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JUDGE ADVOCATE LEGAL SERVICE*

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

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

1. (8, MCM) *O'Callahan v. Parker* **Limitation On Court-Martial Jurisdiction Not Operative On Okinawa.** *United States v. Ortiz,* No. 22,843, 14 Aug. 1970. On his plea of guilty, accused was convicted by a special court-martial convened on Okinawa, of robbery of an Okinawan taxi driver. The offense was prepetrated in a beach area, which was apparently outside the confines of any United States military installation. The case was tried on 23 Jul. 1969, subsequent to the effective date of the limitation of courts-martial jurisdiction defined by the Supreme Court in *O'Callahan v. Parker,* 395 U.S. 258 (1969). Accused now contends that he could not be tried for the robbery because the offense was cognizable in a civilian court on Okinawa, which was open and functioning. *United States v. Crapo,* 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969). Accused further contended that the civilian courts on Okinawa were established by authority of the United States and were, therefore, courts within the meaning of the jurisdictional limitation delineated in *O'Callahan.*

The Court first noted that language in the *O'Callahan* opinion tended to indicate that the cognizability of an act in a civilian court established by the United States in the administration of an occupied zone of a foreign country does not preclude military prosecution of the act, if it constitutes a violation of the UCMJ. The Supreme Court stated in O'Callahan that the offenses were "committed within our territorial limits [Hawaii], not in the occupied zone of a foreign country." 395 U.S. at 273. Assuming, however, that this was not a fair reading of the *O'Callahan* opinion, the Court held that the civilian courts of Okinawa had no power to try accused. It was found that the grant of authority from the President of the United States of criminal jurisdiction to the United States Civil Administration Courts Ryukyu Islands over "employees of the United States Government who are United States nationals" does not confer jurisdiction over military personnel on active duty on Okinawa. Exec. Order No. 10713, 3 C.F.R. 368 (1954-1958 Compilation), as amended by Exec. Order No. 11010, 3 C.F.R. 587 (1957-1963 Compilation). The grant of authority confers criminal jurisdiction over armed services personnel only when the military commander concerned determines not to exercise military jurisdiction. Since the civilian courts of Okinawa did "not have jurisdiction over the accused as a member of the armed forces, except as specifically authorized by the military commander, the military courts were not divested of jurisdiction over the accused."

Reassessment of the sentence below accorded the relief to which accused was entitled due to error in the sentencing instructions. Accordingly, the decision of the United States Navy Court of Military Review was affirmed. (Opinion by Chief Judge Quinn, in which Judges Ferguson and Darden concurred.)

Accord: *United States v. Davis,* No. 22,939, 14 Aug. 1970; *United States v. Hargrave,* No. 22,934, 14 Aug. 1970.

2. (8, MCM; UCMJ, Arts. 125, 134) **Sodomy Offense Found To Be Service-Connected, Fraternization Offense Not Separately Punishable.** *United*

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†**Communications relating to the contents and address changes 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 70-11 JALS [page number] (DA Pam 27-70-11).**

States v. Lovejoy, No. 22,682, 14 Aug. 1970. Accused was convicted by a general court-martial of engaging in acts of sodomy with a sailor in his apartment in the civilian community, and of a specification alleging that he did during the same period "fraternize and associate" with the same sailor on "terms of military equality" by having the sailor as his "guest" in his apartment and sharing with him the cost of food. Both specifications were charged as a violation of article 134. Accused was sentenced to dismissal from the service.

Accused first challenged the jurisdiction of the court-martial over the offense. It was argued that for an offense occuring in the civilian community to have military significance it must affect the property or the person of another member of the armed forces. Accused contended that this limitation requires that the serviceman affected by accused's act suffers loss or injury as a "victim." It was argued that in this case the sailor consented to the acts of sodomy and, therefore, the acts had no "military victim" and no military sighificance. However, the record revealed that there was some testimony of the sailor to the effect that during a part of the period of the sailor's relationship with accused he was "a victim." Beyond that, the Court held that the military association between accused and the sailor, which included the fact that they were part of the same ship's company, imparted sufficient military significance to their conduct to justify the exercise of military jurisdiction over the offense. *Hooper v. Laird,* 19 U.S.C.M.A. 329, 41 C.M.R. 329 (1970), digested in 70-3 JALS 11).

Accused also contended that the specification was duplicious because it alleged that he engaged in acts of sodomy over a period of time. The Court noted that every act of sodomy may be a separate offense. However, a continuous series of acts extending over a period of time and motivated by a single impulse may properly be alleged as a single offense. *United States v. Carrel,* 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966). The Court held that in the circumstances of this case "it was both reasonable and fair for the Government to forego measurement of the separateness of each act to charge all as a single offense." *United States v. Hall,* 6 U.S.C.M.A. 362, 20 C.M.R. 278 (1955).

