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JUDGE ADVOCATE LEGAL SERVICE*

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

I. New General Officers.

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

III. Court of Military Review Decisions.

IV. TJAG Actions Under Article 69, UCMJ.

V. Miscellaneous Military Justice.

VI. Miscellaneous.

I. NEW GENERAL OFFICERS.

The nominations of General George S. Prugh, Jr., Judge Advocate, Headquarters, USAREUR and Seventh Army, and Colonel Bruce C. Babbitt, Assistant Judge Advocate General for Civil Law, for appointment to the grade of Brigadier General were confirmed by the Senate. General Prugh was promoted on 1 November 1969 and Colonel Babbitt's promotion is expected shortly. Biographical sketches of both nominees follow.

General George S. Prugh, Jr. General Prugh was born in Norfolk, Virginia, in 1920. He graduated from the University of California at Berkeley in 1941 and Hastings College of Law in San Francisco in 1948; and in 1963 received a Master of Arts degree from George Washington University.

After serving a brief period as an enlisted man before the United States entered World War II, General Prugh was commissioned as a second lieutenant in 1942. General Prugh served in various artillery and civil affairs units throughout World War II, moving through a series of promotions from battery officer to battalion executive officer. His service was, to a great extent, in the Pacific.

After having left active duty in 1946, General Prugh returned to the Army in 1947. He attended Hastings School of Law as a student officer, and after graduation was assigned as Assistant Staff Judge Advocate, Sixth Army Headquarters, Presidio of California. General Prugh's subsequent assignments included: Claims and Litigation Division, Office of The Judge Advocate General, 1949; Military Justice Division, Office of The Judge Advocate General, 1949-50; various Assistant Staff Judge Advocate and Post Judge Advocate assignments in Europe, 1950-53; Board of Review and Military Justice Division, Office of The Judge Advocate General, 1953-56; student, Command and General Staff College, 1956-57; Deputy Staff Judge Advocate, Headquarters Eighth Army, Korea, 1957-58; Assistant Staff Judge Advocate and Deputy Army Staff Judge Advocate, Headquarters Sixth U. S. Army, 1958-61; Army Staff Judge Advocate, Headquarters Sixth U. S. Army, 1961; student, Army War College, 1961-62; Chief, Military Personnel Division, Office of The Judge Advocate General, 1962-63; Executive, Office of The Judge Advocate General, 1963-64; Staff Judge Advocate, U. S. Military Assistance Command, Vietnam, 1964-66; Legal Advisor, U. S. Army Element, Headquarters, EUCOM, 1966-69; Judge Advocate, Headquarters, USAREUR and Seventh Army, 1969-date.

He is a member of the Bars of California, the U. S. Court of Military Appeals, and the United States Supreme Court.

General Prugh holds the Distinguished Service Medal, the Legion of Merit, the Air Medal, and the Army Commendation Medal with Oak Leaf Cluster.

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*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 69-29 JALS [page number] (DA Pam 27-69-29).

Colonel Bruce C. Babbitt. Colonel Babbitt, also born in 1920, is a native of Livingston, Montana. He attended the University of Montana and participated in the ROTC program there, graduating and receiving his commission in the Infantry in 1941. He was called to active duty the day after graduation.

Colonel Babbitt served with the 32d Infantry Regiment, 7th Infantry, throughout World War II, moving through a series of promotions from platoon leader to battalion commander. He participated in campaigns in Attu, Kwajalein, Leyte, Okinawa, and the initial occupation of Korea.

After leaving active duty, Colonel Babbitt enrolled in the University of Montana School of Law, received his degree in 1947, and practiced law in Montana until 1949. During part of this period he commanded a reserve infantry battalion.

In 1949, Colonel Babbitt was recalled to active duty in The Judge Advocate General's Corps. His initial assignment was to the Office of The Judge Advocate General and subsequently as Assistant Staff Judge Advocate of the 2d Infantry Division at Fort Lewis and in Korea. While in Korea, he commanded for almost a month a provisional rifle battalion deployed in defensive positions along the division's main supply route.

His subsequent assignments were: Executive Officer, Staff Judge Advocate Section, Camp Cooke, California, 1951-52; First Advanced Class, The Judge Advocate General's School, Charlottesville, Virginia, 1952-53 (distinguished graduate); Staff and Faculty, The Judge Advocate General's School, 1953-56; Command and General Staff College, 1956-57; Executive Officer, Staff Judge Advocate Section, 3d Infantry Division, Fort Benning, Georgia, and Wurzburg, Germany, 1957-59; Staff Judge Advocate, 8th Infantry Division, Germany, 1959-61; Armed Forces Staff College, Norfolk, Virginia, 1961-62; Assistant Chief, Military Justice Division, Office of The Judge Advocate General, 1962; Chief, Government Appellate Division, U. S. Army Judiciary, 1962-64; U. S. Army War College, 1964-65 (received M.A. in International Affairs from George Washington University in 1965); Special Assistant to The Judge Advocate General for Military Law, 1965-68; Executive, Office of The Judge Advocate General, 1968-69; Staff Judge Advocate, Headquarters, United States Military Assistance Command, Vietnam, 1969; Assistant Judge Advocate General for Civil Law, 1969 to date.

During 1965-68, Colonel Babbitt was the Army representative on the tri-service committee charged with making the first complete revision of the *Manual for Courts-Martial*, 1951.

Colonel Babbitt is a member of the Bars of Montana, the Court of Military Appeals, and the United States Supreme Court. He holds the Distinguished Service Medal, the Silver Star, the Bronze Star with two Oak Leaf Clusters, the Army Commendation Medal, the Joint Service Commendation Award, and the Combat Infantryman's Badge.

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

1. (8, MCM) ***O'Callahan v. Parker*** **Considered. Constitutional Limitations On Court-Martial Jurisdiction Announced In *O'Callahan* Are Not Applicable To Courts-Martial Held Outside Territorial Limits Of The United States.** *United States v. Keaton*, No. 22,238, 14 Nov. 1969. Accused was convicted by a general court-martial convened in the Republic of the Philippines of one specification of assault with intent to commit murder (art. 134). He was sentenced to a dishonorable discharge, confinement at hard labor for eight years, forfeiture of $75 per month for 96 months, and reduction. Intermediate appellate authorities affirmed the findings and sentence without change. The Court granted review to determine the validity of accused's conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1).

The Court first noted that the all-pervading factor underlying the *O'Callahan* decision is

contained in the following statement by the Supreme Court:

> [W]e see no way of saving to servicemen and servicewomen in any case *the benefits of indictment and of trial by jury,* if we conclude that this petitioner was properly tried by court-martial. [Emphasis supplied by the court.]

In short, *O'Callahan* holds that since in a military trial an accused is not accorded the constitutional benefits of indictment and trial by jury, a court-martial is without jurisdiction to proceed if the offense, though proscribed by the Uniform Code of Military Justice, is not "service connected." Essential to this holding is the fact that the crime must be cognizable in the civil courts of the United States, either State or Federal, and that such courts be open and functioning.

Citing *Reid v. Covert,* 354 U.S. 1 (1957), the Court noted that because accused's offense occurred in a *friendly* foreign country, constitutional principles were applicable.

In this case there was in effect, at the time of trial, a treaty between the United States and the Government of the Philippines respecting the exercise of jurisdiction in criminal matters. This treaty granted to military authorities of the United States the right to hold courts-martial in the Republic of the Philippines in certain instances. The treaty provided for concurrent jurisdiction over United States servicemen insofar as a particular offense was proscribed by the laws of

Under the terms of the treaty, inasmuch as the offense charged against accused was proscribed by article 134 of the Code, and since his victim was another serviceman, military authorities of the United States had the primary right to exercise jurisdiction in this case. The Court then noted that a majority of the Court has held that an offense by one serviceman against another is "service connected" regardless of where or under what circumstances the offense was committed. *United States v. Nichols,* 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested 69-16 JALS 2), and cases cited therein. For the purpose of this opinion, the Court stated that it could leave the matter there. However, in light of the provision in the treaty by which the Philippine Government could waive its primary right to exercise jurisdiction over offenses which were clearly not "service connected," the question arose, and the Court determined to decide the issue of whether an accused is entitled, in those instances, to the benefits of indictment and trial by jury.

The Court queried: "If, under the Constitution, a serviceman who commits a nonservice-connected offense abroad is entitled to the benefits of indictment and trial by jury, how can these benefits be afforded him?" The Court noted that the constitutional protections of this nature are available only through the civil courts of the United States and only military courts are authorized to function within the Republic of the Philippines. Since there are no Article III courts established in the Philippines, the only alternative would seem to be to return an accused to the United States for trial. While it is constitutionally permissible to try United States citizens for crimes committed abroad, the number and kind of offenses in which such action can be taken is limited, inasmuch as the authority of Congress to legislate for trials in Article III courts extends only to those matters relating to the exercise of a power granted as to some matter within the jurisdiction of the United States. Congressional authority to provide for trial of service personnel by court-martial, however, stems from Article I, and insofar as the Court was aware, venue does not lie in Article III courts for those offenses pro-

scribed in the Uniform Code which are not, at the same time, violations of the laws enacted under the authority of Article III. It would appear then that there are a large number of Code offenses which could be committed by a serviceman overseas for which he could not be returned to the United States for trial, nor be given the benefits of indictment and trial by jury, the main thrust of *O'Callahan,* for the simple reason that the offenses are not cognizable in any civil court of the United States.

The Court of Military Appeals, however, did not believe that the Supreme Court, in *O'Callahan,* intended such a result. The Court stated:

> [I]t seems clear that *foreign trial* by court-martial of all offenses under the Code committed abroad, including those which could be tried by Article III courts if committed in this country, is a valid exercise of constitutional authority.

Therefore, the Court held that the constitutional limitations on court-martial jurisdiction announced in *O'Callahan v. Parker, supra,* were inapplicable to courts-martial held outside the territorial limits of the United States. The decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred. Judge Darden concurred in the result.)

2. (8, MCM) ***O'Callahan v. Parker* Considered. Limits On Court-Martial Jurisdiction Announced In *O'Callahan* Are Not Applicable To Offenses Committed In The Federal Republic Of Germany.** *United States v. Easter,* No. 22,278, 14 Nov. 1969. Accused was convicted by a general court-martial convened in the Federal Republic of Germany. The Court granted review to determine whether the constitutional limitations on court-martial jurisdiction laid down by the Supreme Court in *O'Callahan v. Parker,* 895 U.S. 258 (1969, reported 69-13 JALS 1), applied to this conviction. Initially, the Court noted that subsequent to its grant of review in this case, it decided in *United States v. Keaton,* 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested *supra*), that the holding in *O'Callahan* did not apply to a court-martial held in the Philippines for an offense committed in that country. While the particular offense in *Keaton* could be described as "service connected" within the meaning of *O'Callahan,* the Court held, for the reasons set forth therein, that all offenses under the Uniform Code of Military Justice, committed in a foreign country, were cognizable in a court-martial held in that country.

The Court noted that the authority to try accused by court-martial, in the Federal Republic of Germany, was granted under the NATO Status of Forces Agreement. Because the offense of which accused was convicted occurred in the civilian community, a waiver of jurisdiction was obtained from the German authorities.

