant to the charge and could not be the vehicle for conferring jurisdiction on the court-martial. Judge Ferguson would have reversed accused's conviction for the forgery and ordered the specification dismissed.

Judge Ferguson concurred in the affirmance of accused's other offenses.

5. (8, MCM) ***O'Callahan v. Parker* Considered. Uttering Of Forged Check On Base Is "Service-Connected." Off-Base Uttering Of Forged Check Is "Service Connected" Where Accused's Victims Relied On His Military Status.** *United States v. Hallahan,* No. 22,229, 24 Oct. 1969. In accord with his plea, accused was convicted of the theft of thirteen personalized blank checks belonging to *W*, the forgery of three checks, and the uttering of ten forged checks (Charge III). The Court granted review to consider the effect of the Supreme Court's decision in *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported 69-13 JALS 1), on the utterings alleged in Specifications 4 through 8 of Charge III.

In numerical order these specifications alleged the uttering of a forged $100.00 check at Augusta, Georgia, made payable to accused; a $101.85 check, at Augusta, made out to Eastern Airlines; one for $10.00, at Atlanta, payable to Delta Air Lines; another for $48.30, to Delta; and a $10.00 check at Hagerstown, Maryland, payable to Allegheny Commuter Air Line.

The facts revealed that *W* attended a two-week school for reserve signal officers at Fort Gordon. While in attendance, he lost his checkbook and the thirteen checks. They were found and used by accused.

The record further showed that accused uttered the $100.00 check at a Fort Gordon branch bank. The transaction thus appeared to have taken place at a base facility. Citing *United States v. Williams,* 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-24 JALS 5), the Court held that "[a] forged check uttered on post is service-connected within the meaning of O'Callahan v Parker, supra, and the court-martial has jurisdiction to try the accused for this act."

The Court next noted that the $101.85 check, the $48.30 check to Delta, and the $10.00 check to Allegheny all contained indorsements containing a military address. In holding that the court-martial had jurisdiction over these offenses the Court stated: "These utterings are, therefore, triable by court-martial for it appears that each was successfully cashed because . . . [accused's] victims were made aware of and placed reliance on his military status. United States v. Morisseau, 19 USCMA —, 41 CMR — [1969, digested 69-25 JALS 4]." The one remaining $10.00 check to Delta indicated nothing to associate accused with the military, nor was it passed on post. Furthermore, *W*, at the time the check was uttered, had returned to civilian life. Accordingly, the court-martial lacked jurisdiction over this specification. *United States v. Williams, supra.*

Accused's conviction regarding the $10.00 check to Delta was reversed and the specification ordered dismissed. The Court of Military Review may reassess the sentence on the basis of the remaining findings of guilty. (Opinion by Judge Darden.)

Chief Judge Quinn (concurring in part and dissenting in part) would have affirmed all the findings of guilty on the basis of his opinion in *United States v. Borys,* 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969, digested 69-22 JALS 3).

Judge Ferguson (concurring in part and dissenting in part) agreed with the affirmance of accused's conviction concerning the $100.00 check cashed on base and the reversal of the conviction for the $10.00 check to Delta. He was of the opinion, however, that the other offenses were not "service connected" within the meaning of *O'Callahan v. Parker, supra.* Judge Ferguson first accused the majority of using an unwarranted presumption when it decided that the military identification data contained in the indorsements aided accused in victimizing the various payees. Next, assuming *arguendo* that it did cause reliance, Judge Ferguson stated that "reliance on one's *status* as a serviceman is not an element of the offense of uttering a false instrument. The matter is simply irrelevant to the charge. It cannot be the vehicle for conferring jurisdiction in a court-martial any more than the status of the accused in *O'Callahan* and *Williams*, both supra, conferred jurisdiction in those cases."

6. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Had Jurisdiction Over Offense Involving Marihuana Committed In A Foreign Country. Evidence Was Sufficient To Support Finding Of Guilty.** *United States v. Weinstein,* No. 21,909, 17 Oct. 1969. A general court-martial in Germany convicted accused of acts of misconduct involving marihuana (art. 134). In this appeal accused contended that the court-martial lacked jurisdiction over the offenses under *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported 69-13 JALS 1), and that the evidence was insufficient to support the findings of guilty.

In rejecting accused's first argument, the Court held that the court-martial had jurisdiction over this offense. The Court stated:

> The offenses occurred in a foreign country and are not contrary to American civilian penal statutes having effect in Germany. Consequently, the constitutional limitation on court-martial jurisdiction delineated in the *O'Callahan* case is inapplicable. See United States v Goldman, 18 USCMA 389, 40 CMR 101 [1969, digested 69-16 JALS 3].