Accused then contended that the sodomy specification was charged under the wrong article of the Uniform Code. It was noted that article 125 defines the offense of sodomy. However, this misdesignation of the article violated by accused was not found to be prejudicial to any of his substantial rights.

Finally, the Court found that the fraternization charge was based in major part upon the sexual intimacy between accused and the sailor. The concurrence of the period of time, the place, and the scope of the relationship convinced the Court that the fraternization offense merged with the sodomy charge, and for that reason was not separately punishable. *United States v. Murphy,* 18 U.S.C.M.A. 571, 40 C.M.R. 283 (1969); *United States v. McVey,* 4 U.S.C.M.A. 167, 15 C.M.R. 167 (1954). Accordingly, the decision of the United States Navy Court of Military Review was reversed as to the fraternization specification. (Opinion by Chief Judge Quinn, in which Judge Ferguson concurred.)

Judge Darden concurred in the result, stating that he would reach the same conclusion because of his reservations about the treating of fraternization as a crime.

3. (8, MCM) Interstate Transportation Of Stolen Motor Vehicle Not Service-Connected. *United States v. Wills,* No. 22,834, 7 Aug. 1970. Accused was convicted among several offenses, of the interstate transportation of a motor vehicle, knowing the motor vehicle to have been stolen, in violation of article 134.

The Court held that the court-martial did not have jurisdiction over the offense as it was not service-connected. *O'Callahan v. Parker,* 395 U.S. 258 (1969); *United States v. Borys,* 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969). The automobile, which belonged to another serviceman, was stolen from a parking area on a Marine Corps Base, and the Court held that accused was properly convicted for that offense. *United States v. Allen,* 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969); *United States v. Crapo,* 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Paxlao,* 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969); *United States v. Smith,* 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969). However, the subsequent interstate transportation of the vehicle was held to be a

separate offense. The Court stated that larceny and interstate transportation do not depend on each other, "for the latter offense only required *knowledge* that the vehicle had been *stolen.*" Nor was it significant that the subsequent offense was committed off base by the same accused and involved the same subject matter. It was then held that the interstate transportation offense was not service-connected. Accordingly, the decision of the Court of Military Review was reversed as to the offense in issue. The remainder of the convictions were affirmed. (Opinion by Judge Ferguson, in which Chief Judge Quinn and Judge Darden concurred.)

4. (85, MCM) **Staff Judge Advocate's Pretrial Advice and Post-Trial Review Should Have Contained Recommendation Of Accused's Immediate Commander.** *United States v. Rivera,* No. 22,817, 7 Aug. 1970. Accused was convicted, in accord with his pleas, of absence without leave, larceny, and housebreaking, in violation of articles 86, 121, and 130, respectively. He was sentenced to a bad-conduct discharge, total forfeitures, confinement at hard labor for one and one-half years, and reduction. The Court of Military Review reduced the confinement to twelve months.

Accused's company commander had recommended that accused not be separated from the service. The Court noted that "[t]he company commander is probably in the best position of anyone in the service to recognize the future value of a member of his command." This recommendation was not included in either the staff judge advocate's pretrial advice or post-trial review. The Court found that the recommendation was one of those factors which might have had a substantial influence on the convening authority's action, and should have been furnished to him. *United States v. Foti,* 12 U.S.C.M.A. 303, 30 C.M.R. 303 (1961). Accordingly, the decision of the Court of Military Review was reversed. (Opinion by Judge Ferguson.)

Chief Judge Quinn concurring in the result, felt that the fact of a pretrial agreement made it difficult to conclude that accused was prejudiced by "what appears to be the inadvertent failure by his commanding officer to strike the word 'not' from the phrase 'should (not) be eliminated from the service' on the printed form letter used to transmit the charges with his recommendation for trial by general court-martial." However, in view of accused's combat record, Chief Judge Quinn felt that unusual caution was justified and joined in directing return of the record for a new review.

Judge Darden, dissenting, felt that failure to challenge the content of the pretrial advice barred the defense from raising the issue on appeal. Further, accused did not introduce the recommendation as a matter of mitigation. In any event, Judge Darden felt that accused was unharmed, due to the negotiated guilty plea agreement, and the omission of the battalion commander's recommendation of separation from the service.