The Court held that what it had said in *United States v. Keaton, supra,* with reference to the constitutional limitations on court-martial jurisdiction laid down in *O'Callahan,* applied equally to this case. Accordingly, the Court held that the court-martial had jurisdiction to try accused. The decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred. Judge Darden concurred in the result.)

Accord: *United States v. Higginbotham,* No. 22,326, 14 Nov. 1969, and *United States v. Stevenson,* No. 22,288, 14 Nov. 1969.

3. (8, MCM) ***O'Callahan v. Parker* Considered. Constitutional Limitations On Court-Martial Jurisdiction Announced In *O'Callahan* Are Not Applicable To Courts-Martial Held Outside Territorial Limits Of The United States.** *United States v. Gill,* No. 22,398, 28 Nov. 1969. Accused was convicted by general court-martial, convened in the Federal Republic of Germany, of the offense of robbery of two German nationals. He was sentenced to a bad-conduct discharge, total forfeitures, confinement at hard labor for six months, and reduction. Intermediate appellate authorities affirmed the findings and sentence, with-

out change. The Court granted review to determine the validity of accused's conviction in light of the Supreme Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-18 JALS 1).

The Court first noted that authority for trial by courts-martial in the Federal Republic of Germany is contained in the NATO Status of Forces Agreement. In *United States v. Keaton*, 19 U.S.C.M.A. ——, 42 C.M.R. —— (1969, digested *supra*), the Court held that all offenses coming within the purview of the Uniform Code of Military Justice committed in a foreign country were triable by court-martial in that country. See also *United States v. Easter*, 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested *supra*), and *United States v. Stevenson*, 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested *supra*). The Court held that for the reasons stated in these recent decisions, which were equally applicable to this case, the constitutional limitations on court-martial jurisdiction referred to in *O'Callahan* did not deprive the court-martial of jurisdiction when trial was held in a foreign country.

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

4. (8, MCM) ***O'Callahan v. Parker* Considered. Crime By One Serviceman Perpetrated Against Another Serviceman Is "Service Connected."** *United States v. Everson*, No. 22,318, 14 Nov. 1969. Accused was convicted by special court-martial of one specification each of assault with a dangerous weapon and careless discharge of a firearm under circumstances such as to endanger human life (arts. 128 and 134, respectively). He was sentenced to a bad-conduct discharge and confinement at hard labor for three months. The Court granted review 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).

The record reflected that the offenses occurred in front of accused's off-post civilian residence and that the victim of the assault was a serviceman. The Court noted that for the purposes of this opinion the two offenses, though not multiplicious, must be considered together, for the victim was shot in the neck when the accused carelessly discharged the firearm.

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

> [I]t has now become the law of this Court that where an offense cognizable under the Code is perpetrated against the person or property of another serviceman, regardless of the circumstances, the offense is cognizable by court-martial. . . .

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

5. (8, MCM) ***O'Callahan v. Parker* Considered. When Military Rank Is The Moving Force In Victimizing The Civilian Community The Offense Is "Service Connected."** *United States v. Fryman*, No. 22,318, 14 Nov. 1969. In accord with his plea, accused was convicted by a general court-martial of various offenses including one of dishonorably failing to pay a debt (art. 134). His sentence consisted of a bad-conduct discharge—reduced by the convening authority from a dishonorable discharge—total forfeitures, and confinement at hard labor for two years. The question presented to the Court was whether the court-martial had jurisdiction over the article 134 offense in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-18 JALS 1). The Court concluded that it did.

The specification in question alleged in part that accused "being indebted to the Har-

Corps officer accused was able to run up his bill by charging meals, drinks, telephone calls, and similar expenses.

Citing *United States v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969, digested 69-25 JALS 3); *United States v. Morisseau*, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969, digested 69-25 JALS 4); and *United States v. Hallahan*, 19 U.S.C.M.A. ——, 41 C.M.R. —— (1969, digested 69-26 JALS 4), the Court held that when military rank is the moving force, as it was in this case, in the victimizing of the civilian community the offense committed is service-connected within the meaning of *O'Callahan v. Parker, supra.*

The decision of the board of review was affirmed. (Opinion by Judge Darden in which Judge Ferguson concurred.)

Chief Judge Quinn concurred in the result for the reasons set out in his dissent in *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969, digested 69-22 JALS 3).

6. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Lacked Jurisdiction Over Sex Offenses Committed Off-Base.** *United States v. McConigal*, No. 22,407, 28 Nov. 1969. Accused was convicted by general court-martial of one specification each of sodomy and indecent liberties with a child under the age of sixteen (arts. 125 and 134). He was sentenced to confinement at hard labor for five years and reduction to the grade of airman basic. Intermediate appellate authorities affirmed the findings and sentence without change. The Court granted review to determine the validity of accused's conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1).

The victim of the alleged offenses was the dependent daughter of a serviceman and the incidents took place in the latter's civilian residence. The Court held that its decision in this case was governed by its recent holding in *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969, digested 69-24 JALS 4). Here, as in *Shockley*, the Court found no "service connection" between the charged offenses and accused's military duties. *Cf. United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969, digested 69-24 JALS 1), and *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 359 (digested 69-22 JALS 8).

Accordingly, the decision of the board of review was reversed. The charges and specifications were ordered dismissed. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review for the reasons set forth in his dissent in *United States v. Borys, supra.*

7. (120, 121, MCM) **Failure To Give Notice To Accused's Counsel Of Time Of Sanity Board's Hearing Is Not Prejudicial Error *Per Se*.** *United States v. Hayes*, No. 22,049, 14 Nov. 1969. A general court-martial found accused guilty of robbery and escape from custody (arts. 122 and 95, respectively). He was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, confinement at hard labor for 12 months, and reduction to E-1. Intermediate appellate authorities affirmed the findings and sentence.

The record reflected that two days after accused's apprehension, his civilian attorney filed notice of his appearance as accused's individual defense counsel. On the same date an Army psychiatrist, Captain *W*, examined accused and concluded that he was mentally responsible and had the capacity to act in his own behalf. Nearly three months later, accused's civilian counsel requested that a sanity board evaluate accused. The counsel included no request that he be notified of the time of such evaluation. A week later a sanity board consisting of Captain *W* and his superior officer, Major *F*, was convened. The record contained nothing to indicate that either the civilian or the military counsel of accused was notified that the board was to be held. The findings of the board were substantially the same as those made by Captain *W* at the

time of his first evaluation. At the trial, Major *F* testified that in his opinion accused was mentally responsible at the time of the offenses. An expert psychologist called by the defense testified to the contrary. No issue was made at trial of the lack of notice that the sanity board was meeting or the lack of a transcript or tape recording of the board's proceedings.

The Court granted review in this case to determine whether accused was prejudiced because his counsel was not notified of the time when the sanity board was to examine accused. A related question was whether, in the absence of such notice, other procedural safeguards such as a transcript or tape recording of the sanity board proceedings were required. The defense appellate argument was that an accused should have the opportunity to consult with and to receive the assistance of his counsel before a psychiatric examination in order that he may later respond fully and intelligently to questions. Notice, it was argued, was a necessary prerequisite. In pressing these arguments, counsel for accused relied strongly on *United States v. Wade*, 388 U.S. 218 (1967), wherein it was held that a lineup is a critical stage of the prosecutorial process and that the right to counsel attaches at that time. The Court, however, cited *Wax v. Pate*, 409 F.2d 498 (7th Cir. 1969), for the proposition that the "critical stage" rationale of *Wade* has no application to sanity examinations. The Court, however, also noted that in *Wax* it was recognized that there may be situations in which psychiatric examination was conducted in the absence of counsel in a manner that could prejudice an accused's right to [effective] counsel and that if actual prejudice was shown a new trial should be granted.

The Court next looked to determine whether accused could show actual prejudice. The Court first found that the record did not support the appellate defense argument that the purpose of the lineup or other procedural safeguards was [to insure] (1) that his client's mind is focused on his state of mind at the time of the offense,' [and] (2) that 'the accused's responses are not made in answer to questions outside the proper scope of the sanity board proceedings.'"

One argument remaining for the Court's consideration was whether accused's counsel was handicapped in his cross-examination by lack of notice or by the absence of any other procedural safeguards. After examining the record of trial, the Court concluded that this argument lacked merit. The Court found that there was extensive and effective cross-examination of the Army psychiatrist about the basis for the opinions of the sanity board. The Court could find no indication that accused had been prejudiced.

The Court concluded that in situations such as the one presented in this case notice of the time of a psychiatric examination should be furnished to the accused and to his counsel. The absence of such notice, however, is not prejudicial in itself without a specific showing of prejudice.

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

Judge Ferguson (concurring in the result) felt that he had no alternative but to concur in this case because of the Court's previous decisions in *United States v. Babbidge*, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969; digested 69-12 JALS 1); *United States v. Wilson*, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969, digested 69-18 JALS 1); *United States v. Sahell*, 18 U.S.C.M.A. 420, 40 C.M.R. 122 (1969, digested 69-18 JALS 2); and *United States v. Ross*, 19 U.S.C.M.A. [illegible] (1969, digested 69-27 JALS 2). He stated that

Military Justice. Included therein was a charge under article 80 that accused

> did, at DaNang Air Base, DaNang, Republic of Vietnam, on or about 9 February 1968, attempt, by threats of force and violence and with wrongful intent, to exercise control of an *aircraft in flight* in air commerce to wit: a Pan American Airways DC-6B aircraft transporting United States Military Personnel to R and R leave in Hong Kong, British Crown Colony.

For the reasons set forth below, the Court believed that accused's conviction could not be sustained.

The Court first noted that the particular offense was not directly proscribed by the Code. Rather, it seemed, from the specification, that accused was charged with aircraft piracy, prohibited by 49 U.S.C. § 1472(i), which provides in pertinent part:

> (2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft *in flight* in air commerce. (Emphasis added.)

The Court noted that the words "in flight" in the statute were not subject to varying interpretations for the legislative history of the law made it clear that the aircraft must be *in the air* in order for the offense of aircraft piracy to be committed. In this case, a stipulation of fact read into the record by trial counsel after findings revealed that the charged offense took place aboard the aircraft while it "was waiting to take on passengers." Despite accused's orders that the plane take off it never left the passenger area. In mitigation, accused testified in accordance with the stipulation. The Court found that this evidence in mitigation served to clarify the wording of the specification and reflected that neither the offense of aircraft piracy nor an attempt thereat could have been perpetrated. Both require, as an essential element of the offense, that the plane be airborne. Citing *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962), the Court held that under these circumstances the offense was legally impossible of commission.

The decision of the board of review affirming accused's conviction on the article 80 charge was reversed and ordered dismissed. The Court of Military Review was authorized to reassess the sentence on the basis of the remaining findings of guilty. (Opinion by Judge Ferguson. Chief Judge Quinn concurred in the result.)

Judge Darden (concurring in the result) agreed that the charge was not triable by court-martial. Judge Darden found a jurisdictional defect which required dismissal. Because the substantive offense was not an offense punishable by the Code, neither was an attempt to commit it punishable under article 80.