Part of accused's assignment of error, dealing with the sufficiency of the evidence, was concerned with the credibility of several Government witnesses and contradictions between their testimony and that of accused. The Court cited *United States v. Baldwin,* 17 U.S.C.M.A. 72, 37 C.M.R. 336 (1967), for the principle that the credibility of a witness and the determination of facts from conflicting evidence are normally questions for the triers of fact. In this case the Court found that the testimony of the Government witnesses was not so inconsistent, self-contradictory, or uncertain as to justify disregarding it as a matter of law. *United States v. Scales,* 10 U.S.C.M.A. 326, 27 C.M.R. 400 (1959).

The remainder of accused's attack on the validity of the findings of guilty dealt with the sufficiency of the evidence to identify the substance he possessed, smoked, and transferred as marihuana. No expert testimony as to the content of the cigarettes was presented to the court-martial. However, on each occasion accused constructed a cigarette from a green tobacco-like substance, he would describe the material as "grass," "pot," and "good stuff," and he called the cigarette a "roach." Accused kept the substance he used for the cigarettes in a matchbox and retained the residue left from unsmoked cigarettes. The substance had a different aroma and color from ordinary tobacco.

Relying on *Cook v. United States,* 262 F.2d 548 (9th Cir. 1966), accused contended that similar evidence was held to be insufficient to establish the nature of the substance. As noted by the Court, however, *Cook* was rejected by the Second Circuit in *United States v. Nuccio,* 373 F.2d 168 (2d Cir.), *cert. denied* 387 U.S. 906 (1967). In this case the Court also stated that it did not agree with the *Cook* decision. Moreover, *Cook* is inconsistent with the Court's opinion in *United States v. Villasenor,* 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955), in which it was held that a writing by an accused at the time of the performance of an act may serve to identify the contents of a sealed envelope. It is also

inconsistent with *United States v. Smith*, 17 U.S.C.M.A. 55, 37 C.M.R. 319 (1967), which held that the label on a sealed carton was evidence of its contents. In the case at bar, the Court held that "a contemporaneous declaration as to the nature of a substance by a person using the material, and who may be presumed to know its nature, is evidence of the identity of the substance." The Court, therefore, concluded that the evidence was sufficient to support the findings that the substance used and possessed by accused was marihuana. Accordingly, the decision of the board of review was affirmed. (Opinion by Chief Judge Quinn in which Judges Ferguson and Darden concurred.)

7. (70*b*, MCM) ***United States v. Care* Considered. Accused's Plea Of Guilty To Charge Alleging Desertion With Intent To Shirk Important Service Was Improvident.** *United States v. Matheny*, No. 22,222, 17 Oct. 1969. Accused, following his plea of guilty, was convicted of two specifications, one alleging desertion with intent to remain away permanently, the other, covering the same period, alleging desertion with intent to shirk important service (art. 85). For sentencing purposes, the offenses were treated as multiplicious. The question presented to the Court in this appeal concerned the providence of accused's plea of guilty.

As noted by the Court, the law officer's inquiry into this question was equal to that made in *United States v. Care*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 1). The procedure followed, however, would not meet the standard that must apply to cases tried 30 days after the decision in *Care*.

In mitigation, accused told the court that he "went over" his leave period, got married, and then tried to support his wife and her family "because they were very poor people." Accused then found himself having domestic difficulty. After going into debt for a car and an apartment, among other things, he was informed by his wife that she was getting a divorce. Accused's absence was terminated when he was picked up by agents of the Federal Bureau of Investigation. At the time, he held two jobs.

On the basis of this record, Chief Judge Quinn was satisfied that accused knew and understood the nature of the offenses charged and that his plea of guilty was provident and voluntary. Citing *United States v. Gremillion*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-23 JALS 2) and *United States v. Graan*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-23 JALS 2), he would have affirmed the decision of the board of review.

Judge Darden, however, writing the opinion for the majority, stated that he would only affirm accused's conviction for desertion with intent to remain away permanently. He held that under the circumstances, the finding of guilty to desertion with intent to shirk important service must be set aside. A rehearing may be ordered on the charge of desertion with intent to shirk important service or the Court of Military Review may reassess the sentence based upon the remaining charge of desertion with intent to remain away permanently. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson concurred in a separate opinion. He followed *United States v. Care*, *supra*, but stated that he would follow it on cases tried before the effective date of the new rules in *Care*.

