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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. (82, MCM; UCMJ art 54) **Reconstructed Record Of Trial Not Verbatim Within Meaning Of Article 54.** *United States v. Weber,* No. 23,172, 4 Sep. 1970. Accused was tried by general court-martial for separate counts of wrongful possession of marihuana and amphetamines, in violation of article 134. He was found guilty and sentenced to a bad-conduct discharge, confinement at hard labor for twelve months, total forfeitures, and reduction.

At trial a malfunction in the recording equipment resulted in the omission of a substantial portion of the proceedings. The law officer noted that he had corrected the record "as well as I am able," that most of his instructions were omitted, but that he had reconstructed the omissions. The reconstruction took over six months. However, the law officer did authenticate the proceedings as a verbatim record of trial. The Court stated that the facts rebutted the inference of verity imported by the authentication of the law officer, and that the reconstruction was "not a verbatim transcript of the trial within the meaning of article 54." This was held to constitute reversible error.

The record also disclosed that numerous incriminatory statements of accused were received without proof of compliance with the warning required by *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). Due to the errors and the six months' delay at the convening authority level, the court ordered the charge and its specifications dismissed. (Per Curiam)

2. (100c, MCM) **Delay In Review Grounds For Dismissal Of Charges.** *United States v. Ervin,* No. 23,176, 25 Sep. 1970. In accord with his plea accused was found guilty of a number of offenses in violation of the UCMJ. His sentence included four months' confinement at hard labor and a bad-conduct discharge, which was suspended with provision for automatic remission. The Court first held that the instructions with regard to the sentence were erroneous. Next considered was the question of a delay in the review of the case. Action was taken promptly by the convening authority and the general court-martial authority, and on 14 Aug. 1967 a Navy board of review affirmed the conviction. However, accused was not served with a copy of the disposition of the board of review, which would have entitled him to appeal to the Court of Military Appeals, until 13 May 1970. The delay was caused by inadvertently attaching the record of trial to a record which was sent to Central Records. The Court held that when the Government has control of the procedures required to effect timely disposition of criminal charges, "neither its good faith nor 'inadvertent' negligence can excuse inordinate delay." *United States v. Parish,* 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968).

The Court held that the error in the instructions required reversal. However, in light of the fact that the period of confinement had expired, the offenses were of an unsubstantial nature and would not independently authorize the imposition of a punitive discharge, and accused

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had been separated from the service, the Court felt that no useful purpose would be served by continuing the proceedings. Accordingly, the findings of guilty and the sentence were set aside, and the charges ordered dismissed. (Opinion by Chief Judge Quinn, in which Judge Darden concurred.)

Judge Ferguson concurred in the result, stating that the delay was a violation of due process of law and he would dismiss the charges regardless of any other error.

3. (75*d*, MCM) **Possible Objection To Use Of Records Of Article 15 Punishment Occurring Subsequent To Offense Waived.** *United States v. Taylor,* No. 23,110, 18 Sep. 1970. Accused pleaded guilty to robbery and aggravated assault before a general court-martial. He was sentenced to a dishonorable discharge, confinement at hard labor for 10 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority reduced the confinement to two years. The Court first held that the military judge was not required to advise accused of his right of allocution the negative, citing *United States v. Williams,* 20 U.S.C.M.A. 47, 42 C.M.R. 239 (1970, digested 70-12 JALS 1).

The Court then considered the use of records of article 15 punishment. It was noted that in *United States v. Johnson,* 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970, digested 70-7 JALS 5), a divided Court held that for offenses occurring after 31 July 1969, records of article 15 punishment could be considered after findings as an element in the determination of the sentence. The view was expressed in *Johnson* that article 15 punishment is not a conviction that can alter the limits of punishment, but may result in a more severe sentence than would have been administered if the article 15 punishment had not been considered. In this case, the offenses for which accused received article 15 punishment occurred subsequent to the offenses for which he was tried by the court-martial. In *United States v. Stanaway,* 12 U.S.C.M.A. 552, 31 C.M.R. 138 (1961), and *United States v. Crusoe,* 3 U.S.C.M.A. 293, 14 C.M.R. 211 (1954), the Court held that the MCM then in effect prohibited the use of evidence of conviction for offenses committed after the dates of all the offenses for which the accused was then being tried. However, it was stated that the present case construes paragraph 75*d*, MCM, 1969 (rev.), which does not deal with convictions but which permits presentation to the military judge of certain personnel records reflecting past conduct and performance, subject to regulations of the Secretary.

Regulations of the Secretary of the Navy promulgated under 75*d*, MCM, limit the use of records of article 15 punishment to those relating to offenses committed during the current enlistment and during the two years next preceding the commission of the offense of which accused stands convicted. The Army regulation, (AR 27-10, para. 220) at issue in this case, contains no such restriction. Further, since paragraph 75*d*, MCM, permits use of records reflecting "the past conduct and performance of the accused," use of evidence of misconduct occurring between commission of the offenses for which he is being tried and the time of his sentencing "appears to be consistent with the terms of the manual." However, the Court did not decide that issue, holding that under 75*d*, MCM, defense counsel, by stating in response to a question from the military judge, that he had no objection to the use of the records of article 15 punishment, waived any objection accused might otherwise have raised.