9. (83*a*, MCM; UCMJ art. 19) **Accused's Bad-Conduct Discharge Was Disapproved Because A Verbatim Record Was Not Made At His Special Court-Martial.** *United States v. Belarge*, No. 22,123, 28 Nov. 1969. Accused was convicted by special court-martial of three specifications of being absent without leave (art. 86). He was sentenced to a bad-conduct discharge, confinement at hard labor for six months, and forfeiture of $78.00 per month for a like period. The convening authority approved the findings and sentence but suspended execution of the punitive discharge for the period of confinement and six months thereafter with provision for automatic remission. Other appellate authorities affirmed without change. The Court granted review to determine the validity of accused's contention that the record of trial was not verbatim and hence a bad-conduct discharge could not be approved.

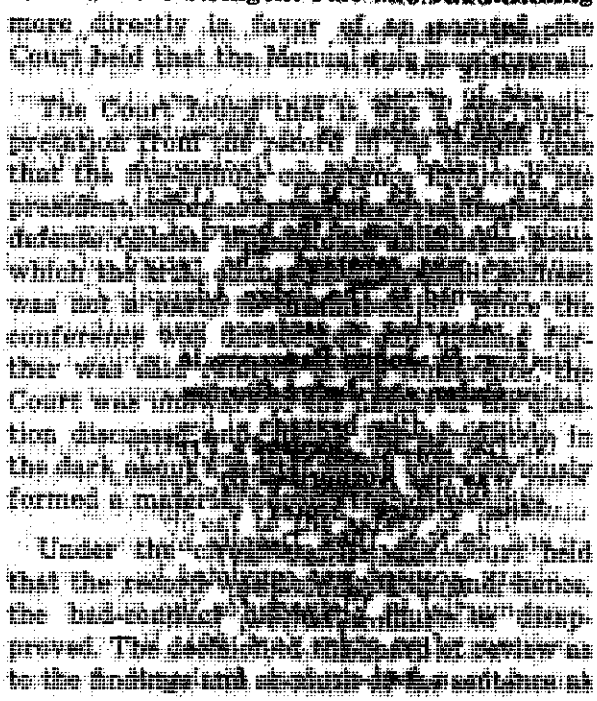
The basis for accused's contention that the record was not verbatim was based on the fact that during the presentencing procedure, and immediately after trial counsel had urged that the court sentence accused to a bad-conduct discharge, the president of the court announced: "The court will be recessed for about five minutes while members discuss a

point which the trial counsel brought up. (Both counsels [sic] approach the court)." When the court reopened five minutes later, no further reference was made to the conference.

According to appellate defense counsel, since an unrecorded side-bar conference was conducted, a bad-conduct discharge could not be adjudged under the provisions of article 19, UCMJ. Article 19 provides in pertinent part that:

> A bad-conduct discharge may not be adjudged unless a *complete record* of the proceedings and testimony has been made. . . . [Emphasis supplied by the Court.]

The Court noted that in *United States v. Whitman*, 3 U.S.C.M.A. 179, 11 C.M.R. 179 (1953), it analyzed this portion of article 19 in connection with a claim similar to the one in the present case. There, the Court stated that while the Code referred to a *complete record*, paragraph 83*a*, Manual for Courts-Martial, United States, 1951, contained a requirement that a verbatim transcript must be made in cases in which a bad-conduct discharge is adjudged. Since the Manual set forth a more stringent rule and one falling



did not include a bad-conduct discharge was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) noted that the requirements of paragraph 83*a*, MCM, *supra*, has been applied in a manner that permits brief unrecorded conferences between the law officer and counsel if these conferences are designated as "side-bar" or "bench" conferences. This procedure was permitted in *United States v. Ransom*, 4 U.S.C.M.A. 195, 15 C.M.R. 195 (1954). Apparently the difference between *Ransom* and the case at bar was that in the instant case the conference occurred within the hearing of the court members. Judge Darden, however, noted that counsel for accused was present. He would trust him to object to or call to the attention of appellate authorities anything that was said or done in such a conference constituting error that "materially prejudices the substantial rights of the accused," as the statutory standard required. Article 59(a), UCMJ.

Judge Darden then noted that even if the decision was to be reversed, he would permit a rehearing. He was unwilling to decide that because of what constituted a technical error, a member of the armed forces with three unauthorized absences may not be awarded a punitive discharge that the court-martial and other appellate authorities thought he deserved.

10. (70*b*, 75*c*(2), MCM) Accused's Guilty Plea Was Provident. Instructional Error Required Reversal As To The Sentence. *United States v. Tackett*, No. 22,045, 28 Nov. 1969. Accused was convicted by special court-martial of one specification of being absent without leave (art. 86). He was sentenced to a bad-conduct discharge, confinement at hard labor for six months, and forfeiture of $78.00 per month for a like period. Intermediate appellate authorities affirmed the findings and sentence but the officer exercising general court-martial jurisdiction suspended the punitive discharge for the period of confinement and twelve months thereafter with provision

for automatic remission. The Court granted review to consider whether the president erred prejudicially in his instructions on sentence and whether accused's plea of guilty was provident in view of the president's failure to delineate the essential elements of the offense when inquiring into the plea.

Turning initially to the question of the providence of accused's plea, the Court noted that the issue was granted prior to its decision in *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969, digested 69-22 JALS 1), which is applicable to cases tried before 29 August 1969. In light of its opinions in *Care*, the Court held that the accused's plea in this case was provident.

With reference to the contention that the president erred in his instructions on sentence, the record reflected that after findings trial counsel read to the court the personal data concerning accused from the charge sheet. After advising the court that he had no evidence of previous convictions, trial counsel stated he had nothing further to offer. Accused then elected to present evidence in mitigation by making an unsworn oral statement. In this statement accused stated that he desired to get out of the service and went absent without leave because he objected to the war in Vietnam and did not feel that he should lay down his life for today's society being such as it is. Defense counsel then announced that he had nothing further to offer.

In his instructions on sentence, the president told the court members, in part:

> In exercising your discretion in determining the sentence to be adjudged, you should consider all the facts and circumstances of the case. In this regard, you may consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after the findings; the reputation or the background and character of the accused; the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits which characterize a good Marine; and the nature and duration of pretrial restraint, if any.

Appellate defense counsel contended that the above quoted instruction was inappropriate in this case since no evidence of this nature was presented; it, in effect, was tantamount to a comment on the failure of the accused to testify as to the matters listed therein; and implied, or at least allowed the court members to infer, that no such evidence was presented because it would have been unfavorable to accused. In *United States v. Wheeler*, 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967), the Court "urge[d] law officers carefully to shape their instructions on the sentence to the *evidence presented* and to inform the court members fully as to their responsibilities." (Emphasis supplied by the Court.)

The Court noted that the complained of instruction in this case referred to matters that an accused *may* offer in evidence in mitigation, according to paragraph 75c(2), Manual for Courts-Martial, United States, 1951. The Court held that since accused did not offer evidence of this nature, it was error for the president to call it to the attention of the members of the court-martial.

Since, in this case, the Court had no way of measuring the effect of the error on the deliberation of the court members, the Court held that reversal as to the sentence was in order. *United States v. Duckworth*, 13 U.S.C.M.A. 515, 33 C.M.R. 47 (1963). Accordingly, the decision of the board of review as to sentence was reversed. The record of trial was returned to The Judge Advocate General and a rehearing on sentence was authorized. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

11. (20, MCM) Accused's Pretrial Confinement Was Not Authorized By Applicable Regulations. *United States v. Jennings*, No. 22,066, 28 Nov. 1969. Despite his plea to the contrary, accused was convicted by a general court-martial in Vietnam for the willful disobedience of an order (art. 90). He was sentenced to a bad-conduct discharge, confine-

ment at hard labor for two years, forfeiture of $50 per month for the same period, and reduction to E-1. The Court granted review to consider whether accused's pretrial confinement was authorized by applicable regulations.

The record reflected that after accused refused to join his battalion in the Khe Sanh area of South Vietnam, he was brought before his battalion commander for "office hours." This officer ordered accused's return to the rear, reportedly saying, "Jennings, I'm going to put you in the Danang brig and for the simple reason that this is a problem in this Battalion and I want it knocked off." As a consequence, accused was held in pretrial confinement during the period from 2 July 1968 to 4 September 1968, and then in a restricted status until 17 September 1968, the day of trial.

The contention on appeal was that accused's pretrial confinement violated not only article 13, Uniform Code of Military Justice, but was in derogation of both Third Marine Amphibious Force Order 1640.1D and Third Marine Division Order P5800.10. The board of review considered the question and decided that the division order made pretrial confinement discretionary and that it was proper here "because of the seriousness of the offense." The Court of Military Appeals disagreed.

The Court first dismissed the argument based on article 13 inasmuch as this provision is a limit on the nature of confinement and not on the discretion to confine.

The Third Marine Amphibious Force Order referred to authorized pretrial confinement if (1) the accused is charged with a capital offense or (2) there is evidence that clearly indicates the accused's release would present "a distinct threat to life, limb or property." The Third Marine Division Order similarly phrased the standard which permitted pretrial confinement if (1) reasonably necessary to insure accused's presence at trial or (2) because of the seriousness of the offense. The Court noted that threat to the safety of life, limb, or property was to be used as a guide in interpreting the extent of the authority to confine under the second criterion. In further elaboration, the Order declared "[c]rimes normally are considered 'serious' enough to require prolonged pretrial confinement for the protection of society only when they involve violence against the person or property of another *and* are punishable, pursuant to the provisions of paragraph 127c, MCM, 1951, by confinement in excess of five years."

The Court first found that accused's confinement was not instituted to secure his presence for trial. Furthermore, the offense in question was treated as noncapital, the court-martial having been instructed that maximum confinement was not to exceed five years. Therefore, the Court's comparison of the two orders and of paragraph 20 of the Manual for Courts-Martial was reduced to a consideration of the single remaining norm in each. In this connection, paragraph 20 provides that pending trial, confinement is not to be imposed except to insure accused's presence at trial or because of the seriousness of the offense.

The Manual rule permits confinement because of the seriousness of the offenses involved. The Commanding General, Third Marine Amphibious Force, has within his authority constricted the right of confinement to those cases involving a "distinct threat to life, limb and property." The division order imposed yet another limitation. "Seriousness of the offense," appeared to be the yardstick of this order but when it was read in its entirety, the Court believed that it imported seriousness only to crimes that threatened life, limb, or property and that are punishable by confinement at hard labor in excess of five years. In sum, the more subordinate the command, the less authority the grant of authority to confine.

The Court held that although accused's conduct would cause extreme concern in com-

bat, it was unconvinced that it constituted a threat to life, limb, or property in the sense those terms were used in the applicable regulations. His conviction was not for a crime of violence; the maximum permissible punishment was not in excess of five years; and his disobedience was in no way accompanied by violence. The Court stated that it was not unaware of the serious consequences of accused's conduct. It was inclined to give much weight to determinations by responsible commanders who are close to combat. In this case, however, the confinement seemed inconsistent with the regulations of the commanders who were on the scene and informed of local conditions.

The Court noted that accused's guilt of the charge of disobedience remained unimpeached. He was, however, entitled to a meaningful reassessment of the sentence. The Court stated that this could be achieved by disapproval of all confinement remaining in the sentence that included hard labor for two years, now little more than half served. The benefit from this action would, therefore, be substantial.

Accordingly, the decision of the board of review as to the sentence was reversed. The Court of Military Review was authorized to reassess and affirm a sentence that did not include further confinement at hard labor. (Opinion by Judge Darden in which Judge Ferguson concurred.)