5. (73, 76*b*(2), MCM) **Omission Of Instructions On Accused's Good Character Not Prejudicial; Use Of Written Voting Instructions Erroneous.** *United States v. Wright,* No. 22,524, 14 Aug. 1970. A general court-martial convicted accused of taking indecent liberties with an 8 year old girl. The conviction was confirmed by intermediate authorities. During an out-of-court hearing, defense counsel submitted written requests to instruct with regard to the merits. Among these was an instruction as the the effect of character evidence, which, in part, provided that "evidence of accused's good character may be sufficient to cause a reasonable doubt to remain as to his guilt, thereby warranting an acquital." The law officer approved the request, but failed to mention the matter when actually instructing the court-martial.

The Court noted that evidence of good character may raise a reasonable doubt as to an accused's guilt. It was error to fail inadvertently to include the properly requested instruction. *United States v. Cooper,* 15 U.S.C.M.A. 322, 35 C.M.R. 294 (1965). However, it was also noted that the failure to give the requested instruction does not require reversal if the "posture of the case is not one which requires an instruction." *United States v. Dodge,* 3 U.S.C.M.A. 158, 11 C.M.R. 158 (1953). The core of accused's defense was that the offense was the product of a psychomotor epileptic seizure induced by compulsion and chronic alcoholism. Accused was pictured as one who lost "all rational control" when under the influence of alcohol, but who would not commit such an offense while sober. Accused, in a pretrial statement, admitted that the act took place

and that he "felt nasty about it." The Court felt that when the defense introduced some evidence of good character, it was not intended to indicate the unlikelihood that accused committed the offense, but rather to emphasize that, when intoxicated, accused was mentally incapable of adhering to the right. Further, when the commission of an offense is admitted, "character evidence is of no effect." *United States v. Dodge, supra.* It was held, therefore, that no prejudice resulted to accused from the omission of the instruction as to the effect of evidence of good character.

The Court did find the failure of the law officer to instruct the court members orally as to the voting procedure to arrive at a sentence was erroneous. *United States v. Pryor,* 19 U.S.C.M.A. 279, 41 C.M.R. 279 (1970, digested 70-2 JALS 4). Accordingly, the decision of the United States Army Court of Military Review as to the sentence was reversed. (Opinion by Chief Judge Quinn, in which Judge Darden concurred.)

Judge Ferguson, concurring in part and dissenting in part, agreed with the holding that the failure of the law officer to instruct orally as to the sentence was prejudicially erroneous. However, he disagreed with the holding that accused was not prejudiced by the omission of an instruction as to the effect of evidence of good character. He distinguished *Dodge* on the basis that it involved a judicial admission of guilt which was not present in this case because accused did not testify. Under these circumstances, Judge Ferguson felt that evidence of good character alone may have been sufficient to warrant acquital. Thus, accused was prejudically harmed by the omission of the instruction.

6. (140*a*, MCM) **Change In 140*a*, Manual For Courts-Martial, United States, 1969, Operated As An Ex Post Facto Law When Applied To Accused.** *United States v. Hise,* No. 22,806, 7 Aug. 1970. Accused was convicted of one specification of sodomy in violation of article 125. He was sentenced to a bad-conduct discharge, confinement at hard labor for 6 months, and reduction to the grade of E-3. The 1951 Manual for Courts-Martial provided:

> A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone. Paragraph 140*a*, MCM.

The 1969 Manual, provides as follows:

> It is a general rule that a confession or admission of the accused not be considered as evidence against him or the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which corroborates the essential facts admitted sufficiently to justify and inference of their truth.

Since the trial of accused began on 21 Jan. 1969, the law officer instructed the court-martial, with reference to its consideration of accused's pretrial confession, in accordance with the provisions of the 1969 Manual. However, the offense had taken place and accused had confessed more than three months prior to the effective date of the new Manual. The Court of Military Review noted that if the prior standard had been applied, accused's conviction would not stand.

The Court of Military Review held that since the law relating to the independent evidence necessary to corroborate a confession or admission is merely a rule of evidence, the constitutional prohibition against *ex post facto* laws did not apply. However, the Court noted that this position overlooked the fact that the rule of corroboration is also a rule of the sufficiency of the evidence. It was held that since paragraph 140*a* of the 1969 Manual provided for a lesser degree of proof than was required under the 1951 Manual, application of the new rule to the trial was *ex post facto* and, hence, constitutionally prohibited. *Kring v. Missouri,* 197 U.S. 221 (1883); *Thompson v. State of Utah,* 1570 U.S. 343 (1898); *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798). There was not sufficient evidence in the case to prove that the crime was probably committed by someone. Accordingly, the decision of the Court of Military Review was reversed, and the charge and specification ordered dismissed. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn concurred in the result on the ground that there was insufficient evidence to corroborate accused's pretrial statement.