8. (70*b*, 75, MCM) ***United States v. Care* Considered. Accused's Guilty Plea Was Provident. Service Medals Should Have Been Before Court On Mitigation.** *United States v. Brooks*, No. 22,091, 17 Oct. 1969. In accordance with his plea, a special court-martial found accused guilty of five unauthorized absences and two breaches of restriction (arts. 86 and 134, respectively). He was sentenced to a bad-conduct discharge, forfeiture of $90 per month for four months, and confinement at hard labor for the same period. In this case, the Court of Military Appeals considered the providence of accused's guilty plea and the issue of whether accused was deprived of

effective assistance of counsel in regard to the sentence.

The record reflected that the president of the court-martial did not itemize the elements of every offense charged before he accepted accused's guilty plea. Considering the record as a whole, however, the Court was satisfied that accused knew what he was pleading guilty to and what acts constituted the offenses charged. The Court stated:

> A copy of the charge sheet was handed to [accused] at the beginning of trial. The offenses involved are simple in nature. His record of prior convictions that was admitted into evidence included a series of past unauthorized absences and breach of restriction. His present trial is not a novelty; he cannot claim unfamiliarity with the type of offenses now before us. Finally, his written unsworn statement in mitigation is hardly a disclaimer of guilt, for in it he asks that the Navy give him another chance. For these reasons we conclude that the whole record shows the guilty plea to be provident. United States v. Care, 18 USCMA —, 40 CMR —, [1969, digested 69-22 JALS 1].

The remaining question arose because the staff legal officer's post-trial review indicated that accused was authorized to wear both the Vietnam Service Medal and the Vietnam Campaign Medal. Defense counsel did not make this fact known at trial. Consequently, the president of the court did not pinpoint the information in his sentencing instructions. Citing *United States v. Rowe*, 18 U.S.C.M.A. 54, 39 C.M.R. 54 (1968, digested 69-1 JALS 4); *United States v. Pointer*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-23 JALS 8); and *United States v. Anderson*, 19 U.S.C.M.A. —, 41 C.M.R. — (1969, digested 69-25 JALS 8), the Court held that this instructional omission was error.

Accordingly, the decision of the board of review as to the sentence was reversed. A rehearing thereon may be ordered. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

9. (70b, 73, MCM, UCMJ, art. 27) Accused Was Not Afforded His Right To Trained Counsel. Accused's Guilty Plea Was Improvident. Instructions Given Concerning Sentence Were Erroneous. *United States v. O'Dell*, No. 22,105, 17 Oct. 1969. At a special court-martial, accused was represented by counsel who was a nonlawyer in the sense of article 27, UCMJ. The court imposed the maximum confinement that could be adjudged by a special court-martial and a bad-conduct discharge, along with partial forfeiture of pay.

A review of the record of the proceedings indicated that accused requested representation by qualified military counsel but that no official action was taken on this request. The board of review, relying on *United States v. Mitchell*, 15 U.S.C.M.A. 516, 36 C.M.R. 14 (1965), held that since the matter was not raised at trial it would not be considered on review. The Court of Military Appeals, however, held that *Mitchell* was inapplicable. Citing *United States v. Williams*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-21 JALS 6), the Court stated that waiver of the right to qualified counsel has been "resolutely refused . . . in those instances in which the accused has not been represented by trained counsel."

At trial, accused and six others facing unrelated charges were subjected to "[c]ommunity examination" as to the right to counsel, the right to enlisted membership on the court-martial, and whether they had had pretrial consultation with counsel regarding their rights at trial. Citing *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968), the Court stated that this kind of *en masse* proceedings was condemned. Next, the Court found that the inquiry into accused's understanding of the elements of the offense and the meaning and effect of his plea of guilty did not conform to the procedure approved in *United States v. Chancelor*, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966). Finally, the Court found that some of the instructions in regard to the sentence were contrary to decisions of the Court of Military Appeals and others were not supported by any evidence in the case.

Considering all the proceedings, the Court was unable to conclude that accused was accorded the rights and the kind of trial contemplated by the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951. Accordingly, the decision of the board of review was reversed. The findings of guilty and the sentence were set aside and the charge ordered dismissed. (Opinion by Chief Judge Quinn in which Judge Ferguson concurred.)

Judge Darden (dissenting), relying on *United States v. Mitchell, supra,* and *United States v. Care,* 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 1), found nothing in this case which required reversal of accused's conviction for absence without leave.

II. COURT OF MILITARY REVIEW DECISIONS.

1. (153*a*, MCM) **Admission Of Witness' Pretrial Identification Of Accused Was Error Where Witness Failed To Identify Accused At Trial.** *United States v. McCutchins,* CM 418032, 5 Sep. 1969. Conviction: housebreaking (art. 130) and rape (art. 120), involving the on-post dwelling and person of a dependent wife and burglary (art. 129) and rape (art. 120), involving the on-post dwelling and person of another dependent wife, as well as an offense of wrongful appropriation on a military installation of a serviceman's motor vehicle (art. 121). Sentence: DD, 40 yrs CHL, TF, and red E-1.