Chief Judge Quinn (dissenting) did not read the division order as an absolute prohibition against pretrial confinement, except when the offense involved the life or property of another person and was punishable by confinement at hard labor for five years. In his opinion, the nature of the offense and the grave danger it presented to the discipline of the command provided ample justification for the decision to confine the accused. He would, therefore, have affirmed the decision of the board of review.

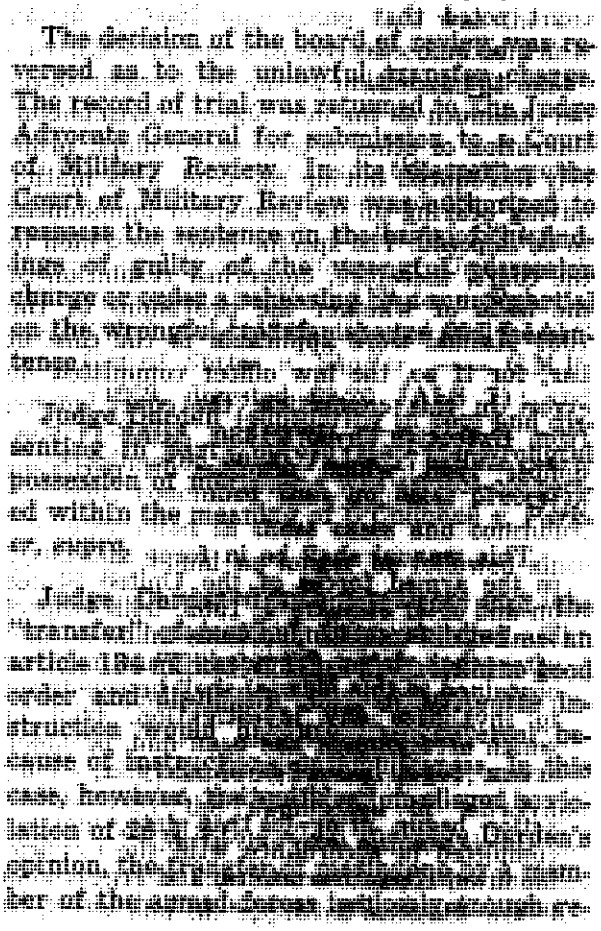
12. (UCMJ art. 134) Accused's Conviction For Transferring Marihuana Was Reversed.

United States v. Adams, No. 21,594, 21 Nov. 1969. On initial review of accused's conviction by general court-martial of four offenses, in violation of article 134, UCMJ, the Court set aside and dismissed for insufficient evidence, two specifications of alleged pandering. *United States v. Adams*, 18 U.S.C.M.A. 310, 40 C.M.R. 22 (1969, digested 69-11 JALS 7). Thereafter, accused petitioned for a rehearing. The Court granted the petition to consider the applicability of *Leary v. United States*, 395 U.S. 6 (1969), and *O'Callahan v. Parker*, 395 U.S. 358 (1969, reported 69-13 JALS 1), to the findings of guilty of wrongful possession of marihuana and unlawful transfer to another serviceman "not pursuant to a written order" from the transferee as required by 26 U.S.C. § 4742.

The Court first noted that in *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969, digested 69-28 JALS 1), it determined that wrongful possession of marihuana on or off a military installation is a service-connected act and, therefore, not subject to the constitutional limitation on court-martial jurisdiction announced in *O'Callahan*. Similarly, in *United States v. Rose*, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969, digested 69-25 JALS 7), the Court concluded that unauthorized delivery or transfer to another serviceman of dangerous drugs is service-connected within the meaning of the *O'Callahan* decision. In each of these cases, the premise for the Court's decision was that transactions in narcotics, marihuana, and dangerous drugs may, in particular circumstances, be detrimental to the "health, morale and fitness for duty of persons in the armed forces."

Whether an act is prejudicial to good order and discipline in particular circumstances is a question of fact for the court members, and they "must find that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." The Court noted that such an instruction was given as to the possession charge but not in regard to the wrong-

ful transfer charge. The Court found, therefore, that whether it disregarded the reference to 26 U.S.C. § 4742 in the specification as surplusage and treated the offense alleged as conduct to the prejudice of good order and discipline, or whether it gave effect to the allegation as an essential part of the specification, reversal of the findings of guilty was required. As a violation of the transfer provisions of 26 U.S.C. § 4742, the wrongful act involved no circumstance to distinguish it as having military significance and it would not, therefore, be triable by court-martial. As an offense constituting conduct to the prejudice of good order and discipline, the specification required appropriate instructions to that effect. Since reversal was necessary for either of these reasons, the Court did not determine whether the certificate of transfer required by 26 U.S.C. § 4742 involved self-incrimination as a transferee under the *Leary* case.



lated to the use and possession of marihuana to retain military jurisdiction. Judge Darden, therefore, found it necessary to reach the granted issue and determined the effect of *Leary v. United States, supra.*

In *Leary* the United States Supreme Court decided that a timely and proper assertion of the privilege against self-incrimination provided a complete defense to prosecution of the transferee under the Marihuana Tax Act, 26 U.S.C. § 4744(a)(2). This section of the Act makes it unlawful for a transferee who is required to pay a transfer tax to acquire or otherwise obtain marihuana without having paid such tax, or to transfer, conceal, or facilitate transportation or concealment of marihuana acquired or obtained without having paid the tax. In this case, however, the accused was the transferor. As the transferor, Judge Darden believed that accused was outside the scope of *Leary v. United States, supra.* Accordingly, Judge Darden would have affirmed the decision of the board of review.

Judge Ferguson (concurring in the result) agreed that the wrongful possession of marihuana by a serviceman, whether on or off base, is "service connected" within the meaning of *O'Callahan v. Parker, supra,* and hence, triable by court-martial. Next, Judge Ferguson agreed with Judge Darden that since the specification alleging the unlawful transfer of marihuana was laid under that portion of article 134 of the Code relating to crimes and offenses not capital, the law officer was not obligated to instruct the court that, in order to convict, it must find that the charged offense was prejudicial to good order and discipline within the service. Judge Ferguson, however, then disagreed with Judge Darden and found that under *Leary v. United States, supra,* accused's conviction under the transfer charge must be reversed. He did not agree with Judge Darden that a distinction could be drawn between the transferor and the transferee under 26 U.S.C. § 4742. Accordingly, he concurred in the result reached by Chief Judge Quinn. He also would reverse

the decision of the board of review as to the transfer charge.

Accord: *United States v. Wysingle,* No. 21,597, 21 Nov. 1969.

13. (76*b*(2), MCM) **President's Failure To Instruct On Procedure To Be Followed In Voting On Sentence Constituted Reversible Error.** *United States v. Conner,* No. 22,329, 14 Nov. 1969. Accused was convicted of one specification each of being absent without leave, willful disobedience of an order of a superior officer, willful disobedience of an order of a superior noncommissioned officer, and wrongful possession of marihuana (arts. 86, 90, 91, and 134, respectively). He was sentenced to a bad-conduct discharge, confinement at hard labor for four months, and forfeiture of $97 per month for four months.

In reversing accused's conviction, the Court cited its recent decisions in *United States v. Johnson,* 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969, digested 69-19 JALS 3), and *United States v. Newton,* 18 U.S.C.M.A. 562, 40 C.M.R. 274 (1969, digested 69-22 JALS 4), and held that the president of the special court-martial erred to the substantial prejudice of accused by failing to instruct the court that when voting on proposed sentences, it should begin with the lightest proposal and continue in this manner until a sentence was adopted by the concurrence of the required number of members.

The record of trial was returned to The Judge Advocate General. A rehearing on sentence was authorized. (Opinion by Judge Kilday in which Chief Judge Quinn and Judge Darden concurred.)

III. COURT OF MILITARY REVIEW DECISIONS.

1. (76*a*(2), MCM) **Paragraph 76*a*(2), MCM, Is Not *Ex Post Facto* In Nature.** *United States v. Dowdy,* CM 420596, 8 Oct. 1969 (*En banc* hearing). Conviction: robbery, consistent with plea. Sentence: BCD, TF, two yrs CHL, and red E-1. The convening authority reduced the period of confinement to ten months, but otherwise approved the sentence.

Accused claimed that the law officer erred to his substantial prejudice by failing to instruct the court on the limited purpose for which evidence of pretrial confinement was received. Specifically, he argued that because the court was shown that he was placed in pretrial confinement some two months after the date of the offense, and that its consideration thereof was not instructionally limited to mitigation, the court was left free to speculate that the confinement had its roots in misconduct not charged, citing *United States v. Harrell,* ___ C.M.R. ___ (1969, digested 69-20 JALS 14) and *United States v. Underwood,* CM 420405 (unpublished, 12 Jun. 1969) which so held.

In this *en banc* hearing the opinion of the court noted that paragraph 76*a*(2), MCM, which became effective in January 1969, was unlike the provision in the predecessor Manual inasmuch as the new Manual permits consideration of other acts of misconduct, properly introduced during the trial, as a matter having bearing on the amount of punishment to be imposed. The specific issue presented to the court, therefore, concerned resolution of the issue of whether the provisions of the 1969 Manual were applicable to the case at bar, for if so, the law officer committed no error. In this connection, the court quoted from Executive Order 11430, dated 11 September 1968, which provides in pertinent part:

> This manual shall be in force and effect in the armed forces of the United States on and after January 1, 1969, with respect to all court-martial processes taken on and after that date: *Provided,* That nothing contained in this Manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to January 1, 1969, and any such investigation, trial, or other action begun prior to that date may be completed in accordance with the applicable laws, Executive orders, and regulations pertaining to the various armed forces in

the same manner and with the same effect as if this Manual had not been prescribed: *Provided further,* That nothing contained in this Manual shall be construed to make punishable any act done or omitted prior to the effective date of this Manual which was not punishable when done or omitted: *Provided further,* That the maximum punishment for an offense committed prior to January 1, 1969, shall not exceed the applicable limit in effect at the time of the commission of such offense: *And provided further,* That for cases arising under section 12 of the Act of May 5, 1950, 64 Stat. 147 (50 U.S.C. 740), the provisions of paragraph 110, Manual for Courts-Martial, United States, 1951, shall remain in effect.

The court noted that although the date of accused's offense was 29 November 1968, his trial began and was concluded on 8 March 1969. The court stated that in this case it was not dealing either with the creation of a new offense or an increase in authorized punishment. Therefore, the trial date was the decisive factor. Accordingly, the court held that the 1969 Manual was applicable and accused's error lacked merit.

In disposing of the issue, the court noted that it had carefully considered the *ex post facto* theory advanced in *United States v. Harrell* and *United States v. Underwood*, both *supra*, and also *United States v. Roberts*, ___ C.M.R. ___ (1969, digested 69-18 JALS, 19); *United States v. Shaffer*, ___ C.M.R. ___ (1969, digested 69-20 JALS, 7); and *United States v. Hatton*, ___ C.M.R. ___ (1969, digested 69-20 JALS, 7). The court, however, concluded that no legal precedent had been cited in these cases and concluded that they should not be followed since they did not accord with previously rendered substantial precedent on the point at issue. The court next quoted extensively from the decisions in *Thompson v. State of Missouri*, 171 U.S. 380 (1898) and *Wantuck v. California*, 269 F.2d 906 (9th Cir. 1959), and concluded that the application of paragraph 76*a*(2), MCM, in this case did not violate the *ex post facto* rule. Accordingly, the findings of guilty and the approved sentence were affirmed. (Chalk, J.; Westerman, C.J., Collins and Folawn, JJ., concurring.)