7. (76*a*(2), MCM) **Accused Not Harmed By Erroneous Consideration Of Uncharged Misconduct.** *United States v. Gaitanis,* No. 22,909, 7 Aug. 1970. Accused was convicted of the unlawful possession of codeine, methamphetamine, and anphetamine. The conviction for possession of

codeine was subsequently disapproved, and accused's sentence presently stands at two months' confinement at hard labor and forfeiture of $70 per month for the same period.

In attempting to establish the conscious possession of marihuana, trial counsel introduced evidence of prior use by accused. Accused later conceded that he had used marihuana on past occasions. The offenses were committed before the promulgation of the Manual for Court-Martial, United States, 1969. Thus, the president of the special court-martial should have limited the court's consideration of this evidence on findings and sentence. However, this error did not harm accused because the prior misconduct was related to the offense on which he was acquitted. *United States v. Vogel,* 18 U.S.C.M.A. 160, 39 C.M.R. 160 (1969). For the same reason, trial counsel's brief reference to this evidence while arguing on sentence did not have any effect on the sentence. Accordingly, the decision on the Court of Military Review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

II. FEDERAL DECISIONS.

PM (152, MCM) U.S. Supreme Court Permits Warrantless Search Of Automobile When Probable Cause Present. *Chambers v. Maroney,* 38 U.S.L.W. 4547 (U.S. 22 Jun. 1970). On 20 May 1963 a service station was robbed by two armed men. Two teenagers who had noticed a blue compact station wagon in the area, then saw the station wagon speed away from a parking lot near the service station. Learning of the robbery, they reported to police that four men were in the station wagon and one was wearing a green sweater. This description matched one given by the service station attendant. Within an hour a station wagon answering the description and carrying four men was stopped by police. Accused was one of the men stopped, and was wearing a green sweater. The occupants were arrested and the car was driven to the police station. Police searched the car at the station and found two guns, the money from the service station, and evidence from a prior robbery. Accused was convicted of both robberies.

Considering first the claim that the search was the fruit of an unlawful arrest, the Court held that the arresting officers did have probable cause to make the arrests. However, the search of the automobile was made later at the police station and could not be justified as a search incident to arrest. *Preston v. United States,* 376 U.S. 364 (1964) held that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." The Court distinguished *Preston,* which involved a search following an arrest for vagrancy, on the basis that in *Preston* the police had no cause to believe that evidence of a crime was concealed in the automobile. In the present case, the Court found that the police had probable cause to believe that the car would contain guns and the fruits of the crime.

The Court noted that "[i]n terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office." *Carroll v. United States,* 267 U.S. 132 (1925). The reason for this distinction has been the fact that automobiles can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. It was stated that "if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search." For Constitutional purposes the Court saw no difference between these alternatives. "Given probable cause to search, either course is reasonable under the Fourth Amendment." On the facts of this case the car could have been searched when it was stopped since there was probable cause and it was "a fleeting target for a search." The probable cause and mobility factors still existed at the police station, "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." The Court held that "[i]n that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." Having found that other of accused's claims did not warrant reversal, the decision of the Court of Appeals was affirmed. (Opinion by Mr. Justice White.)

Mr. Justice Harlan, concurring in part and dissenting in part, believed that "a warrantless search involves the greater sacrifice of Fourth Amendment values," and that the police should have held the car and obtained a warrant.

III. COURT OF MILITARY REVIEW DECISIONS.

1. (8, MCM) Case Is Final For Purposes Of Court-Martial Jurisdiction Following Decision Of Court Of Military Review. *Enzor v. United States,* Misc. Doc. No. 1970/2, 7 Jul. 1970. Accused filed this motion for appropriate relief in the nature of coram nobis, seeking to set aside his conviction, previously affirmed by a board of review on 5 May 1969. Accused was convicted of attempted sodomy, sodomy and indecent assault (arts. 80, 125, and 134, respectively) upon a civilian within the civilian community. Accused relied upon *O'Callahan v. Parker,* 395 U.S. 258, (1969), in support of his theory that the offenses were not service-connected and that the court-martial thus lacked jurisdiction over the offenses. The court stated that accused was correct in his contention that the offenses would not meet the service-connection test laid down in *O'Callahan.* However, service-connection was not the crucial factor in this case. The United States Court of Military Appeals, in *Mercer v. Dillion,* 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970, digested 70-2 JALS 2), limited the application of *O'Callahan* to those convictions which were not final before 2 Jun. 1969. The issue was whether or not accused's conviction was final on that date.