Finally, citing *United States v. Montgomery,* 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970, digested 70-12 JALS 3), the Court held that the use of accused's DA Form 20, containing a notation of a previous unauthorized absence, was proper. Accordingly, the decision of the Court of Military Review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson, concurring in part and dissenting in part, agreed that in this particular case the military judge was not required to advise accused of his right of allocution. However, he stated that for the reasons set forth in his separate opinions in *United States v. Johnson, supra* and *United States v. Montgomery, supra,* he would disagree with the use of an accused's personnel records, including evidence of prior article 15 punishment. Further, the article 15 punishments in this case should not have been admitted in evidence because they were not

"prior convictions" under para. 75*b*(2), MCM. Finally, due to the "miscarriage of justice" Judge Ferguson would not permit the doctrain of waiver to be invoked.

4. (76*a*(2), MCM) **Evidence Of Previous Civil Conviction Properly Admitted To Rebut Accused's Evidence Of Good Character.** *United States v. Hamilton,* No. 22,809, 18 Sep. 1970. Accused, charged with desertion, pleaded guilty to unauthorized absence. To demonstrate accused's innocence of the offense charged, the defense introduced several favorable Airman Performance Reports. The reports covered the period from 20 Jan. 1961 to 14 Jan. 1968. After findings, defense counsel also informed the Court of accused's decorations as a result of duty in Vietnam. In response to this unsworn statement, and the aspect of good character placed in issue by the Airman Performance Reports, the Government introduced a copy of a United States District Court proceeding showing that accused had pleaded guilty on 27 May 1969 to theft of government property. In that case imposition of sentence was suspended and accused was placed on probation for one year.

The Court stated that "[w]here the defense makes an issue of the appellant's military record and standing, rebuttal evidence of a previous conviction is relevant to his character and his performance of duty." *United States v. Plante,* 13 U.S.C.M.A. 266, 32 C.M.R. 266 (1962). The breadth of defense counsel's mitigating statement and an examination of the exhibits in question satisfied the Court that the district court conviction was sufficiently related in time to be relevant. Accordingly, the decision of the Court of Military Review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred. Judge Ferguson concurred in the result.)

5. (74*d*(3), MCM) **Law Officer's Instructions On Voting Procedure For Reconsideration Of Findings Prejudicially Erroneous.** *United States v. Boland,* No. 23,082, 11 Sep. 1970. Paragraph 74*d*(3), MCM, provides that when a member of a court proposes that a finding be reconsidered, the question is determined by secret written ballot. In this case the law officer instructed that "[i]f such a request is made the members shall vote orally on the request." This instruction was erroneous. *United States v. McAllister.* (9 U.S.C.M.A. 420, 42 C.M.R. 22 (1970).)

In the *McAllister* case the court-martial had reconsidered its findings, and found the accused guilty, making the prejudice of the failure to vote on the question of a reballot apparent. In the present case it was not clear whether a reconsideration or reballot on the findings was made. However, the Court stated that the error affected a substantial right of accused and that the silent record was not sufficient to rebut the presumption of harm. Accordingly, the findings of guilty were reversed. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden dissented, stating that he doubted so strongly that the court-martial did in fact vote on whether to reconsider a finding or that at least one member's oral vote was different from what it would have been in writing, and that the result of the vote initiated a change of a not guilty finding to a finding of guilty, that the error was harmless.

6. (53*h*, 75*c*(2), MCM) **Military Judge Is Not Required To Advise Accused Of Right Of Allocution.** *United States v. Wilburn,* No. 23,135, 11 Sep. 1970. The Court held that the failure of the military judge to inquire of accused personally if he had anything to say in his own behalf before sentencing did not make the sentence illegal. *United States v. Williams,* 20 U.S.C.M.A. 47, 43 C.M.R. 239 (1970, digested 7-12 JALS 1). (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson dissented, stating that there were no facts in this case which reflected that accused was afforded the right to speak in his own behalf before sentencing. Judge Ferguson opined that the record should specifically reflect his knowledge and understanding of his right to speak. The record being silent in that respect, Judge Ferguson would reverse.

7. (UCMJ art. 128) **Specification Insufficient To Allege Offense.** *United States v. Jones,* No. 23,196, 11 Sep. 1970. The Court held that the specification, which read that accused "did . . . strike Private E-1 . . . in the face with his fists," and did not aver that the act was wrongful or unlawful, was insufficient to allege a violation of article 128. Accordingly, the decision of the

Army Court of Military Review as to the specification and sentence was reversed, and the specification was ordered dismissed. (Per Curiam)

8. (148, MCM) **Witness Not Competent Because Of Agreement With Convening Authority.** *United States v. Conway,* No. 23,250, 16 Oct. 1970. The principal witness against accused, who was charged with larceny and forgery, was an accomplice. The accomplice testified pursuant to an agreement with the staff judge advocate, in which the accomplice was to plead guilty to the same charges, but before other than a general court-martial, and the staff judge advocate was to recommend the offer to the General. The accomplice furnished an unsworn confession implicating accused in the crimes as part of the agreement. Subsequently, a statement under oath was taken, with the witness, his lawyer, a reporter, and trial counsel present. Defense counsel moved that the accomplice be declared an incompetent witness because of the agreement. In connection with the motion, the accomplice testified that his understanding of the agreement was that he must testify in conformity with the pretrial statement or face a general court-martial. The law officer rejected the motion.