Judge Porcella, whom Bailey and Hagopian, JJ., joined concurred in the result. Judge Porcella considered that a change in restraint from some lesser form of confinement does not suggest uncharged misconduct and therefore did not agree with Judge Chalk's assumption of uncharged misconduct. Inasmuch as the opinion of the court, however, raised an *ex post facto* question, Judge Porcella determined to state his views. He found that the third sentence of paragraph 76*a*(2), MCM, United States, 1969 (a) was not *ex post facto* in nature, (b) became effective on 1 January 1969, and (c) applies to all trials held on or after the date irrespective of the date of the offenses.

Judge Stevens, whom Kelso and Nemrow, JJ., joined, concurred in part and dissented in part. Judge Stevens concurred in the affirmance of the finding of guilty but dissented as to sentence affirmance on two grounds. First, the evidence justifying an inference of uncharged offenses or acts of misconduct was not properly introduced in the case *for the purpose of establishing any offense or misconduct*; and second, the application of paragraph 76*a*(2), MCM, *supra*, to the evidence was oppressively retroactive, *ex post facto*, and thus violative, in spirit, of Executive Order 11480, *supra*.

Judge Kramer concurred in part and dissented in part. He concurred in the result only. He did not believe that "under the facts in this case, there was any *sua sponte* duty to instruct on the limited purpose of a *possible inference* of uncharged misconduct even had the trial been held prior to 1 January 1969. He also concurred in the view of Judge Stevens that retroactive application of paragraph 76*a*(2), MCM, is seriously contrary to the spirit of, but within the scope of the constitutional prohibition against *ex post facto* laws. Judge Kramer applied retroactively would be in the nature of an *ex post facto* statute relating to more than a

matter of mere evidence but to substantial rights as well.

Judge Rouillard concurred in part and dissented in part. He concurred only in affirming the findings of guilty. His dissent from affirmance of the sentence in this case was based upon his belief that retroactive application of paragraph 76*a*(2), MCM, in the circumstances in this case, violated the constitutional provision against *ex post facto* enactments.

2. PM (76, 140, MCM; UCMJ art. 31) No Warning Required For Voluntary Statements Not Initiated By The Government. Subsequent Statement, However, Was Inadmissible Where No Warning Was Given. *United States v. Russell,* CM 420936, 8 Oct. 1969. Conviction: desertion (art. 85). Accused had pled guilty to an unauthorized absence, not terminated by apprehension (art. 86). He was, however, convicted as charged. Sentence: DD, F $79 per mo for two yrs, two yrs CHL, and red E-1. The convening authority approved the sentence.

In this appeal, appellate defense counsel argued that accused's pretrial statements made to an FBI agent were inadmissible in view of the agent's failure to advise accused of his privilege against self-incrimination and his right to counsel. In this connection, the facts reflected the following: FBI Agent *A*, in his testimony for the prosecution, stated that acting upon the request of the military he went to accused's room to apprehend him for desertion. He knocked on the door and when accused opened it, the agent identified himself, pushed open the door, grabbed accused's arm, and told him that he was under arrest. When accused asked "for what," the agent said "desertion." Accused replied, "How can that be, I've already been discharged." The agent then asked accused, "Do you have any papers here?", and accused indicated that he did not and that he had misplaced them. *A* then took accused to the Armed Forces Police Detachment. There, the agent told Sergeant *B* that accused had told him that he had been discharged from the service, and that *B* should do something to verify this. *B* then asked accused when he had been discharged, and accused gave him a date by month and year.

In an out-of-court hearing concerning the admissibility of Agent *A*'s testimony, the law officer ruled that accused's statements were voluntary within the meaning of *United States v. Vogel,* 18 U.S.C.M.A. 160, 39 C.M.R. 160 (1969, digested 69-7 JALS 2), and therefore admissible.

Accused, however, in this appeal, asserted that the failure to warn him of his rights as required by *Miranda v. Arizona,* 384 U.S. 436 (1966), and *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), rendered inadmissible all statements thereafter made by him. The court's review of the evidence led it to the conclusion that accused's contentions were in part correct, that is, concerning his statements made in response to questions by Sergeant *B*.

The court found that accused unquestionably was in custody from the moment *A* spoke to him and grasped his arm. But not all statements uttered by an accused while in the custody of the police are inadmissible against him. Statements made by a suspect which are not prompted and self-induced are admissible. *United States v. Vogel, supra.* The court found that the evidence in this case showed that accused's statements to the FBI agent regarding his discharge were not uttered during an interrogation. The court determined, as a factual matter, that those utterances were voluntary in all respects.

On the other hand, the court found that the evidence clearly indicated that the subsequent conversation between accused and Sergeant *B* took place under such circumstances as would constitute an interrogation within the meaning of *Miranda* and *Tempia,* both *supra.* The sergeant, instead of becoming involved in the conversation with accused, should have given him appropriate advice as to his privilege against self-incrimination and his right to counsel. In the court's opinion, the admission in evidence of accused's statement to

Sergeant *B* were reversible error. See *United States v. Jones*, —— C.M.R. —— (1969, digested 69-11 JALS 11).

Accordingly, the court found that only so much of the findings of guilty as found accused guilty of absence without authority were correct in law and fact and should be approved. Reassessing the sentence, the court determined that only so much of the sentence as provided for a DD, F $45 pay per mo for one yr, one yr CHL, and red E-1 was correct in law and fact and should be approved. The findings and sentence, both as modified, were affirmed. (Nemrow, J.; Stevens, S.J., and Kelso, J., concurring.)

3. (8, MCM) *O'Callahan v. Parker* Considered. Court-Martial Lacked Jurisdiction Over Sex Offense. *United States v. Kester*, CM 421316, 6 Oct. 1969. Conviction: taking indecent liberties, at Cypress, California, with a female under sixteen years of age (art. 134); unauthorized absence (art. 86) and larceny (art. 121); in accord with pleas. Sentence: DD, F $73 per mo for 24 mos, two yrs CHL, and red E-1. The convening authority approved the sentence.

Citing *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1), *United States v. Borys*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3), *United States v. Prather*, 18 U.S.C.M.A. —, 40 C.M.R. —— (1969, digested 69-22 JALS 4), and *United States v. Henderson*, 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-24 JALS 1), the court agreed with appellate defense counsel that the court-martial lacked jurisdiction over the offenses. The court noted the factors in the case to provide the necessary service connection to invest a court-martial with jurisdiction over the offense. It was the court's view that any resulting prejudice to accused could be purged by reassessing the sentence on the basis of the remaining findings of guilty.

Accordingly, the court found the findings of guilty of the indecent liberties charge and its specification incorrect in law and ordered it dismissed. The remaining findings of guilty were correct in law and fact and were approved. Reassessing the sentence the court determined that only so much of the sentence as provided for F $73 per mo for nine mos, nine mos CHL, and red E-1 was correct in law and fact and should be approved. The findings of guilty and the sentence, both as modified, were affirmed. (Nemrow, J.; Stevens, S.J., and Kelso, J., concurring.)

4. (85, MCM) Error In SJA's Review Concerning The Maximum Sentence Required Curative Action. *United States v. Campbell*, CM 421345, 24 Sept. 1969. Accused was tried for larceny of morphine syrettes (Charge I), two specifications of assault with a dangerous weapon (Charge II), and wrongful use and possession of morphine (Charge III) (arts. 121, 128, and 184, respectively). He pleaded guilty to the specifications laid under Charges I and III and not guilty to the aggravated assault charges. He was found not guilty of the latter offense and guilty, in accordance with his pleas, of the other offenses. Sentence: BCD, F $80 per mo for one yr, one yr CHL, and red E-1. The convening authority approved the sentence but suspended the punitive discharge for the period of confinement with provision for automatic remission. In this appeal, the court found error in the staff judge advocate's post-trial review of the record of trial. The convening authority was advised that the maximum sentence based on correct findings was confinement for 16 years. In fact, the maximum sentence based on correct findings was confinement for 10 years. The court, citing *United States v. Doughty*, 24 C.M.R. 365 (1957), held that this error required curative action. The court was of the opinion that reassessment was appropriate under the circumstances.

The court found the findings of guilty correct in law and fact and determined that they should be approved. Reassessing the approved sentence, the court determined that only so much of the sentence as provided for a BCD, six months CHL, F $80 pay per mo for six

mos, and red E-1 was correct and should be approved. The findings of guilty and the sentence, as thus reassessed, were affirmed. (Kelso, J.; Stevens, S.J., and Nemrow, J., concurring.)

5. (85, MCM) **Possible Prejudice Resulting From Error In SJA's Review Concerning Maximum Sentence Was Resolved In Accused's Favor.** *United States v. Burleson,* CM 420972, 25 Sep. 1969. Conviction: two specifications of disrespectful behavior towards a superior commissioned officer and two specifications of willfully disobeying the same officer (arts. 89 and 90, respectively). Sentence: BCD, TF, and two yrs CHL. Honoring a pretrial agreement, the convening authority reduced the period of confinement at hard labor to one year, but otherwise approved the sentence.

Appellate defense counsel urged the court in this case to reassess the sentence. The record reflected that the staff judge advocate advised the convening authority that the maximum sentence based on correct findings of guilty included confinement at hard labor for 15 years. The law officer, however, had properly determined at the trial that the correct maximum term of confinement at hard labor was ten years and six months. The court held that it would resolve any doubt on the matter of prejudice in accused's favor and purge the same by reassessment of the sentence.

Accordingly, the court found the findings of guilty correct in law and fact and determined that they should be approved. Reassessing the sentence on the basis of the error noted, considered and the entire record, 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. (Nemrow, J.; Stevens, S.J., and Kelso, J., concurring.)

6. (73, 76*b*(2), MCM; UCMJ app. 8*a*) **Law Officer's Failure To Follow *Trial Procedure Guide* Was Error. Law Officer Erred In Not Tailoring His Instructions And In Failing To Instruct On Procedure To Be Followed In Voting On Sentence.** *United States v. Morrison,* CM 421163, 28 Aug. 1969. Conviction: unauthorized absence (art. 86), in accord with plea. Sentence: TF and one yr CHL.

Although accused waived representation by appellate defense counsel before the Court of Military Review, the court found that the record reflected certain errors, two of which required corrective action. Accused was represented at trial by the appointed assistant counsel, having consented on the record to the absence of the appointed defense counsel. The law officer, after properly advising accused of his rights, asked the assistant defense counsel the following question: "Have you acted as the accuser, investigation officer, law officer, or member of the court, or a member of the prosecution in this case?" Accused's assistant defense counsel responded in the negative and no further inquiry was made into this matter. The court noted that the *Trial Procedure for General Courts-Martial,* prescribed in Appendix 8*a*, Manual for Courts-Martial, United States, 1969, requires trial counsel to inquire whether "*any member* of the defense" has acted as the accuser, etc. The prescribed use of the quoted language is not limited to instances where more than one counsel representing the accused is (or are) present. The court thus found that the law officer erred in not including accused's other counsel within the scope of his inquiry. However, since the record disclosed no prohibited action by the absent appointed defense counsel, the court perceived no resultant prejudice to accused.