It was noted that the term "final" in the general sense, has been given various meanings by the judges of the United States Court of Military Appeals. The court held that accused was entitled to no relief because his conviction became final on 5 May 1969, the date of the board of review decision, subject only to his petition to the board of review for reconsideration or to the United States Court of Military Appeals for a grant of review, or the forwarding of the case by The Judge Advocate General to the United States Court of Military Appeals for review, all within prescribed time limits. As none of these contingencies occurred, the finality of the board's decision remained unaffected. Accordingly, petitioners motion was denied. (Opinion by Chalk, J., in which Westerman, C.J., and Collins, Folawn, Kelso and Taylor, J.J., concurred.)

Nemrow, J., concurred in the result.

Kreiger, J., with whom Bailey, Hagopian, Porcella and Rouillard, JJ., concurred, dissented, stating that the language of *Mercer v. Dillion, supra,* required that the court look to the status of the case as of 2 Jun. 1969, to determine whether *O'Callahan* should have been applied. It was noted that as of 2 June accused had not even been served with the board of review decision. Further, it was stated that accused's conviction was not finalized until 11 Jul. 1969, the date of the general court-martial order ordering accused's sentence into execution. Article 76, UCMJ.

2. (33/(1) MCM) Variance In Ordinary Procedure For Referral Of Case For Trial As Non-Capital Not Jurisdictional Error. Failure Of Trial Defense Counsel To Advise Military Judge Of Accused's Awards And Decorations Erroneous. *United States v. Shirley,* CM 422317, 13 Jul. 1970. Conviction; causing a false alarm in camp in the presence of the enemy and assault with a dangerous weapon, (arts. 99 and 128), in accord with his pleas. Sentence: DD, TF, 4 yrs, CHL, red E-1. The convening authority reduced the period of confinement to 2 yrs.

Accused contended that the court-martial, consisting of a military judge alone, lacked jurisdiction to try him for the capital offense of causing a false alarm in camp in the enemy's presence. The question was whether the convening authority, in the facts and circumstances of the case, could be held to have referred the case for trial as non-capital. The record was clear that the ordinary process by which a case for which the death penalty can be adjudged upon conviction is referred for trial as non-capital was not followed. The endorsements to the charge sheet did not contain any special instructions. Further, no reference was made in the pretrial advice of the command staff judge advocate to the general court-martial convening authority that the case be referred for trial as non-capital. However, the pretrial advice did advise the convening authority, although erroneously, that the maximum punishment included confinement at hard labor for life. The court stated that the staff judge advocate's pretrial advice may be viewed as establishing the conditions under which the convening authority's decision to refer a particular case to trial is made. *United States v. Alderten,* 4 U.S.C.M.A. 354, 15 C.M.R. 354 (1954). In the court's opinion, a conclusion that the convening authority understood and accepted

the conditions of referral for trial contained in the pretrial advice was fully justified. Further, the pretrial agreement recited the non-capital maximum punishment contained in the pretrial advice. The court personnel were informed of the limitations on punishment, and likewise considered the case a non-capital prosecution. Thus, in substance, the case was referred by the convening authority for trial as non-capital. Accordingly, the court found no jurisdictional defect in the proceedings.

Accused also contended that the failure of the trial defense counsel to advise the military judge of accused's awards and decorations was erroneous. The court agreed. Knowledge of several of the decorations and awards was imputed to the military judge, due to accused's Vietnam experience, and certain other testimony of accused. However, accused's possession of the Army Commendation Medal was not made known to the military judge. Such knowledge could have affected the outcome of the court's sentencing deliberations. Accordingly, the sentence was reassessed to provide for a BCD, TF, 18 mos CHL, and red E-1.

3. (73, 148*e*, MCM) **Instruction Prejudicially Erroneous. Testimony Of Wife Not Violative Of Marital Privilege.** *United States v. Tavolacci,* CM 420843, 14 Jul. 1970. Conviction: assault consummated by a battery on a child under the age of sixteen years and involuntary manslaughter (arts. 128, 119), contrary to his pleas. Sentence: DD, TF, 5 yrs CHL, red E-1.

The prosecution's principal witness was accused's wife, who testified that she left the child, who was in good health, in the care of her husband, and when she returned found the child unconscious. An autopsy revealed numerous bruises on the body, varying in age, although they were not the cause of death. The cause of death was a subdural hematoma, which could have been caused by a fall from a bed, as contended by accused.