The Court, citing *United States v. Stoltz,* 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964), and *United States v. Kinney,* 14 U.S.C.M.A. 465, 34 C.M.R. 245 (1964), held that the accomplice should have been declared incompetent to be a witness. The accomplice believed that he was required to testify strictly in accordance with the statement obtained from him under oath prior to trial. Whether or not the terms of the agreement required him to do so was not viewed as controlling. The belief was a reasonable one on the part of the accomplice, in view of the circumstances. Absent evidence of a complete understanding between the Government and the witness that the latter was to testify only as to the truth of the matters involved, the conviction could not be affirmed. Accordingly, the decision of the Court of Military was reversed. (Opinion by Judge Ferguson, in which Chief Judge Quinn concurred.)

Judge Darden, concurring, stated that the receipt of a benefit by a witness should not render his testimony incompetent. However, the testimony must be truthful. In this case the record did not reveal that the accomplice was to testify only in a truthful manner, thus requiring reversal.

II. COURT OF MILITARY REVIEW DECISIONS

1. (8, MCM) **Bigamy Not Service-Connected.** *United States v. Hadsell,* CM 421869, 10 Aug. 1970. Conviction: bigamy (art. 134), in accord with his plea. Sentence: BCD, F of $40 per mo for 9 mos, and 9 mos CHL. The convening authority approved the sentence but suspended the execution thereof for six months with provision for automatic remission.

At trial, a stipulation of fact in support of a motion to dismiss on the basis of *O'Callahan v. Parker,* 395 U.S. 258 (1969), was submitted to the military judge. The stipulation indicated that the offense was not committed on post; accused was not on duty or in uniform at the time of the offense; the females involved were not service members; bigamy is an offense under Texas law, and the civil courts were open. The court stated that it could not be said from the stipulation that the offense involved any question of "flouting military authority," or the integrity or security of military property. The court held that jurisdiction could not be sustained on the basis that the offenses brought discredit upon the military service. Nor, in this case, did it appear that the marriage was for the purpose of obtaining military dependent's benefits, which would be an area of military interest. Finally, the court held that accused's application for an identification card for the female in the bigamous marriage was not sufficient to confer jurisdiction for the bigamy offence. Accordingly, the proceedings, findings and sentence were found invalid and declared void, and the charges were dismissed. (Opinion by Bailey, J., in which Porcella, J. concurred.)

2. (46, 70b, MCM) **Defense Counsel Erred In Recommending Sentence.** *United States v. Rousseau,* CM 423401, 5 Aug. 1970. Conviction: unauthorized absence (art. 85), in accord with his plea. Sentence: BCD, TF, 18 mos CHL, and red E-1. During sentence argument, defense counsel opined that accused should have been given an administrative discharge. Thereafter, the military

judge asked defense counsel what an appropriate sentence would be. Defense counsel recommended a BCD and 1 yr CHL. The court stated that defense counsel "abandoned his role as advocate for the accused . . ." and became "an *amicus* for the court." The court noted that from the record they were not prepared to say that accused desired a punitive discharge, but even if they were, defense counsel rendered his previous leniency plea meaningless and conceded the appropriateness of extended confinement. This error required a rehearing on the sentence.

Additionally, defense counsel commented to the military judge following inquiry into the providency of the guilty plea that defense counsel had fully advised accused of his rights in connection with the guilty plea, and that this made the judge's inquiry unnecessary. The military judge agreed. The court noted that a military judge may not forego his responsibility to conduct a full inquiry on the assumption that defense counsel has correctly and fully advised his client. The inquiry is necessary to develop a complete record, and to insure that the plea is voluntary and knowing. Accordingly, the sentence was set aside. (Opinion by Chalk, S.J., in which Collins and Folawn, J.J., concurred.)

3. (54*b*, MCM) **Law Officer Erred In Denying Witness To Court.** *United States v. Smith,* CM 421490, 17 Jul. 1970. Conviction: violation of a lawful general regulation by the wrongful possession and transfer of a hallucinogenic drug (art. 92), contrary to his plea. Sentence: 1 yr CHL, F of $80 per mo for 12 mos, red E-1.

At trial the Government presented only one witness who implicated accused in the offenses. Accused denied any culpability. A significant part of the defense was an attack on the credibility of the Government's witness. After both sides had rested, two court members requested an additional witness to determine how a particular person was admitted into accused's room. The law officer denied the requests, both initially, and when the requests were received during deliberation on findings.

The court stated that a court-martial has a right to call for further witnesses. *(United States v. Pugsley,* 11 U.S.C.M.A. 182, 28 C.M.R. 406, 312 (1956)) which is subject to an interlocutary ruling by the law officer as to admissibility and propriety. Evidence which bears on the credibility of witnesses is relevant and admissible. The court stated that for this reason the law officer prejudicially abused his discretion by preventing the court from having the evidence it desired. There was a fair risk that the determination of accused's guilt or innocence was affected by the ruling. Accordingly, the findings and sentence were set aside. (Per Curiam)

4. PM (152, MCM) **Use Of Illegally Obtained Evidence Requires Reversal.** *United States v. Mehalek,* CM 422468, 27 Aug. 1970. Conviction: wrongful possession of marihuana (art. 134), and unauthorized absence (art. 86). Sentence: BCD, 1 yr CHL, TF, red E-1. The record disclosed that on 29 Aug. 1969, an informer telephoned the military police and reported that he had been in the company of another enlisted man who was using marihuana and who had possession of a handgun. A description of the person and his automobile was furnished. The next morning a vehicle matching the description was stopped by the gate guard. Accused was an occupant of the car. The driver of the car was informed that he was suspected of possessing marihuana, and was searched. In the meantime, accused was given a "frisk search." Following this search, accused was held for a short time, and then was "well searched," and marihuana was found in his possession.