Initially the court stated that the findings of guilty of burglary, rape of an occupant of the burglariously entered dwelling, and wrongful appropriation were correct in law and fact. However, the findings of guilty of the alleged housebreaking and the alleged rape of an occupant of the dwelling allegedly broken into were incorrect in law.

With regard to the latter convictions of housebreaking and rape, the only question at issue was the identity of the victim's assailant. The victim could not make a positive identification of accused as her assailant. In response to prosecution questioning, she testified as follows:

> Q. . . . [D]o you see anyone in the courtroom *who looks similar* to the man who violated you . . .?
>
> A. Yes.
>
> Q. Would you indicate where the man is sitting, please?
>
> A. He's sitting over there at the table there (pointing toward accused). (Emphasis added by the court.)

In an effort to conclusively establish the identity of accused as the rapist, the prosecution called the seven-year-old daughter of the victim. Although she failed to make an in-court identification of anyone as her mother's assailant, the military judge admitted evidence, over defense objection, that she had made a pretrial identification of a photograph of accused shortly after the incident. As the court noted, paragraph 153*a*, Manual for Courts-Martial, United States, 1951, provides pertinently:

> *If a witness testifies as to the identity of the accused* as the person who committed . . . the offense in question, such testimony may be corroborated, even though the credibility of the witness has not been directly attacked, by showing that the witness made a similar identification with respect to the accused on a previous occasion. In such a case the identifying witness himself and any person who has observed the previous identification may testify concerning it. (Emphasis supplied by the court.)

The court found the language of the Manual unambiguous. The Manual is clear that a witness must first identify the accused in court before corroborative testimony may be received. In the absence of such condition precedent, evidence of the pretrial identification should not have been received. The court held that this error substantially prejudiced the rights of accused since there was a fair risk that the members of the court might have determined the crucial issue otherwise, but for this error.

On the basis of its action in this case the court decided to reassess the sentence. It determined that only so much of the sentence as provided for DD, 25 yrs CHL, TF, and red E-1 should be approved. The findings and sentence, both as modified, were affirmed. (Kramer, J.; Westerman, C.J., and Rouillard, J., concurring.)

2. PM (140, MCM) **Denial Of Accused's Right To Consult With Counsel Resulted In Court's Holding That Statement Made By Him Was Inadmissible In Evidence.** *United States v. Griffin,* CM 419862, 29 Aug. 1969. Conviction: conspiracy to steal U. S. Government truck axles, the larceny thereof, and their attempted sale (arts. 81, 121, and 80, respectively). In addition, accused was convicted for the wrongful appropriation of three government trucks and trailers (art. 121), contrary to his pleas. Sentence: BCD, TF, and three mos CHL. The convening authority approved the sentence but suspended execution of all adjudged forfeitures and the confinement with provision for automatic remission.

In this appeal, appellate Government counsel conceded that because there was a "complete failure" of proof of ownership of the truck axles at trial, the findings of guilty of all the offenses relating to these axles were in error.

Left for the court's consideration was accused's conviction for wrongful appropriation of the government's trucks and trailers. In this regard, the court found merit in accused's contention that his pretrial statements were erroneously received in evidence inasmuch as he had been denied the right to consult with counsel. The facts reflected that accused was apprehended by a military policeman at about 0100 hours and was advised of his rights under article 31 and of his rights in connection with legal counsel. Accused then declined to make any statement and requested legal counsel. The MP, however, did nothing to secure counsel for accused; instead accused was transported to the MP Operations Office at about 0700 hours that morning. At about 0950 hours, a criminal investigator again advised accused of his rights. This time accused stated that he did not want to talk to a lawyer and desired to make a statement, which he did. Later, accused was given an opportunity to get his story straightened out and he made a second statement.

In holding that the statements made by accused should not have been admitted into evidence, the Court of Military Review stated:

> Although no attempt was made to interrogate appellant at the time he requested legal counsel, he was kept in custody, and no action was taken to get him the counsel which he requested and to which he was entitled. (Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Tempia, 37 CMR 249 (1967)). The factual situation reflecting that appellant, following his request for legal counsel, remained in custody the balance of the night, and in mid-morning, being turned over to a CID agent, was readvised of his rights, and that he then agreed to make a statement, in our opinion, provides corroboration of appellant's explanation of his change of mind—i.e., that he thought he was not going to get legal counsel and so decided to make a statement. We have no doubt that appellant has been materially prejudiced as to a substantial right (Art. 59, UCMJ) by the denial of his request for counsel and continued interrogation thereafter, resulting in the pretrial statements used by the Government to convict him.