The offense of which accused was convicted occurred in off-post housing on Okinawa. The court held that the court-martial did have jurisdiction. *O'Callahan v. Parker,* 395 U.S. 258 (1969), not being applicable to courts-martial held outside the territorial limits of the United States. *United States v. Keaton,* 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

Accused also contended that the law officer prejudicially erred by failing to instruct on the defense of independent intervening cause with respect to the lesser offense of involuntary manslaughter. There was testimony that the child had fallen from bed, which could have caused the death, thus raising the issue of intervening independent cause. The law officer instructed on causation, but did not specifically inform the court of this possible defense. The court found that there was no attempt in the instructions to relate the defense of intervening independent cause, and the evidence supporting it, to the applicable law. *United States v. Tanner,* 14 U.S.C.M.A. 447, 34 C.M.R. 217 (1964). Rather, the law officer merely gave the standard instructions regarding reasonable doubt, causation, and findings by exceptions and substitutions. The court refused to look at the instructions as a whole to determine their adequacy. The instruction pertaining to the lesser offense of involuntary manslaughter, standing alone, was prejudicially inadequate. A later instruction that intervening independent cause is a defense to negligent homicide, was not related to the former advice concerning involuntary manslaughter. Consequently, there was a fair risk that the members assumed that its applicability was limited to the offense of negligent homicide. The law officer's instructions also erroneously placed the burden on accused to establish justification or excuse for the offense of assault.

Finally, accused contended that the law officer erred by admitting the testimony of accused's wife in violation of the marital privilege. The court disagreed. Paragraph 148*e* provides that mistreatment of a child is an exception to the marital privilege, and it is controlling, notwithstanding the contrary holding of *United States v. Massey,* 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965).

Accordingly, the findings and sentence were set aside. (Opinion by Bailey, J. in which Porcella and Hagopian, J.J. concurred.)

4. (75*d*, 165, MCM) **Contradictory Morning Reports Did Not Prove Unauthorized Absence; Use Of Improperly Retained Records Of Non-Judicial Punishment Erroneous.** *United States v. Ward,* SPCM 6690, 3 Jun. 1970. Conviction: un-

authorized absence and unlawfully carrying a concealed weapon (arts. 86, 134). Sentence: BCD, 6 mos CHL, F of $100 per mo for 6 mos, and red E-1. The convening authority reduced the forfeitures to $82 per mo.

The court first considered the military judge's recommendation that accused's sentence, except for the punitive discharge, be remitted upon completion of appellate review. Accused's contention that this recommendation rendered ambiguous the sentence imposed, was rejected as non-meritorious.

Next considered was the proof of one of accused's unauthorized absences by a morning report. Accused asserted that he had no knowledge of his assignment to the unit from which it was alleged he absented himself, and a morning report entry of the unit showed that the orders concerning accused's transfer had in fact been revoked. The court was unconvinced that the Government had established beyond a reasonable doubt that accused had absented himself. It was noted that prior to the alleged absence a board of officers had recommended accused's discharge under 635-212, and that recommendation, although never effectuated, had been approved. Hence, it was unlikely that accused had in fact been reassigned and transferred in the interim to another unit.

Finally, the court considered the use of records of nonjudicial punishment. Trial defense counsel affirmatively stated at trial that the defense had no objection to use of the records. However, the court stated that such waiver applied "only to those nonjudicial punishment records which have been retained properly in the accused's Military Personnel Records Jacket (DA Form 201) in accordance with prescribed directives." The record showed that accused had been transferred from a correctional holding detachment to another unit on 22 Aug. 1969. The court held that the Article 15 punishment records were improperly retained in accused's DA Form 201, and the use thereof by the military judge was violative of para. 2-20*b*(2), AR 27-10. A period of a year had elapsed from the date of imposition of four of the punishments when accused was transferred. The other two, which were received on 30 Sep. 1968, were appealed, the appeal being denied on 31 Oct. 1968. The court held that these should have been removed on 1 Oct. 1969, prior to the trial, when the conditions that required their retention no longer existed.

Accordingly, the finding of guilty of specification 1 of Charge I was set aside and dismissed. The remaining findings were affirmed, and the sentence reassessed to provide for 6 mos CHL, F or $82 per mo for 6 mos, and red E-1. (Opinion by Nemrow, J., in which Kelso, S.J., concurred.)