The court opined that the marihuana was obtained from accused in the course of an unreasonable search and seizure. The military police possessed no information implicating accused in any criminal activity. It was stated that a person "by 'mere presence in a suspected car' does not lose immunities from search of his person to which he would otherwise be entitled." Further, in light of the "frisking," the search could not be jusitifed as one for weapons. Accordingly, the findings of guilty of the marihuana offense were set aside and the charge dismissed. The sentence was reassessed to provide for 3 mos CHL, F of $50 per mo for 3 mos, and red E-1. (Opinion by Folawn, J., in which Chalk, S.J., and Collins, J., concurred.)

5. PM (152, MCM) **Search Was Conducted Without Probable Cause.** *United States v. Armstrong,* CM 420683, 5 Aug. 1970. Conviction: wrongful possession of marihuana, and wrongful

possession of heroin (art. 134), contrary to his plea. Sentence: dismissal, TF, 15 yrs CHL.

On 9 Jan. 1969, a Lieutenant *F* observed accused and another smoking hashish. This was reported to his immediate superior officer, and subsequently to the Battalion Executive Officer. The Executive Officer reported the information to the CID, who also interviewed Lieutenant *F*. The CID then gave the information received from Lieutenant *F* to the Provost Marshal. The Provost Marshal called the Chief of Staff and informed him that accused and another were observed by a third officer "smoking pot in their room"; that he believed that they were in the room at the time, and he wanted authority to search for marihuana. The Chief of Staff had authority to order the search. However, he was not told who the informer was. Rather, his order to search was predicated upon the information and recommendation of the Provost Marshal. The court noted that the Chief of Staff relied solely on the information related to him by the Provost Marshal. He had no independent corroboration or verification of the heresay facts. Further, the Chief of Staff failed to weigh the evidence and determine probable cause. The court also held that the circumstances did not demand immediate action to prevent the removal or destruction of the drugs. Accordingly, the findings of guilty of the charge and its specifications were set aside and the charges were dismissed. (Opinion by Krieger, J., in which Rouillard, J., concurred.)

6. PM (UCMJ, art. 31) **Failure To Give *Miranda* Warnings Rendered Statements Inadmissible.** *United States v. Miller,* CM 421790, 12 Jun. 1970. Conviction: attempted robbery, attempted larceny, assault (arts. 80, 122, 128) contrary to his pleas. Sentence: BCD, TF, 7 yrs CHL, red E-1.

On 18 Mar. 1969 accused was questioned by an agent of the CID. At that time accused was advised of his rights under article 31 and of his right to counsel. Accused exercised his right to counsel, and such counsel was appointed to represent him. Later that afternoon, accused was placed in a lineup, with his counsel present. Thereafter, he was interviewed by another CID agent. At this time accused was not advised of his right to counsel or his right to terminate the interview. After spending the evening in the post stockade accused was again questioned and, after being advised of his rights, accused did not ask for counsel and made an inculpatory statement. Accused's attorney was in the CID office during this later questioning, but no attempt was made to contact him. The court held that while failure to deal directly with defense counsel is not reversible error *per se,* on the facts of this case the procedure could not be sanctioned. *United States v. Estep,* 19 U.S.C.M.A. 201, 41 C.M.R. 201 (1970). Accordingly, the findings of guilty of two of the charges were set aside. (Per Curiam)

7. (140, MCM) **Written Statement Taken Without Proper Warnings Inadmissible.** *United States v. Klug,* CM 421273, 9 Sep. 1970. Conviction: desertion (art. 85), contrary to his plea. Sentence: DD, 3 yrs CHL, TF, red to E-1. Accused, during training for service in Vietnam, failed to return to his unit following his authorized leave. Instead, he traveled to Rome, Italy, where his parents resided. His unit proceeded to Vietnam without him, and accused remained in Europe for two years, at which time he surrendered at the American Embassy in Paris. Upon his arrival in the United States, he was taken into custody by a Lieutenant *F*. Accused then began distributing copies of a document to newsmen. Lieutenant *F* requested and was given a copy of the document. This document was admitted into evidence at trial. Lieutenant *F* acknowledged that he had not informed accused of his article 31 rights. The document in question was a statement of accused pertinent to the issues of the case.

The court, citing United States v. Arnett, —— C.M.R. —— (ACMR 26 May 1970, digested 70-7 JALS 12) held that the Government had not satisfied his burden of establishing that accused's statement was not obtained as a result of a custodial interrogation, unaccompanied by the requisite warnings.

Accordingly, the court affirmed the lesser offense of absence without authority, and took into consideration the erroneous consideration by the court-martial, unlimited by appropriate instructions before findings and sentencing, of an act of uncharged misconduct reflected in the statement. The sentence was reassessed to provide

for a DD, 1 yr CHL, TF, and red E-1. (Opinion by Collins, J., in which Chalk, S.J., and Folawn, J., concurred.)