The court concluded that under the facts and circumstances of this case, a rehearing was not authorized. The charges were ordered dismissed. (Rouillard, J.; Westerman, C.J., and Kramer, J., concurring.)

3. (UCMJ arts. 66, 94) **Court Of Military Review Will Consider Sentences From Other Cases In Determining The Appropriateness Of A Sentence.** *United States v. Perkins,* CM 419826, 13 Aug. 1969. Conviction: mutiny (art. 94). Sentence: DD, TF, and 10 yrs CHL. The convening authority approved the sentence.

On appeal, defense counsel asked that only part of the sentence be approved as appropriate, *i.e.*, TF and CHL for two yrs. They pointed to six other cases arising from the same incident which formed the basis of accused's conviction. Many of these involved convictions for other offenses as well as mutiny, and yet the sentences imposed were still lower than the one received by accused.

The court held that the six other sentences could properly be judicially noticed by the court and considered in its review of the conviction. The Government had moved to strike all reference to the other sentences from the defense brief. It argued that the court should not consider matters outside the record of trial, citing former Rule 18, Uniform Rules of Procedure for Proceedings in and before Boards of Review. However, the court noted that this rule contained an exception for "matters as to which judicial notice may be taken in military law." Moreover, the Court of Military Review adopted its own rules of Practice and Procedure when it replaced the Board, and these rules contain nothing comparable to Rule 18. The court concluded that it could properly take judicial notice, *"for an appropriate purpose,"* of its own records in other cases.

The Government further argued that determining the appropriateness of a sentence was not an "appropriate purpose" for considering this outside-the-record material. The court rejected this argument.

The Government finally contended that the court should not consider matters which were not considered by the convening authority, citing *United States v. Pinkston*, — C.M.R. — (1969, digested 69-18 JALS 16). *Pinkston* held that the board of review, in determining sentence appropriateness, ought not to consider matters not in the record or not considered by the convening authority. In the case at bar, the court assumed, although there was conflicting evidence, that the convening authority had not considered the other sentences. As for the record of the court-martial itself, the court pointed to the general rule that the trial court may not properly consider sentences in cases other than the one before it. The court held, relying on prior practice and dicta in *United States v. Judd*, 11 U.S.C.M.A. 164, 28 C.M.R. 388 (1960), that it could consider other sentences provided that (1) such consideration does not "operate unfairly against the accused" and (2) the sentence "ultimately approved is determined to be just and appropriate under the facts of the particular case." Further, it decided to take judicial notice of and consider three related cases, also pending before the Court of Military Review, in addition to the six suggested by defense counsel.

In the light of the additional cases considered, the court approved a sentence of DD, TF, and five yrs CHL. It affirmed the finding of guilty and the sentence as modified.

In addition, the court expressed its disapproval of a procedure followed at trial. After the formal convening of the court but before arraignment, the trial counsel called for an out-of-court hearing and stated that he had no evidence to support one of the specifications as drafted. The law officer then granted a motion by the defense counsel to dismiss the specification in question. The Court of Military Review felt that this was a nonprejudicial error, citing *United States v. Castro*, — C.M.R. — (1969, digested 69-23 JALS 9). The court stated that in this case, as in *Castro*, "the charges in their original form had been appropriately referred to trial by the convening authority . . . and the law officer's ruling precluded the court members from performing their function of determining controverted issues of fact." (Stevens, C.J.; Kelso and Nemrow, JJ., concurring.)

4. (74*i*, MCM) **Court Of Military Review Condemns The Use Of "Special Findings" On Collateral Issues.** *United States v. Robertson*, CM 420885, 10 Sep. 1969. Conviction: unauthorized absence (art. 86), in accord with plea. Sentence: BCD, TF, ten mos CHL, and red E-1. The convening authority approved the sentence. A pretrial agreement was involved.

Although the court found no prejudice to accused, it felt compelled to condemn a highly irregular procedure followed by the law officer in this case. The record reflected that after the court-martial announced its findings, trial counsel read a report which revealed that accused was "[a]pprehended [by] civil authorities . . ." Trial defense counsel, during a prior out-of-court hearing, had objected to the term "apprehension" on this document, but his objection was overruled. The law officer stated that he would later give appropriate instructions on this matter to the court.

Accused, when called as a witness, refuted the apprehension and indicated that his return to military control was voluntary. Faced with this apparent conflict in evidence, the law officer, after noting that apprehension was not an element of the charged offense, instructed the court that the situation called for the use of *"special findings."* The court first was to find whether accused's return to military control was involuntary. In addition, the court was instructed to indicate, after resolving the first question, whether or not they considered the fact of apprehension as an aggravating factor in determining an appropriate sentence.