Next, the court found error in the law officer's presentencing instructions. After examining the instructions, the court found that they failed to comply with the frequently reiterated requirement in *United States v. Wheeler,* 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967), that the law officer delineate matters which the court-martial should consider in its deliberations on the sentence to be adjudged. Although the court found that the failure to tailor the instructions to the relevant matter was error under *Wheeler,* it did not examine the record for resultant prejudice in view of

the nature of the second instructional deficiency and the remedy which its correction required.

Finally, the court noted that the instructions did not include a direction to the effect that, when voting on proposed sentences, the court must begin with the lightest, as required by subparagraph 76*b*(2), *Manual, supra.* Citing *United States v. Johnson,* 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969, digested 69-19 JALS 3), and *United States v. Strachan,* 18 U.S.C.M.A. 438, 40 C.M.R. 150 (1969, digested 69-19 JALS 4), the court held that since the omission amounted to a denial of military due process and constituted plain error, it could not be cured by mere reassessment of the sentence but required reversal and sentence rehearing.

The court found the findings of guilty correct in law and fact and determined that the same should be approved. The findings of guilty were affirmed. The sentence, however, was incorrect in law and was set aside. A rehearing on the sentence was ordered. (Stevens, S.J.; Kelso and Nemrow, JJ., concurring.)

7. (76*b*(2), MCM) **Law Officer's Failure To Instruct On Procedure To Be Followed In Voting On Sentence Constituted Reversible Error.** *United States v. Hobbs,* CM 421069, 28 Aug. 1969. Convictions, absence without leave (art. 86), in accord with plea. Sentence, TF, and one yr, CHL. The convening authority approved the period of confinement but reduced the forfeiture to [illegible] for one year. A pretrial agreement was involved.

In this appeal, accused urged error relating to the instructions of the law officer with respect to the sentence. The instructions were deficient in two respects, citing *United States v. Wheeler,* 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967). The court found that the law officer erred in not instructing the matters which the court should consider in its deliberations. The court noted that in *United States v. Mabry,* 17 U.S.C.M.A. 285, 38 C.M.R. 83 (1967), the Court of Military Appeals indicated that the *Wheeler* error could be nonprejudicial where the matter presented in mitigation was limited and the court imposed a lenient sentence. However, because of the remedy required by the second instructional error, the court found that it need not decide this question.

Citing *United States v. Johnson,* 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969, digested 69-19 JALS 3), the court held that the law officer erred by not instructing the court-martial that it should vote on proposed sentence "beginning with the lightest," and that reversal of the sentence therefore was required.

The court found the findings of guilty correct in law and fact and determined that they should be approved. The findings of guilty were affirmed. The court found the sentence incorrect in law and fact and the same was set aside. A rehearing was ordered on the sentence. (Kelso, J.; Stevens, S.J., and Nemrow, J., concurring.)

8. (UCMJ art. 66(e)) **Error In Staff Judge Advocate's Advice Substantially Prejudiced Rights Of Accused.** *United States v. Barton,* CM 418078, 8 Sep. 1969. This case was before the panel for a second time. In the panel's previous capacity, as a board of review, it set aside certain findings of guilty, but affirmed other findings. It set aside accused's sentence and ordered a rehearing based on the affirmed findings of guilty. (CM 418078, *Barton,* unpublished, decided 30 Dec. 1968). The rehearing resulted in an approved sentence extending to one yr, CHL, and F $73 pay per mo for a like period of time.

After the opinion of the board of review was published the record of trial was transmitted to the original convening authority for appropriate action. Inasmuch as accused, by this time, was serving the confinement portion of his sentence in the Disciplinary Barracks, Fort Leavenworth, Kansas, the original convening authority transferred the case to the Commanding General, Fort Leavenworth, requesting the latter to assume jurisdiction

"to accomplish the order of the Board of Review." In his advice to the Commanding General, Fort Leavenworth, the staff judge advocate, in pertinent part, advised as follows:

> You are authorized to take any one of the following actions in this case:
>
> a. Refuse to accept jurisdiction in the case and return it to the original convening authority, or
>
> b. Order a rehearing as to the sentence only on the affirmed findings of guilty.

Citing article 66(e), UCMJ, and *United States v. Robbins*, 18 U.S.C.M.A. 86, 39 C.M.R. 86 (1969, digested 69-2 JALS 3), the court found error in the staff judge advocate's advice. Noticeably missing from the advice was that a third option was available to the convening authority, namely that of reaching a determination that a sentence rehearing was impracticable. Left for the court's consideration, then, was the question of whether this error precluded affirmance of accused's sentence or any part thereof. The court was convinced that it did.

The court noted that the advice procedure required by article 34, UCMJ, is not a mere formality, but rather an important pretrial protection for an accused. It embraces the statutory duty of the staff judge advocate which must be accomplished with precision and accuracy, and substantial defects in the advice may so prejudice a substantial right of an accused so as to require corrective action on appeal from an otherwise valid conviction. *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101, (1954). Tested in light of these principles, the court felt that it would seem that the error in the pretrial advice was of such a character as to require disapproval of the sentence without more. The court found, however, that it need not go that far for the record reflected other factors from which prejudice was manifest. At the time the convening authority referred the case for rehearing, accused had been in confinement for almost one year and three months. Moreover, during the year he had been confined in the disciplinary barracks, his conduct, efficiency, and attitude had so radically changed for the better that two of his "prisoner superiors" urged at the rehearing that he be restored to duty. The court thus found that it was clear that the omission in the pretrial advice was prejudicial because it was not beyond the realm of reason to conclude, as it concluded, that the convening authority might have pursued a different course of action but for the defective advice.

The court determined that no useful purpose would be served by ordering a second rehearing on sentence. Its action thus resulted in a conviction with no punishment. *United States v. Speller*, 8 U.S.C.M.A. 368, 24 C.M.R. 173 (1957). The findings of guilty were affirmed, but the sentence was set aside. (Chalk, S.J.; Collins and Folawn, JJ., concurring.)

9. (148*e*, MCM) Accused's Accomplice Was Not Rendered Incompetent As A Witness By The Fact That He Had A Promise Of Leniency For Himself. Trial Counsel's Argument Did Not Prejudice Accused. *United States v. DeStefano*, CM 420566, 29 Sep. 1969. Conviction: wrongful possession of marihuana and wrongful sale of marihuana (art. 134). Sentence: BCD, one yr, CHL, and TF.

Accused, in his first assignment of error, urged that the findings of guilty to the specification alleging the wrongful sale of marihuana be reversed as the only testimony against him on that charge was incompetent. Accused's argument was based on the fact that the sole witness against him on that charge was Private *S* who, according to his testimony, had a signed agreement with the special court-martial convening authority, which provided for suspension of any confinement adjudged against *S* in return for his testimony against accused. As to this assigned error, the record disclosed that Private *S* was an accomplice to the wrongful sale of marihuana as he was the purchaser thereof from accused. Upon cross-examination by trial defense counsel, *S* testified that prior to accused's trial, he spoke with the trial counsel

who stated he might be able to "lighten" the sentence at his court-martial for wrongful possession of marihuana which was scheduled to be tried the day following accused's trial. He testified further that a convening authority (not the one who acted in this case) and apparently the trial counsel "signed an agreement, if I would plead guilty at my court-martial and tell them everything about this case [accused's], that all confinement will be suspended."

In rejecting accused's first assignment of error, the court noted that it is a settled rule of evidence that an accomplice, who is otherwise competent to testify, is not made incompetent by the fact that he has a promise of immunity or leniency for himself. What has disqualified such evidence has been a promise of immunity or leniency extended in return for testifying falsely, or in a particular way; *i.e.*, not truthfully and fully. *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964). In this case, the court found nothing in the agreement of leniency so as to make *S* incompetent as a witness. The court found the fact that he was to be tried by a court-martial on the following day, plead guilty thereat, and receive leniency if sentenced to confinement did not, singularly or collectively, provide any basis for determining that his testimony was directed in a particular manner, false or otherwise, or that he was compelled to testify other than to what he knew about the case.

In his next assignment of error, accused contended that the trial counsel unfairly prejudiced him in his closing argument on the merits when he argued that accused should be found guilty because the government had considered all of the defense testimony prior to trial, investigated the case thoroughly, and nevertheless brought accused to trial. The court, however, after examining the record and after placing trial counsel's argument in proper prospective, did not view it as extending to what appellate defense counsel urged was its effect. The court found that the argument complained of was in retort to the assertions by trial defense counsel that the pretrial investigation had not been conducted properly and that the government had been remiss in not following other investigative alternatives. Precipitated by the trial defense counsel, the retort was, in effect, that the pretrial processes had been proper. The court noted that although argument is to be based upon the evidence or reasonable inference therefrom, provocation often renders innocuous remarks made during argument by the prosecutor which would otherwise tend to be prejudicial. *United States v. Doctor*, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956). In view of the statements by trial defense counsel, the court did not find trial counsel's argument to be prejudicial to accused. Next the court stated that even assuming that the complained of argument went beyond proper bounds, trial counsel did not object at the time the remarks were made, and thus accused waived his right to assert the error on appeal. *United States v. Doctor, supra.* Furthermore, immediately following argument, the law officer instructed the court that "the accused is to be presumed innocent of the charges against him and neither the fact that charges have been preferred against an accused nor the fact that such charges have been referred to this court is any evidence of guilt." Accordingly, the court held that the alleged error was without merit.

The findings of guilty and the sentence, as approved, were affirmed. (Folawn, J.; Chalk, S.J., and Collins, J., concurring.)

10. (73, 154*a*(4), MCM) **Failure Of Law Officer To Instruct Sua Sponte On The Defense Of Reasonable Mistake Of Fact Was Error.** *United States v. McDowell*, CM 420183, 2 Sep. 1969. Conviction: wrongful appropriation of an automobile and presenting a false claim against the United States (arts. 121 and 132, respectively), despite pleas. Sentence: F $75 per mo for 12 mos, one yr CHL, and red E-1. The convening authority approved the finding of guilty as to the wrongful appropriation, but disapproved the finding of guilty as to the article 132 offense. He

approved only so much of the sentence as provided for F $75 per mo for six mos, six mos CHL, and red E-1.

In this appeal accused contended that the law officer erred to his substantial prejudice by failing to instruct the court on the defense of reasonable mistake of fact. The record reflected that accused, in his testimony relative to the wrongful appropriation charge, indicated that he had been granted permission to use the car involved in the charge by one who was in authority to grant such authorization. The permission was granted by *M*. Although accused knew *M* was not the owner of the car, accused further testified that *M* had told him that he (*M*) had been given permission by the owner to use the car. *M*, in turn, gave accused authority to use the car. Neither accused nor the military authorities were able to locate an individual named *M*. The owner, victim, however, stated that he had once known an individual named *M*, but had not seen him for approximately 20 months.