8. (88 MCM) **Sentence Exceeded Limits Of Pretrial Agreement.** *United States v. Addair,* CM 422686, 31 Aug. 1970. Conviction: larceny (art. 121), in accord with his plea. Sentence: dismissal, TF, 2 yrs CHL. Due to an error, a rehearing on the sentence was ordered by the convening authority. The rehearing resulted in a sentence of dismissal, payment to the United States of a fine of $1,700, and confinement at hard labor until the fine was paid, not to exceed one year.

The pretrial agreement provided for disapproval of any confinement. Accordingly, the convening authority approved only the dismissal and the fine. However, the court found that the fine should have been disapproved altogether. The fine rendered accused pecuniarily liable to the United States, and the Government could collect it even after discharge from the service. A forfeiture is collectable only while the individual is on active duty and entitled to draw pay and allowances. In this case, where the forfeiture could not be collected until the sentence was ordered executed and the sentence also included a punitive discharge not suspended, the net result was that accused never would forfeit any pay and allowances. Thus, in this sense, the fine was a more severe punishment than a forfeiture. Since the agreement contemplated a maximum sentence of dismissal and TF, the fine portion exceeded the scope of the agreement. Accordingly, the court approved only so much of the sentence as provided for dismissal from the service. (Opinion by Chalk, S.J., in which Collins and Folawn, J.J., concurred.)

9. (143*b*(2), MCM) **Morning Report Improperly Admitted Into Evidence.** *United States v. Lawson,* CM 423631, 2 Sep. 1970. Conviction: unauthorized absence (art. 86), contrary to his plea. Sentence: BCD, TF, 12 mos CHL.

To establish the termination of two of accused's three unauthorized absences, the prosecution relied on entries from a special processing detachment morning report. The exhibit containing the entries was a carbon copy of an extract copy and the signature of the certifying officer was illegible. The court held that the illegible signature did not meet the Government's burden of authentication. Further, the extract showed that two officers porported to sign the original morning report on the same day as "Commanding Officer." The court stated that this lead to a logical conclusion that the extract copy thereof lacked authenticity.

The court also noted several other irregularities in the trial. The detailed trial counsel and defense counsel were changed on the day of trial, although there was evidence that the officers finally detailed had acted in the case some months previously. The court stated that the convening order should have reflected the change as soon as possible. Finally, the staff judge advocate's post-trial review in the "clemency" section did not contain discussions of the following: (a) civilian background, (b) military record, (c) evidence in extenuation and mitigation, (d) post-trial interview, (e) prospects for rehabilitation, (f) accused's rebuttal, and (g) appropriateness of sentence.

Due to the errors in the morning report the findings of guilty of one specification were set aside and the charge dismissed. Another unauthorized absence was reduced to a one day absence. The remaining findings of guilty wer affirmed. The sentence was reassessed to provide for a BCD, TF and 6 mos CHL. (Opinion by Nemrow, J.)

Taylor, J., and Kelso, S.J., concurring, disagreed as to the deficiency of the staff judge advocate's review. They stated that only a "temporary 201 file" was available, an accused's rebuttal section was not applicable, and that the other subjects were adequately discussed in the review. The fact that they appeared in other than the clemency paragraph was not significant.

III. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. 1918 conviction set aside since the court lacked jurisdiction over the accused as he was less than 16 years of age when he enlisted, committed the alleged offenses and on the date of trial. JAGVJ GCM 1969/574.

In a 1927 general court-martial, relief was denied although accused was under 16 years of age when he enlisted. His enlistment was void but he continued to serve after passing that age

and deserted the service after his 16th birthdate. Thus, this accused was constructively enlisted and he was subject to court-martial jurisdiction. See: Hoskins V. Pell 239 F279 (1917), citing U.S. Revised Statutes Section 1118. In this connection, however, it should be noted that it was not until 10 August 1956 that the minimum enlistment age was raised from 16 to 17 years of age. See 10 USC 8256. JAGVJ GCM 1970/880.

2. Evidence held to be insufficient to sustain findings by exceptions and substitutions of an assault. Sentence reassessed on remaining finding of guilty. JAGVJ SPCM 1970/892.

3. Wrongful possession of marihuana set aside since no evidence other than a laboratory report, inadmissible hearsay evidence, was introduced to establish identity of substance involved. JAGVJ SUMCM 1970/999.

4. Sentence reassessed since the court members cross-examined the accused as to his unsworn statement made in extenuation and mitigation. See U.S. v. Wells, 13 USCMA 627, 33 CMR 159 (1963).

5. Conviction set aside since the convening authority failed to approve and order the sentence executed, albeit the Summary Court Martial Order reflected that he had done so. JAGVJ SUMCM 1970/1076.

6. A specification which alleges "violate a lawful regulation, to wit:" held not to state an offense under Article 92(1) since it did not allege the regulation violated was a "general" regulation, and since the accused's "knowledge" of the regulation was not alleged, conviction under Article 92(2) could not be sustained. Additionally, the president of the court failed to instruct on the raised issue of intoxication with respect to the willfullness alleged in another charge. TJAG reassessed sentence on remaining findings of guilty. JAGVJ SPCM 1969/949.