The Court of Military Review, commenting on the procedure of using special findings, stated:

> . . . [W]e feel compelled to condemn the highly irregular procedure followed by the law officer in this case. Though we find no prejudice resulting to appellant in this instance, we find no legal basis for such procedure either in the present Manual for Courts-Martial or in the predecessor Manual. [Footnotes omitted.] Although the revised edition of the 1969 *Manual* makes provision for special findings when the military judge, sitting alone, is deciding the guilt or innocence of the accused (¶ 74*a*, MCM, 1969 (Rev.)), no provision exists which allows the members of the court-martial to make such special findings involving solely collateral issues in the area of sentencing. The trial of collateral matters at that juncture of the proceedings, by using the vehicle of special findings, is an invitation to error and should not be followed.
>
> . . . Conflicts in evidence on collateral issues in the delicate area of sentencing need not and should not be the subject of special findings. Surely, appropriate instructional guidance can be given without resort to this irregular procedure.

The court found the findings of guilty and the sentence, as approved, correct in law and fact. The findings of guilty and the sentence were affirmed. (Per curiam; before Stevens, S.J., Kelso and Nemrow, JJ.)

5. (UCMJ arts. 61, 64) The Fact That The Convening Authority Took His Action A Day Before The President Authenticated The Record Necessitated A New Review. *United States v. Smith,* CM 421006, 10 Sep. 1969. Conviction: unauthorized absence (art. 86), in accord with plea. Sentence: DD, six mos CHL, and F $60.00 pay per mo for six mos. Two previous court-martial convictions were considered. The convening authority, honoring a pretrial agreement, approved only so much of the sentence as provided for a BCD, five mos CHL, and F $60 pay per mo for five mos.

The record of trial reflected that the convening authority took his action a day before the president authenticated the record. The Court of Military Review stated that this precise problem was considered by Board of Review No. 4 on a number of occasions. See CM 419053, *Mahr,* unpublished (18 Dec. 1968); CM 418699, *King,* unpublished (13 Sep. 1968); CM 418357, *Kinard,* unpublished (23 July 1968), and its disposition would be the same as in those cases.

Accordingly, the action of the convening authority was set aside. The record of trial was returned to The Judge Advocate General for a new review and action by a different staff judge advocate and convening authority in accordance with the provisions of articles 61 and 64, UCMJ. (Nemrow, J.; Stevens, S.J., and Kelso, J. concurring.)

6. (85 MCM; UCMJ art. 127*c*) Error In Staff Judge Advocate's Review Concerning

Maximum Permissible Sentence Necessitated Reassessment. *United States v. Matlock,* CM 421022, 10 Sep. 1969. Conviction: conspiracy to commit larceny and larceny (each involving property of a value in excess of $100) as well as housebreaking (arts. 81, 121, and 130, respectively). Sentence: BCD, TF, and 18 mos CHL. The convening authority disapproved the conspiracy conviction and approved so much of the sentence as provided for BCD, TF, and one yr CHL.

Accused's assignment of error concerned the staff judge advocate's advice to the convening authority, in the post-trial review of the record of trial, that the maximum sentence based on correct findings included confinement for fifteen years, instead of the correct term of ten years (see subpara. 127*c*, page 25-14, MCM, 1969). The court agreed with accused that the convening authority was incorrectly led to believe that he was operating within the limits of a permissible confinement ceiling of fifteen years instead of the correct period of ten years. This was patently erroneous and the court decided to cure the error by reassessing the sentence. The court, however, went on to state that it believed that it was unlikely that the convening authority would have reduced the adjudged confinement period below one year, which actually proportionately matched the reduction in maximum authorized confinement resulting from the disapproving action.

Accordingly, the court found the findings of guilty correct in law and fact and held that they should be approved. Reassessing the approved sentence, the court determined that the same was correct in law and fact and should be approved. The findings of guilty and the sentence, as thus reassessed, were affirmed. (Stevens, S.J., Kelsor and Nemrow, JJ., concurring.)

III. GRANTS AND CERTIFICATIONS OF REVIEW.

1. *United States v. Peterson,* ACM 20408, petition granted 3 Oct. 1969. Consonant with his pleas, accused was found guilty of seven specifications under Charge I and four specifications under an additional charge of making and uttering checks with intent to defraud (art. 123*a*). He was sentenced to a bad-conduct discharge. All the checks were drawn on accused's personal checking account maintained at the Mather Air Force Base Facility of Sacramento Main Office, Bank of America. They were cashed off-base and payable to various off-base civilian establishments. The pre-printed personalized checks bore the name, AF serial number, and military address of accused.