Taylor, J., concurring in part and dissenting in part, disagreed that two of the nonjudicial punishments were improperly retained. The nonjudicial punishment in question was imposed on 30 Sep. 1968, and action was taken on an appeal therefrom, on 31 Oct. 1968. Accused was transferred to two other organizations, the last transfer occurring on 22 Aug. 1969. Since one year had not elapsed since the imposition of the punishment at the time of the last transfer it was proper to retain the records in accused's file for a period of two years from the date of imposition of punishment.

IV. GRANTS AND CERTIFICATIONS OF REVIEW.

1. *United States v. Katz*, ACM S-22952, petition granted 29 Jul. 1970. Accused was charged with a single specification of AWOL in violation of Article 86 and a single specification of larceny in violation of Article 121. He plead guilty to the AWOL and to wrongful appropriation and was found guilty in accordance with his pleas.

Prior to accepting the pleas of accused, the military judge advised him and made inquiries of him to determine the providence and voluntariness of the pleas as required in *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969). The record of trial reflects that the military judge, "personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waives such rights by his plea." (*United States v. Care*, supra.) The *Care* decision also included the following requirement:

"Based upon the foregoing inquiries and such

additional interrogation as he deems necessary, the military trial judge or president must make a finding that there is a knowing, intelligent, and conscious waiver in order to accept the plea. *United States v. Care,* supra, at page 253.

No such specific finding was made by the military judge in the case at bar.

Issue (specified by Court): "Whether the failure of the military judge to make a finding that the accused knowingly, intelligently and consciously waived the rights against self-incrimination, to confront the witnesses and to a trial on the merits, negated the guilty pleas."

2. *United States v. Thurman,* ACM S-22944, petition granted 7 Jul. 1970. Upon his plea of guilty, accused was convicted of absence without leave in a trial by military judge alone. Prior to arraignment, the following colloquy took place between the military judge and the accused:

MJ: Airman Thurman, I have before me a request for trial by military judge alone. Do you persist in your request to be tried by me alone without the benefit of jury?

Accused: Yes, Sir.

MJ: Your request is granted.

Issue Granted: "Whether failure of the military judge to assure himself that accused's pretrial request for trial by the military judge alone was understandingly made, as required by paragraph 53*d*(2)(b), Manual for Courts-Martial, 1969 (Rev.), prejudiced the accused."

V. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Conviction of willfully disobeying his superior NCO's order and treating his superior NCO with contempt set aside since accused's guilty pleas as to these offenses held to be improvident as accused had a potential defense to these offenses which was not raised by non-lawyer defense counsel. Conviction of behaving with disrespect toward his superior officer affirmed; sentence disapproved. JAGVJ SPCM 1969/414.

2. Conviction of resisting lawful apprehension, in violation of UCMJ, Article 95, set aside since the purported apprehension was by German policemen who did not have the authority to take a serviceman into custody for a traffic violation; additionally, the accused's conduct did not amount to a violation of Article 95, if such authority did exist, as the German police were not granted such authority by regulation nor were they acting as agents for the U.S.; thus, if an offense was committed it would have been in violation of Article 134, one of the essential elements of which is prejudicial to good order and discipline in the armed forces or conduct of a nature to bring discredit upon the armed forces. See: US v Hutcherson, 29 CMR 770 (11 Jan 1960). Sentence reassessed by TJAG on remaining finding of guilty. JAGVJ SPCM 1970/729.

3. Conviction of wrongful possession and sale of marihuana set aside since the accused was convicted solely on the uncorroborated testimony of an accomplice which was uncertain and unreliable, who, after stating it was not the accused who sold him the marihuana, finally implicated accused after pressure by the CID that he could get two years confinement, and pressure by a unit NCO who urged him to implicate accused. JAGVJ SPCM 1970/763.

4. Special court-martial conviction set aside since a military judge detailed to the court-martial was not present during the trial, as required by paragraphs 2-15b and 9-8, AR 27-10. JAGVJ SPCM 1970/872.

5. Conviction of concealing stolen property set aside since accused's pretrial statement was admitted into evidence although no foundation for its admission was established by the prosecution as required by UCMJ, Article 31. Additionally, prejudicial hearsay testimony by a CID agent was introduced as to what the two individuals who stole the items in question told him concerning the accused's participation. JAGVJ SPCM 1969/689.

6. Conviction of failing to obey officer's order to drive a 25-passenger bus based on his guilty plea set aside since the guilty plea held to be improvident as the order was inconsistent with the accused's driver's permit (SF 46) in effect on the date of the order which did not show accused was qualified to operate a bus. JAGVJ SPCM 1970/754.

7. Two convictions of AWOL offenses set aside since the accused was suffering from a mental disease, schizophrenia, at the time of the offenses and trial, and thus was unable to distinguish right from wrong as to adhere to the

right. JAGVJ SPCM's 1970/897, 898.