7. Sentence to reduction set aside since it appears that the members of the court were not aware of and were not instructed on the automatic reduction to pay grade E-1 upon approval of a sentence which included hard labor without confinement. Article 58*a*, UCMJ. JAGVJ SPCM 1970/992.

8. The failure of the court to make and enter findings as to a specification resulted in the conviction being set aside. TJAG reassessed sentence on remaining findings of guilty. JAGVJ SPCM 1970/987.

9. A specification held not to state an offense, since no date is alleged as to when the offense was committed and the allegation which merely states that the "accused was derelict in the performance of your duties, in that you failed to properly prepare yourself for guard as it was your duty to do" held to be too vague and uncertain in that it fails to allege in any manner how the accused failed to properly prepare for guard. The evidence showed that he was not fully knowledgeable as to the "Chain of Command." Conviction set aside. JAGVJ SUMCM 1970/1082.

10. Two more convictions were set aside since the detailed trial counsel was a qualified lawyer in the sense of Article 27*b* while no member of the detailed defense was a qualified lawyer in the sense of Article 27*b*. This error is jurisdictional and thus the courts were illegally constituted, and the fact that individual counsel, either military or civilian, was a lawyer did not cure the error. JAGVJ SPCM 1970/1011; 1970/1037.

11. Conviction set aside since the court member who signed the authentication of the record of trial as the President was not present during the trial and thus the convening authority acted on an unauthenticated record. JAGVJ SPCM 1970/834.

12. A specification which alleges that the accused was disrespectful in language toward an absent warrant officer held not to state an offense even though the offense was laid under Article 134, since Article 91 preempts the field in this area, and paragraph 170*a*, MCM 1969, limits the application of this offense to language within the sight or hearing of the warrant officer. Additionally the convening authority failed to order the suspended portion of the sentence into execution thereby negating the effectiveness of that portion of the sentence. Article 57(c), UCMJ. TJAG, upon reassessment for the remaining finding of guilty, limits the sentence to the suspended portion. JAGVJ SUMCM 1970/997.

13. AWOL conviction set aside since the President of the court-martial erred in failing to instruct on mistake of fact, an issue reasonably raised by the evidence. The accused testified that he had been previously discharged because of a lung condition. He reenlisted and the condition recurred; he believed he was not to report to his duty station from the hospital as he was told by a medical officer to wait at home for a medical discharge. JAGVJ SPCM 1970/882.

14. Conviction set aside since in a case tried after 7 April 1969 the record of trial failed to even indicate that the accused was advised of his Article 38(b) rights to counsel, and his understanding thereof, as required by U.S. v. Donohew, 18 USCMA 149, 39 CMR 149 (1969). JAGVJ SPCM 1970/959.

15. Conviction set aside since based on psychiatric evaluations a reasonable doubt exists as to the accused's ability to distinguish right from wrong and to adhere to the right at the time of the offense and as to his capacity to participate in the proceedings against him at the time of trial. JAGVJ SPCM 1970/984.

16. Conviction set aside since in a trial after 7 April 1969 the record of trial failed to even indicate accused was advised as to Article 38(b) rights to counsel; additionally, the accused was tried by a military judge alone and there is no request, in writing, for trial by military judge alone; neither does the record of trial reflect that the military judge advised the accused of the rights which he would forego by requesting trial by military judge alone. JAGVJ SPCM 1970/1009.

17. Conviction set aside since the convening authority erroneously directed proceedings in revision to correct improper voting procedures on findings that resulted in a finding of guilty; the original two ballots resulted in a tie vote and one of the court-members stated that they must continue to vote until two-thirds voted for a finding of guilty or not guilty. Under these circumstances the proceedings in revision could not be conducted without material prejudice to the substantial rights of the accused as the original balloting resulted in an acquittal. See Article 62, UCMJ. JAGVJ SPCM 1970/1071.

18. The Memorandum allegedly violated states that no intoxicating beverage or nonintoxicating malt beverage will be permitted or consumed in enlisted barracks; the same officer who issued that Memorandum in a DF issued prior to the alleged offense herein stated that all personnel would be made familiar with the Memorandum which "prohibits introduction or consumption of intoxicants or malt beverages in the barracks area." The Summary Court Martial made Special Findings of Fact, as follows: "Guilty of possession, although did not consume or introduce beer into barracks". Conviction of "having two (2) cans of beer in the billets" set aside since the findings of guilty are not supportable. JAGVJ SUMCM 1970/895.

19. AWOL conviction set aside since at a rehearing the prosecution failed to establish by admissible evidence the inception of the accused's absence. The extract copy of the morning report which was introduced to establish the inception of the AWOL was the same extract which was held by the convening authority to have been erroneously received in evidence at the original trial and was the basis for ordering the rehearing. JAGVJ SPCM 1970/946.

20. A specification which alleges a dereliction of duty by willfully failing to remain on his post as a sentinel on or about 1745 hours, resulted in a conviction by excepting the word "willfully" and substituting the word "negligently" which is held not to be supportable by evidence which clearly shows that the accused's tour of duty as a guard was not to commence until 1800 hours. Upon reassessment of sentence, TJAG held the approved sentence to be appropriate for remaining findings of guilty. JAGVJ SPCM 1970/1088.