The court noted that although trial defense counsel did not request an instruction on the defense of mistake, it has consistently been held that when an affirmative defense is reasonably raised by the evidence, the law officer is required, *sua sponte*, to instruct thereon. The test of whether a defense is reasonably raised is whether the record contains some evidence to which a jury may attach credit if it so desires. *United States v. Simmelkjaer*, 18 U.S.C.M.A. 406, 40 C.M.R. 122 (1969, digested 69-18 JALS 2). The fact that the accused may be the sole source of his contention is of no consequence. *United States v. Remele*, 18 U.S.C.M.A. 617, 33 C.M.R. 149 (1968). Further, what weight, if any, is to be accorded to his testimony is for the members of the court-martial to determine, under proper instructions. *United States v. Kuefler*, 14 U.S.C.M.A. 186, 33 C.M.R. 348 (1968). Based on these principles, the court held that whether accused honestly believed he had the authority to use the vehicle, or whether *M* had the necessary authority, was a matter which should have been the subject of instructions. In the instant case, such instructional guidance was required, *sua sponte*, and the law officer's failure to so instruct was error.

The court next examined and rejected accused's claim that the court-martial was without jurisdiction to try him for the charged wrongful appropriation in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported 69-13 JALS 1). The court found the necessary "service connection" in that the automobile was owned by an active duty serviceman and was taken from an on-post parking lot.

The court found the findings of guilty and the sentence incorrect in law and fact and the same were set aside. A rehearing was ordered. (Per curiam; before Stevens, S.J.; Kelso and Nemrow, JJ.)

11. (70, MCM; UCMJ art. 76) **Accused's Plea Of Guilty Was Provident. Negotiated Plea Did Not Contravene Public Policy. Convening Authority Complied With Terms Of Pretrial Agreement.** *United States v. Mogardo*, CM 420242, 10 Sep. 1969. Conviction: willful disobedience of a superior officer (art. 90), in accord with plea. Sentence: BCD and one yr CHL. The convening authority approved the sentence.

The facts in this case reflect that on 4 November 1968, the commanding general of accused's division approved accused's offer to plead guilty, which provided in pertinent part:

> I further state and affirm that upon return to my unit from a period of emergency leave, I will return to the field and endeavor to perform my military duties as directed to the best of my ability. I offer to plead guilty as described above, provided the Convening Authority will suspend so much of my sentence as exceeds reduction to the lowest enlisted grade, and will grant me three (3) weeks emergency leave to visit my wife.

On 6 November 1968, accused pled guilty to the charge and specification of willful disobedience and was sentenced to BCD and one yr CHL. On 10 November 1968, accused was granted a 30-day emergency leave to return

to the United States. Following the 80-day leave accused returned to his unit. Thereafter, within the month of January 1969, it was alleged that accused was absent without authority and willfully disobedient.

On 9 February 1969, purportedly pursuant to article 72, UCMJ, a hearing was held "to vacate suspension." On 14 February 1969, the commanding general of accused's division approved his post-trial confinement after having been informed by his staff judge advocate that accused "has broken his promise to soldier by his unauthorized absences and disobedience and refusal to perform his military duties."

In this appeal, appellate defense counsel first contended that accused's plea of guilty was improvident. The record of trial, however, disclosed that the law officer had made a careful and complete inquiry concerning the providence of accused's plea. The law officer concluded, and the court agreed, that accused fully understood the meaning and effect of his plea and entered into it freely and voluntarily.

In their first assignment of error, appellate defense counsel also contended that a negotiated plea of guilty in return for "emergency leave" contravened public policy. The court found that if the emergency leave was the only element on accused's side of the argument, and if emergency leave were his only benefit from pleading guilty, his argument might have more weight. However, the first element of the agreement with the convening authority was to suspend the sentence to a BCD and one yr CHL, leaving reduction to the lowest enlisted grade as the only part of the sentence to be executed. Since accused was then serving in the grade of only Private E-2, the court found that this part of the agreement was in itself a generous concession by the convening authority, and for him to allow the additional emergency leave seemed to the court to be, if anything, a gratuity which was requested by accused himself. Accordingly, the court found the first assignment of error to be without merit.

In his second assignment of error accused contended that the action of the convening authority in approving the court-martial sentence of a bad-conduct discharge and confinement at hard labor for one year was a nullity because by the terms of the pretrial agreement the convening authority was to "suspend so much of the sentence as exceeds reduction to the lowest enlisted grade." Finally, accused argued that the 9 February 1969 proceedings "to vacate suspension" were a nullity since the convening authority did not take his action until 19 March 1969 and in point of fact accused's sentence was never suspended, such as to justify a vacation of the suspension for any reason. The court rejected the second and third assignments of error for the following reasons: Following the trial, and in conformity with the pretrial agreement, accused was granted leave and subsequently allowed to return to his unit without confinement. The convening authority never formally took action to suspend accused's sentence as agreed. The delay in formal suspension of the sentence was due in part, however, because of accused's misconduct after his return to active duty from emergency leave. The court found that this misconduct, consisting of five AWOL's, was contrary to accused's part of the pretrial agreement to "endeavor to perform [his] military duties to the best of [his] abilities." The court held that it was this misconduct by accused which precipitated proceedings to vacate the suspension and sentence in accordance with article 72, UCMJ. The court noted that although the convening authority did not take formal action to suspend accused's sentence, he did honor the agreement by allowing accused to take emergency leave and return to his unit in the field upon his return. The convening authority fully complied with the spirit of the terms of the pretrial agreement.

The findings of guilty and sentence were affirmed. (Westerman, C.J.; Kramer and Rouillard, JJ., concurring.)

12. (171, MCM) **MACV Directive 37-6 Did Not Punitively Apply To Accused In His Purchase Of Dollar Instruments.** *United States v. Benway* CM 420976, 12 Sep. 1969. Conviction: three specifications of violation of a general regulation and two specifications of absence without leave (arts. 92 and 86, respectively), in accord with pleas. Sentence: DD, TF, one yr CHL, and red E-1.

On 12 August 1969, the Army Court of Military Review affirmed the findings in this case and modified the sentence to include a BCD, TF, one yr CHL, and red E-1. In the instant decision, however, the court withdrew its decision of 12 August and reversed accused's conviction for violation of a general regulation. The court noted that the three specifications alleging violation of a general regulation asserted the unlawful purchase of over $200 in dollar instruments during different specific months, in violation of paragraph 38a, MACV Directive 37-6, entitled "Financial Administration Regulation of Currency and Operation of Military Banking Facilities."

In the recent decision of *United States v. Baker,* 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested 69-21 JALS 9), the Court of Military Appeals, in construing a similar regulation, held that the regulation did not apply to an accused and consequently reversed his conviction. In this case, the court found that the rationale in *Baker* was applicable and concluded that the provisions allegedly violated were directed to those concerned with accomplishing currency transactions and did not punitively apply to accused's purchase of dollar instruments.

Accordingly, accused's conviction for violation of a general regulation was reversed. The findings of guilty of being absent without leave were affirmed. Only so much of the sentence as provided for BCD, TF, six months CHL, and red E-1 were affirmed. (Per curiam; before Porcella, S.J.; Bailey and Hagopian, JJ.)

[Editor's Note: On 28 October 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 Court of Military Review correct in holding that MACV Directive 37-6 does not punitively apply to the appellee's purchase of dollar instruments?"]

13. (70*b*, 73, MCM) **An Instruction Which Permits Court Members To Use A Withdrawn Guilty Plea Is Patently Erroneous. Other Instructional Errors Were Also Present.** *United States v. Hollie,* CM 420727, 24 Sep. 1969. Conviction: accused was charged with intent to commit murder, and two counts of assault with a dangerous weapon. He pled guilty to assault and battery and guilty to one count of assault with a dangerous weapon. After both sides had presented their cases, the law officer, on his own motion, withdrew accused's guilty pleas and entered pleas of not guilty. Accused was found guilty of assault with intent to commit voluntary manslaughter and guilty of one count of assault with a dangerous weapon. Sentence: DD, TF, five yrs CHL, and red E-1.

Accused's claimed error stemmed from the action of the law officer in withdrawing his guilty pleas and substituting pleas of not guilty. When the president of the court inquired as to the reason prompting the change, the law officer, in pertinent part, stated:

> [A]fter hearing the evidence I conclude that there is an issue to be resolved by this court and that resolution is simply this: You have heard from the stand the accused state that he fired the weapon. The resolution to be made by this court is whether this constitutes justification in so far as the offenses charged. I've told you what you must find and bear in mind the burden is upon the government in all respects to prove that he was not acting in justification. Unless you find that he was not acting in justification you must find no guilt. *I want to reiterate the fact that you heard his plea. This admits the facts but doesn't admit the lack of fact, that is requisite criminality.* This is what you will find behind those closed doors or not find. (Emphasis added by the court.)

The thrust of accused's argument regarding this instruction was that it erroneously permitted the court to consider his guilty pleas as establishing "the facts" of the shooting, leaving the court only with the determination as to whether there was justification for his actions. Citing *United States v. Burse*, 16 U.S.C.M.A. 62, 36 C.M.R. 218 (1966), the court agreed with accused and held that an instruction which permits the court members to use a withdrawn guilty plea is patently erroneous and precludes affirmance of the conviction.

The court went on to note another serious instructional error which affected accused's conviction of assault with intent to commit voluntary manslaughter. The law officer's instruction on this point would have permitted a finding of guilty of assault with intent to commit either murder or voluntary manslaughter based on an intent to inflict grievous bodily harm. The court, citing *United States v. Barnes*, 5 U.S.C.M.A. 792, 19 C.M.R. 88 (1955), held that such an instruction is prejudicially erroneous.

The court noted that its action in this case disposed of the need to decide whether the defense counsel imposed a binding waiver on accused by agreeing to permit the same court to continue on to final judgment after the guilty pleas were withdrawn.

The findings of guilty and sentence were set aside. A rehearing was ordered. (Chalk, S.J.; Collins and Eolawn, JJ., concurring.)

14. (171, MCM; UCMJ art. 92) **Court Held That The Provisions Of Paragraph 18.1, AR 600-50, Were Not *Ultra Vires*.** *United States v. Vlahos*, CM 420852, 17 Sep. 1969. Conviction: wrongful possession of marihuana (art. 134); violation of paragraph 18.1, AR 600-50, by selling a substance commonly known as "LSD" (art. 92); and violation of paragraph 18.1, AR 500-50, by having in his possession five tablets of "LSD" (art. 92). Sentence: DD, TF, and nine yrs CHL. One previous special court-martial conviction was considered. Honoring a pretrial agreement, the convening authority reduced the period of confinement at hard labor to four years, but otherwise approved the sentence.

In this appeal, accused contended that paragraph 18.1, AR 600-50, was illegal on its face and, consequently, disobedience of it was no offense; that the LSD specifications failed to state an offense because of the failure to allege accused's knowledge of the proscriptive listings of the Secretary of Health, Education, and Welfare (HEW); and that the LSD specifications were individually subject to a maximum penalty including only one year confinement, not two years, as the law officer informed the court-martial. The court found that its holding in *United States v. Elwood*, —— C.M.R. —— (1969, digested 69-23 JALS 8), was dispositive of accused's contentions. Accordingly, the court found that they lacked merit.

In a supplemental assignment of error, accused asserted that paragraph 18.1, AR 600-50, was "ultra vires" and illegal because on 2 November 1968, at the time of the alleged offenses, the regulations of the Secretary of HEW pertaining to the drug or substance "LSD" were no longer in effect. The court disagreed.