On 2 June 1969, the board of review issued a decision affirming the findings of guilty and the sentence. In light of the Supreme Court's decision in *O'Callahan v. Parker* issued the same date, a motion for reconsideration was granted by the board. Subsequently, in a decision dated 26 September 1969, the Court of Military Review vacated the board's decision of 2 June 1969, set aside the findings and the sentence, and ordered the charge and additional charge and their specifications dismissed. The Judge Advocate General certified the following issue: "Was the Court of Military Review correct in its conclusion that under the facts and circumstances in this case the bad check offenses in violation of article 123a were not in any way service-connected?"

2. *United States v. Davis,* CM 419702, petition granted 12 Sep. 1969. Accused was tried and convicted of absence without leave (art. 86), sodomy (art. 125), and assault with intent to commit sodomy (art. 134). He pled not guilty to the sodomy and assault with intent to commit sodomy charges. The latter two offenses arose out of one incident in a stockade where accused was confined pending trial for AWOL.

Prior to trial, the convening authority authorized the taking of the deposition of the cell mate of the victim of the sodomy. The cell mate had witnessed the act of sodomy. At the taking of the deposition the defense counsel reserved the right to call the cell mate at trial for further cross-examination.

The cell mate was subsequently transferred to a post 900 miles away from the place of trial. One week prior to trial the defense counsel requested the convening authority to produce the cell mate at the trial. The request was denied. Defense counsel reviewed his request during the trial and it was denied by the law officer. The deposition was admitted at trial (Prosecution Exhibit 1). The Court will consider whether the law officer abused his discretion in denying the defense request for a continuance to obtain the personal appearance of a principal witness and whether the law officer erred to the prejudice of accused by receiving Prosecution Exhibit 1 in evidence.

3. *United States v. Chappell,* CM 420500, petition granted 2 Sep. 1969. Accused was charged and convicted of unpremeditated murder (art. 118). He pled not guilty. The accused got into an argument with a drunken soldier. Accused was carrying an M-16 rifle at the time the other soldier told accused that he was going to get his rifle and would return. The drunken soldier departed with a third soldier who was not involved in the argument. As they departed the area, accused fired his rifle at them and killed the third soldier.

Trial and defense counsel stipulated to the expected testimony of a psychiatrist who had examined accused. The stipulation contained affirmative answers to the questions found in paragraph 121, MCM, 1969 (Rev.), except that the stipulation stopped short on the third question and did not contain: "and to conduct or cooperate intelligently in his own defense." The narrative summary of the psychiatrist's findings was in the allied papers in the record of trial. That summary contained two statements as follows:

a. In my opinion, he [accused] lacks sufficient mental capacity to "intelligently conduct his own defense in the sense that he may not perceive the significance of some of his testimony nor understand the procedures of the court in determining guilt or innocence) and

b. In my opinion . . . the alleged crime was an impulsive one committed by an unstable mentally defective person.

The narrative summary also indicated that accused had an intelligence quotient of 69. Issue granted: "Whether the substantial rights of the accused were materially prejudiced by the limited nature of the stipulation relative to his mental responsibility."

4. *United States v. Gill,* ACM 20452, petition granted 17 Oct. 1969. Accused was convicted of the robbery of two civilian women at an off-base insurance agency in Germany. An *O'Callahan* issue (*O'Callahan v. Parker,* 395 U.S. 258 (1969)) was raised before the board of review, but decided adversely to accused on the grounds that the *O'Callahan* decision did not apply when a crime was committed in a foreign situs. The Court will consider whether the court-martial lacked jurisdiction to try accused on the charge and its specification.

5. *United States v. McGonical,* ACM 20424, petition granted 17 Oct. 1969. Accused was found guilty by a general court-martial of committing sodomy upon a female dependent and taking other indecent liberties with her. Both offenses allegedly occurred off base. The Court of Military Review resolved the jurisdictional issue on the ground that the decision in *O'Callahan v. Parker,* 395 U.S. 258 (1969), could not be applied retroactively. Issue granted: "Whether in the circumstances of this case, the court-martial had jurisdiction of the charged offenses."

IV. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Conviction of sleeping on post set aside since no evidence was introduced that the accused assumed his post as a sentinel and was on post when he was found asleep. JAGVJ SPCM 1969/272.

2. Conviction of disrespect to superior officer by striking set aside since evidence was insufficient to show that the accused knew or should have known that the passen-

ger in the vehicle was a general officer. Upon reassessment the approved sentence was deemed appropriate for remaining findings of guilty. JAGVJ SPCM 1969/325.

3. Conviction of wrongful possession of marihuana set aside since the search was not based on probable cause, a laboratory report, to establish the substance was marihuana and the entire CID report were erroneously received in evidence. JAGVJ SPCM 1969/341.