21. Forfeitures of $100.00 per month held to be in excess of two-thirds pay per month, since accused was reduced to the grade of Private E-1 and he had less than two years prior service. Forfeitures reduced to $82.00 pay per month. JAGVJ SPCM 1970/1096.

22. Conviction set aside since two of the four members of the court were added after arraignment but prior to the entry of pleas, and were not sworn until after the prosecution and defense had presented its case but prior to instructions on findings. Error held to be juris-

dictional. See: US v Kendall, 17 USCMA 561, 38 CMR 359 (1968); citing US v. Robinson, 13 USCMA 674, 33 CMR 206 (1963). JAGVJ SPCM 1970/1097.

23. Conviction of being disrespectful in language to his superior NCO set aside; the NCO was not accused's superior NCO since the NCO was in a different service (Navy) and was not in accused's chain of command (See Paras 168, 170*a*, MCM 1969); conviction of resisting apprehension set aside since the accused reasonably but erroneously believed that the persons who attempted to apprehend him were not empowered to do so; accused's guilty pleas as to these charges held to be improvident. Sentence reassessed on remaining findings of guilty. JAGVJ SPCM 1970/1098.

24. Conviction of indecent exposure set aside since the competent evidence was insufficient to support the findings; the accused was effectively denied a valuable and material witness, a psychiatrist, who could testify as to accused's mental condition; and a Military Police Report, inadmissible hearsay, was considered by the Summary Court. JAGVJ SUMCM 1970/1115.

IV. MISCELLANEOUS MILITARY JUSTICE

1. Military Judge Memorandum Number 61
Wearing of Judicial Robes

1. As military judges you are aware that the wearing of judicial robes was authorized by Para 4-9, AR 670-5 and that during the past year certain military judges have been wearing them. The consistent favorable reaction received as a result of this practice has prompted TJAG to require that all military judges wear judicial robes except where the Area Military Judge may determine it to be impractical (e.g. Vietnam and Thailand). By separate communication he has made his desires known on this matter to the staff judge advocates and requested that all general and special court-martial convening authorities be so advised.

2. Within the near future this office will distribute robes to those military judges who do not have one available. A sufficient number will be distributed to you for use of the military judges not assigned to the U.S. Army Judiciary. To properly compliment the robe a light shirt, dark tie and dark trousers should be worn with it.

3. DA Form 10-233 Hand Receipt, should be executed and returned to the Chief, Trial Judiciary immediately upon receipt of your individual robe. JAGVA, 1 Oct. 1970.

2. Enlisted Personnel In Grade Of E-7 No Longer Subject To Article 15 Reduction. The adoption by the Army of a centralized system for promoting personnel to the grade of E7 has made necessary a change to Chapter 7, AR 600-200. Such promotions will now be accomplished in the same manner as provided for grades E8 and E9. Consequently, enlisted personnel in the grade of E7 are no longer subject to reduction under Article 15, UCMJ. The effective date for adoption of this change is 1 October 1970.

3. Monthly Average Court-Martial Rates Per 1000 Average Strength April-June 1970

	General CM	*Special CM*	*Summary CM*
ARMY-WIDE	.16	2.24	.96
CONUS (Excluding ARADCOM)	.22	3.29	1.49
MDW	.05	.12	—
First US Army	.22	3.52	1.24
Third US Army	.24	3.18	1.04
Fourth US Army	.20	3.14	.69
Fifth US Army	.16	3.66	.92
Sixth US Army	.28	3.62	4.50
USARADCOM	—	.21	.15
OVERSEAS	.09	1.09	.39
USA, Alaska	.23	1.37	.61
USA, Forces So Cmd	.04	1.18	1.59
USAREUR	.08	.93	.28
Pacific Area	.09	1.15	.41

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.

Non-Judicial Punishment
Monthly Average And Quarterly
Rates Per 1000 Average Strength
April-June 1970

	Monthly Average Rates	*Quarterly Rates*
ARMY-WIDE	18.78	56.33
CONUS (Excluding ARADCOM)	20.68	62.03
MDW	3.62	10.87
First US Army	18.07	54.20
Third US Army	20.42	61.26
Fourth US Army	19.98	59.94
Fifth US Army	19.47	58.41
Sixth US Army	30.78	92.34
USARADCOM	11.30	33.90
OVERSEAS	16.77	50.31
USA, Alaska	18.66	55.97
USA Forces So. Cmd	1.41	4.22
USAREUR	15.17	45.51
Pacific Area	17.51	52.53

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.

V. MILITARY AFFAIRS OPINIONS*

1. (Non-Judicial Punishment 11) **Commander Of A Provisional Unit May Impose Reduction As An Article 15 Punishment.** In response to an inquiry from a staff judge advocate for clarification of an opinion reported at 70-2 JALS 22 (JAGA 1969/4726, 10 Nov. 69), concerning the lack of authority of provisional unit commanders to impose reduction as punishment under Article 15, it was stated that the opinion in question was derived from a Military Justice Division opinion which was substantially overruled by that office in JAGJ 1970/7534, 16 Apr. 70. The more recent opinion concludes that the provisional unit commander may impose reduction as punishment in certain circumstances. Accordingly, to the extent that JAGA 1969/4726, *supra,* is inconsistent with the Military Justice Division Opinion, it should no longer be followed. JAGA 1970/4222, 25 Jun. 1970.