8. Conviction set aside since the Government's only evidence in support of the offense that "three EM's were ignoring retreat" is insufficient to support the conviction violating paragraph 14c, AR 600-25, by failing while in uniform and to stand at attention and render a proper salute during the playing of "To the Colors", as alleged. JAGVJ SPCM 1970/920.

9. Accused was sentenced to forfeit $50.00 per month for three months and to be reduced to the grade of Private E-2. The convening authority's action, in pertinent part, is as follows: "... the sentence is approved, but the execution of that portion of the sentence adjudging the forfeiture of $50.00 per month for three months is suspended for three months at which time unless the suspension is sooner vacated the forfeiture will be remitted without further action." It is clear that the convening authority approved the sentence but failed to order executed that portion of the sentence providing for reduction to Private E-2.

This is in violation of para 89*c*(4) MCM 1969 (Rev ed) and Article 71(d), UCMJ. The effect of this error is to negate the effectiveness of that portion of the sentence which is neither suspended nor ordered executed. Thus, the adjudged reduction to E-2 is of no effect. Article 57(c).

Several cases involving the above error are presently being considered for Article 69 relief. In this connection, it should be noted that if only a portion of an adjudged sentence in a special court-martial is to be suspended, Form 33, A14-4, MCM 1969 (Rev. ed.) should be used as a guide and if the entire sentence is suspended, Form 34 should be used as a guide. In the case discussed above, it is obvious that Form 34 was used as a guide whereas had Form 33 been used the error would not have resulted.

10. Conviction of wrongfully using marihuana set aside since the evidence is insufficient to establish accused's guilt beyond a reasonable doubt. JAGVJ SPCM 1970/882.

11. Convictions of AWOL set aside since accused was only 16 at the time of trial and 15 at the time of *induction* and was thereafter separated from the service UP AR 635-200 (Minority). JAGVJ SPCMs 1970/887 and 888.

12. Conviction of disrespect toward superior commissioned officer, willfully disobey superior commissioned officer's order, and striking a sergeant set aside since the accused was required to participate in a line-up without being informed of his right to counsel; additionally, the court did not vote to revote on a finding of not guilty of Charge I. JAGVJ SPCM 1970/879.

13. Conviction of nine-day AWOL set aside since the record fails to reflect any compliance with US v. Donohew, 18 USCMA 149, 39 CMR 1969 as to the accused's Article 38*b* rights to counsel. JAGVJ SPCM 1970/907.

14. Sentence set aside since the convening authority erred in approving a sentence after he set aside the findings of guilty as to the only Charge and specification for which accused was tried and of which he was convicted (the Charge Sheet showed two charges, but page 4 of the Charge Sheet shows only pleas and findings as to one charge). JAGVJ SUMCM 1970/917.

15. Conviction of attempting to distribute a newspaper without prior approval of the Post Commander, in violation of a lawful general regulation, set aside since evidence was obtained from the accused and admitted into evidence without the required warnings under Miranda/Tempia and Article 31 having been given. JAGVJ SPCM 1970/908.

VI. CLAIMS.

Collection pursuant to AR 27-38 (Medical Care Recovery Program)

2d Quarter 1970
1 Apr-30 Jun 1970

All Activities	$354,378.71
CONUS	
First United States Army	$166,620.81
Third United States Army	102,186.50
Fourth United States Army	67,321.05
Fifth United States Army	75,033.93
Sixth United States Army	40,907.87
MDW	4,350.80
DA	2,651.78

OVERSEAS

U.S. Army Alaska	xxxxxxxxxx
U.S. Army Southern Command	xxxxxxxxxx
U.S. Army Europe	92,757.22
U.S. Army Pacific	2,548.75

VII. MISCELLANEOUS

1. Regulations Of Interest To Judge Advocates.

AR 345-20, change No. 4, 29 Jul. 1970, effective 15 Sep. 1970, requires that requests for a record involving an actual or potential administrative tort claim be referred to the approving or settlement official.

2. AR 37-9, 21 July 1970, effective 15 Sep. 1970, entitled: Validation of Disbursements Potentially Subject To Fraud or Improper Payment, establishes responsibilities and prescribes procedures for conducting the Army-wide Validation Program.

3. Circulars Of Interest To Judge Advocates.

Circular 600-71, 21 Jul. 1970, Distribution of Court-Martial and Article 15 UCMJ Orders, was issued to alert commanders to changes in AR 27-10, Legal Services, Military Justice.

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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