Accused relied on footnote 3 of the *Elwood* opinion. There, the court noted the following: Paragraph 18.1 was added to AR 600-50 by Change 2, dated 15 May 1968. On 8 April 1968, Reorganization Plan No. 1 of 1968 became effective, and, in pertinent part, divested the Secretary of HEW of his power to designate dangerous drugs and transferred this function to the Bureau of Narcotics and Dangerous Drugs headed by a director appointed by the Attorney General. Thereafter, the director of that Bureau promulgated a new Chapter, effective 8 October 1968, which combined the regulations previously promulgated by the Secretary of HEW with the regulations of the former Bureau of Narcotics. In *Elwood*, however, the court also stated that the Reorganization Plan did not, *ipso facto*, invalidate the then existing regulations of the Secretary of HEW pertaining to dangerous drugs. Thus, the references in paragraph

18.1a, AR 600-50, to the designation and regulation by the Secretary of HEW were not improper and remained, effectively, part of the definition therein, at least for the purposes of this case—the offenses having occurred on 16 June 1968."

In the instant case the court concluded that the provisions of paragraph 18.1 were not rendered illegal by the Reorganization Plan. As a matter of law, by virtue of the plan, the function of designating "hallucinogenic drugs" was deemed transferred from the Secretary of HEW to the Attorney General. The court noted that the fact that paragraph 18.1, AR 600-50, has not been changed to reflect the new regulatory agency is of no consequence. The significant factor was that when accused committed the offense alleged, the possession and transfer of LSD on 2 November 1968, LSD was designated by applicable regulations as a hallucinogenic drug.

Accordingly, the court found the findings of guilty and the sentence, as approved by proper authority, correct in law and fact and determined that they should be approved. The findings of guilty and the sentence were affirmed. (Nemrow, J.; Stevens, S.J., and Kelso, J., concurring.)

15. (150, 154*d*, MCM) **Evidence Available To Trial Defense Counsel Concerning Possible Illegal Search And Seizure Should Have Been Resolved At Trial Level. Doctrine Of Waiver Not Invoked.** *United States v. Goldfinch*, CM 420087, 24 Sep. 1969. Conviction: wrongful possession of marihuana (art. 134), despite plea. Sentence: BCD, TF, and 18 mos CHL. The convening authority approved the sentence.

In this appeal the Government conceded that the law officer erred in his instructions on sentence by advising the court members that they "should pay little attention to the conviction that was subsequent to this offense of which he [accused] now stands convicted . . ." The law officer should have advised the court to totally disregard the subsequent conviction. Because of the court's disposition of accused's second assignment of error, however, the court did not decide the question of whether or not the law officer's error was harmless.

In his second assignment of error accused contended that the event which led to the discovery of contraband in his locker, although labeled a normal health and safety inspection, was, in reality, a search for criminal activity. His argument continued that absent probable cause, which was not shown in this case, the search was illegal and the fruits of the search were therefore not admissible in evidence. In light of the admission in evidence of the fruits of the search, the court was urged to set aside the findings and sentence and order the charge dismissed. Appellate Government counsel responded that the contraband was uncovered in the course of a normal health and safety inspection. This inspection, they contended, authorized by accused's commanding officer, was a legitimate exercise of his authority to inspect his command.

From the foregoing, it was apparent to the court that it had to inquire as to the distinction between a "search" and an "inspection." This distinction was definitively discussed in *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965), wherein the Court of Military Appeals stated:

> Comparing "search" with "inspection", we find that a search is made with a view toward discovering contraband or other evidence to be used in the prosecution of a criminal action. In other words, it is made in anticipation of prosecution. On the other hand, an inspection is an official examination to determine the fitness or readiness of the person, organization, or equipment, and though criminal proceedings may result from matters uncovered thereby, it is not made with a view to any criminal action. It may be a routine matter or special, dictated by events, or any number of other things, including merely the passage of time. There is no requirement for "probable cause", as that term is used in law, but it may result from a desire of the commander to know the status of his organization or any part of it, including its arms, equipment, billets, etc.

In the case at bar, the court, after a very thorough review of the record, found that there was an appearance of the utilization of the so-called "shakedown" inspection as a vehicle for fettering out evidence of criminal activity. In other words, it appeared to the court that the event which led to the discovery of marihuana in accused's locker was a search, as defined in *Lange, supra*, rather than an inspection. Furthermore, failure to establish probable cause therefor would render the search illegal and the fruits thereof inadmissible into evidence.

After finding the appearance of a search, rather than an inspection, the court was faced with the critical question of whether the record warranted dismissal of the charge. In this connection, it was noted that trial defense counsel interposed no objection to the admissibility of the evidentiary matter which stemmed from the discovery of contraband found in accused's locker. Nor, did he affirmatively urge the law officer to hold an out-of-court inquiry regarding the legality of the search and seizure. These omissions, noted the court, necessarily gave rise to consideration of the applicability of the doctrine of waiver.

Ordinarily, an error occurring during trial must be called to the attention of the trial court in order to be reviewed on appeal. *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966). One of the basic reasons for the waiver rule is that if objection is made at the trial, evidence might be introduced by the prosecution to show that the search and seizure was legal. The United States Court of Military Appeals, in its early decisions, enunciated the basic principles and guidelines to be followed regarding the waiver doctrine. In *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951), the Court, in adopting the federal rule, quoted extensively from the case of *Smith v. United States*, 178 F.2d 181 (1949). In *Smith*, the Court stated in pertinent part:

> The admitted normal rule is that an appellate court will not consider matters which are alleged as error for the first time on appeal, and this is true of criminal as well as civil cases. *However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would "seriously affect the fairness, integrity, or public reputation of judicial proceedings."* (id at 184) (Emphasis supplied by the court.)

The urgings of appellate defense counsel aside, the court stated that it has always been its custom, particularly in cases of serious offenses involving constitutional rights, to check the record carefully for error prejudicial to accused, although not urged at the trial forum. In this case, the court held that it was reluctant to dispose of accused's contentions by invoking the doctrine of waiver. The court again noted that the record before it, when viewed in its entirety, certainly served to raise the issue of unlawful search and seizure. The sources of information upon which this conclusion was based were available and known to counsel at the trial level. The court also noted that it had been unable to ascertain from the record why the issue was not raised at the trial level by appropriate objections or a request for an out-of-court inquiry. While the court hesitated to speculate, it stated that it was entirely within the realm of probability that such an inquiry would have been to the distinct advantage of the accused. Therefore, cogent arguments could be made that accused had not been well represented and accorded a fair hearing at the trial level. In these circumstances, the court held that application of the doctrine of waiver would be inappropriate.

In disposing of this case, the court made it clear that it did not purport to reach or decide the question concerning the admissibility of the contraband uncovered in the course of what was labeled a normal "shakedown" inspection. Its inquiry was limited to determine whether matters available to counsel at the trial level served to raise the issue of illegality of the search and seizure. The court found that they were sufficient to raise the issue. The issue not having been raised at the trial level and in justice to the accused, the court

noted that the case would ordinarily be remanded for a rehearing, limited to the search and seizure issue. However, since the Secretary of the Army had remitted the unexecuted portion of accused's sentence and accused had been restored to duty, the court found no useful purpose would be served by directing further proceedings in this case.

In light of the foregoing considerations, the court found the findings of guilty and the sentence incorrect in law. The charge and its specification were ordered dismissed. (Bailey, J.; Porcella, S.J., and Hagopian, J., concurring.)

IV. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Approved forfeitures of $91.00 per month for enlisted man with less than two years service reduced to lowest enlisted grade held excessive. TJAG reduced forfeiture to $78.00 per month. JAGVJ SPCM 1969/227.

2. The president of a special court-martial informed accused of his Article 88b rights to counsel from a prepared form which erroneously omitted the accused's right to be defended by civilian counsel at his own expense. This misadvice resulted in setting aside the conviction. JAGVJ SPCM 1969/381.

V. MISCELLANEOUS MILITARY JUSTICE.

1. Military Judge Memorandum Number 54—Presentencing Consideration Of Matter From Personnel Records. Under paragraph 75*c*, MCM, 1969 (Rev.) and paragraph 2-20, AR 27-10, a court-martial constituted with a military judge may properly consider information from the accused's personnel records reflecting his past conduct and performance. The military judge is to determine what information is relevant to sentencing and, if the trial is before a court with members, what information is to be presented to the members.

Several records of trial before a military judge alone have been received recently which indicate that the judge considered information from the accused's personnel records which was not included in the record of trial. Although the Manual and the above-cited regulation may appear ambiguous, it is clear that for proper appellate review all matters considered by the military judge or members of the court in arriving at a sentence must be made a part of the record. Accordingly, all information so considered, whether in the form of an original document or an authenticated copy or summary, should be formally received into evidence and attached to the record as an exhibit. JAGVP, 20 Nov. 1969.

2. Monthly Average Court-Martial Rates Per 1000 Average Strength, July-September 1969.

	General CM	*Special CM*	*Summary CM*
ARMY-WIDE	.14	2.54	.73
CONUS (Excluding ARADCOM)	.20	3.77	.97
MDW	.08	.17	.04
First US Army	.13	4.10	1.12
Third US Army	.20	3.31	.62
Fourth US Army	.27	3.77	.77
Fifth US Army	.24	5.77	1.13
Sixth US Army	.20	3.10	1.66
USARADCOM	—	.91	.06
OVERSEAS	.07	1.15	.46
USA, Alaska	—	1.81	.64
USA, Forces So. Cmd.	—	.70	1.40
USAREUR	.07	.91	.34
Pacific Area	.07	1.24	.48

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas, excepting ARADCOM personnel. JAGVU, 2 Dec. 1969.

3. Nonjudicial Punishment Monthly Average And Quarterly Rates Per 1000 Average Strength, July-September 1969.

	Monthly Average Rates	*Quarterly Rates*
ARMY-WIDE	17.07	51.20
CONUS (Excluding ARADCOM	19.40	58.21
MDW	2.77	8.32
First US Army	17.52	52.55
Third US Army	18.67	56.00
Fourth US Army	20.18	60.53
Fifth US Army	20.38	61.15
Sixth US Army	25.06	75.19
USARADCOM	10.14	30.43
OVERSEAS	14.48	43.45
USA, Alaska	14.84	44.51
USA, Forces So. Cmd	13.57	40.70
USAREUR	14.03	42.09
Pacific Area	14.67	44.00

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas, excepting ARADCOM personnel. JAGVU, 2 Dec. 1969.

VI. MISCELLANEOUS.

1. Instructor Positions At United States Military Academy. Because of an increase in the size of the Corps of Cadets, several new teaching positions will be created during the summer of 1970 in the Department of Law, United States Military Academy, West Point, New York. Interested JAGC officers are encouraged to correspond directly with: Career Management Office, Office of The Judge Advocate General, ATTN: MAJ Watkins, Washington, D. C. 20810. Applicants should be in the grade of Captain or Major with a minimum of 12-24 months active duty service. JAGC, 2 Dec. 1969.

2. Articles Of Interest To Judge Advocates.

Rishe, *U.C.C. Brief No. 12: The Effect of Inspection Under Government Contracts and the U.C.C.* 15 Prac. Law 75 (1969). Copies may be obtained from The Practical Lawyer, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

Whipple, *Talk Show Talks About World Peace,* 55 A.B.A.J. 1060 (1969). Copies may be obtained from the American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

Comment, *Civilian Court Review of Court-Martial Adjudications,* 69 Colum. L. Rev. 1259 (1969). Copies may be obtained from the Editorial Offices, Columbia Law Review, 435 West 116th Street, New York, New York, 10027.

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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