4. Failure of special court-martial president to inquire into the providency of the accused's plea of guilty resulted in setting aside conviction of sleeping on post when accused testified in extenuation and mitigation that he had taken pills which had been prescribed for pain and that they made him drowsy to the extent that he had to "fight to try to keep awake" while on guard. JAGVJ SPCM 1969/376.

V. MISCELLANEOUS MILITARY JUSTICE.

Status Of Special Court-Martial Judge. Initial reports about the performance of special court-martial judges are encouraging. Most convening authorities recognize the desirability of detailing special court-martial judges when they are available. However, the use of part-time military judges in special court-martial trials, particularly when an accused waives trial by court members, has greatly increased the possibilities for Article 27(a) violations, as convening authorities may fail to recognize the impropriety of discussing the findings or sentence in a case with an assistant staff judge advocate who sat as the military judge at the trial. Accordingly, staff judge advocates and general court-martial military judges should be alert to prevent a special court-martial judge from being censured, reprimanded, or admonished by a convening authority or commanding officer in regard to the performance of his judicial duties. JAGJ 1969/9210, 22 Oct. 1969.

VI. MILITARY AFFAIRS OPINIONS.*

(Reserve Forces 75) **Disenrollment Board For ROTC Cadet Must Be Comprised Of No More Than One RA Officer And The Rest Reserve Officers.** Cadet *C* was recommended for disenrollment for willful evasion of his advanced course contract and ordered to active duty in his enlisted grade for two years by a board appointed under the provisions of AR 145-1, 14 Oct. 1968. When the recommendation was forwarded up to Fifth Army Headquarters, Cadet *C* attacked the jurisdiction of the board on the basis that it was not constituted in accordance with subpar. 3*c*(3), AR 15-6, 12 Aug. 1966, as two of the board's four voting members were RA officers. Subpar. 3*c*(3) requires that "[w]hen a board of officers is convened to investigate a member of a Reserve component not on active duty or examine an applicant for appointment in a Reserve component, one member of the board will be a Regular Army officer and the remainder will be Reserve officers of the Army in an active reserve status or on active duty."

In answer to a letter from the staff judge advocate, The Judge Advocate General expressed the view that disenrollment boards must conform to the requirement of subpar. 3*c*(3), AR 15-6, *supra*.

As a rule, when an improperly constituted board makes findings and recommendations adverse to the respondent, he is entitled to a rehearing before a properly constituted board since errors in the composition of boards of officers are jurisdictional rather than procedural (see, *e.g.*, JAGA 1968/3568, 7 Mar.

***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.**

1968). Accordingly, Cadet *C* could not be ordered to active duty upon the basis of the board proceedings, but would have to be brought before a new, properly constituted board. Shortly after this opinion was rendered, AR 145-1, *supra*, was changed to exempt disenrollment boards from the requirement of subpar. 3*c*(3), AR 15-6, *supra*. JAGA 1969/4200, 21 Aug. 1969.

VII. MISCELLANEOUS.

1. JAGC Warrant Officer Procurement. The FY 1970 JAGC Warrant Officer procurement quota will be received in phased increments. The total number has not been released. To permit full utilization of quotas, the JAGC Warrant Officer Selection Board will remain in continuous session. Appointments will be made as vacancies occur. The files of applicants who are considered to be highly qualified will be retained at Headquarters, Department of the Army. These files will be reviewed as quotas are received to select the best qualified individuals for appointment. A successful applicant will be notified when he has been approved for appointment and call to active duty. An unsuccessful applicant will be notified when his application is disapproved. As a matter of policy, no information will be released concerning an applicant's relative standing among other applicants. JAGC, 22 Oct. 1969.

2. Articles Of Interest To Judge Advocates.

Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1498 (1969). Copies may be obtained from the Editorial and Business Offices, Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan 48104.

Comment, *Military Justice and the Military Justice Act of 1968: How Far Have We Come?*, 23 Sw. L.J. 554 (1969). Copies may be obtained from the Editorial and Business Offices, Southwestern Law Journal, Southern Methodist University School of Law, Dallas, Texas 75222.

3. Correction. The first sentence of the note dealing with "Change to DA Pam 27-15, 'Trial Guide for the Special Court-Martial,'" appearing in 69-25 JALS 14, which reads "In *United States v. Johnson*, 18 USCMA 436, 40 CMR (1969) the Court of Military Appeals held it was in error to include in the instructions on voting procedure that voting on the sentence must begin with voting on the lightest sentence proposed," should read as follows: "In *United States v. Johnson*, 18 USCMA 436, 40 CMR (1969) the Court of Military Appeals held it was in error *not* to include in the instructions on voting procedure that voting on the sentence must begin with voting on the lightest sentence proposed."

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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