2. (Posts, Bases, and Other Installations 29) **Commanding General May Not Provide for Automatic Suspension of Driving Privileges for Mere Apprehension.** A staff judge advocate requested an opinion as to the authority of the Commanding General of a post, by local regulation, to provide for the automatic suspension of motor vehicle operating privileges upon apprehension for a moving traffic violation on post, regardless of prior driving record and regardless of final disposition of the case. The Judge Advocate General stated that the provision is improper insofar as it is inconsistent with AR 190-5 (20 Dec 1962), which prescribes when the driving privilege may be revoked or suspended. AR 190-5, *supra,* requires, in part, the assessment of points and calls for suspension only if that offense or that offense plus points assessed for earlier offenses, totals 12 or more. In the case of a serious offense, which calls for the assessment of 12 points, it would be proper for the commander to take summary action against the alleged offender. Driving privileges may also be suspended in the case of a serious offense, pending disposition of the charges, or for repeated violations, involvement in an accident resulting from unsafe driving, or when the offender has committed a violation of the type for which civilian authorities would normally revoke or suspend a driver's license. JAGA 1970/4157, 9 Jul. 1970.

3. (Enlisted Men 73) **Time Spent In Civil Confinement May Not Accrue As Time Lost After ETS.** A man enlisted in the Army on 31 Jan 1963 for three years. He was arrested by civil authorities while on leave on 15 Apr 1963, tried and convicted of murder, and sentenced to life imprisonment. The conviction was appealed and set aside. The enlisted man was released from civilian custody on 3 Apr 1970

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

and returned to military control voluntarily on 10 Apr 1970. An opinion was requested by TAG as to whether the time spent in civil confinement from 15 Apr 1963 to 3 Apr 1970 was time lost within the meaning of 10 U.S.C. 972.

The Judge Advocate General opined that there was sufficient evidence upon which to base an administrative determination that the enlisted man was absent without leave from 19 Apr 1963 to 10 Apr 1970. However, as a member may not accrue time lost after the expiration of his period of service, only that period from 19 Apr 1963 to 30 Jan 1966 may be assessed as time lost. It was further stated that as the absence was occasioned by the member's own misconduct it would not be excused as unavoidable UP para. 71, AR 630-10 (Change No. 6, 3 Oct. 1969). The member may be given a waiver of time lost UP para. 2-3, AR 635-200 (15 Jul 1966) to be discharged at this time, and he could be eligible to reenlist if he were otherwise qualified and was given such a waiver. Finally, it was noted that there was no prohibition against discharging a member for the convenience of the Government UP para. 5-3, AR 635-200 (15 Jul 1966) while the conviction by civil authorities was pending appeal. JAGA 1970/4230, 26 Jun 1970.

4. Dissent and the Powers of Post Commanders

Three recent decisions by Federal courts in *Kiiskila* v. *Nichols, Yahr* v. *Resor,* and *Dash* v. *Commanding General* have far reaching implications for the military service and should be considered in connection with future decisions in the dissent area.

In *Kiiskila* v. *Nichols,* —— F. 2d —— (7th Cir., 1970), the Commanding Officer, Fort Sheridan, barred a civilian employee of a credit union located on his post from entering Fort Sheridan. The plaintiff had been active in antiwar activities off post, had offered a ticket to an off-post anti-Vietnam war rally to an officer during a casual conversation, and had been stopped driving onto Fort Sheridan with a large amount of anti-Vietnam war literature in her car. From these facts, the commander had concluded that Miss Kiiskila would attempt to distribute antiwar leaflets on Fort Sheridan in violation of a local post regulation, and that her literature would prejudice good order and discipline and disrupt his mission.

Although plaintiff was initially unsuccessful, the Court of Appeals for the Seventh Circuit reversed the decision of the lower court and ordered her admitted to Fort Sheridan. The court determined that her right to oppose the Vietnam war and join organizations to achieve that goal was protected by the First Amendment. While the court was willing to weigh the competing interests of the plaintiff and the Army, it found no independent evidence that plaintiff's presence on post would endanger military discipline or that she intended to distribute her leaflets on post in violation of the local regulation. The court refused to consider the commander's affidavit and testimony as to his reasons for excluding Miss Kiiskila because it believed those reasons were too subjective and speculative.

Yahr v. *Resor,* —— F. 2d —— (4th Cir., 1970), involved an attempt by way of a preliminary injunction to enjoin the Commanding General, XVIII Airborne Corps and Fort Bragg, from refusing to permit plaintiffs, who were soldiers stationed at Fort Bragg, from distributing four editions of "Bragg Briefs" on Fort Bragg. The commander had determined, pursuant to Army Regulation 210-10 and a local implementing regulation, that the contents of the publications presented a clear danger to the loyalty, discipline, and morale of the military personnel at Fort Bragg. The District Court denied plaintiffs all relief and the Court of Appeals for the Fourth Circuit affirmed. The latter court concluded that the District Court had not abused its discretion when it denied plaintiffs preliminary relief, and, in effect, approved Army Regulation 210-10 and the local implementing regulation. However, it left open a final decision on the specific facts of the case before it until the District Court had held a final hearing on the injunction and determined which articles in "Bragg Briefs" were objectionable, and why.

Finally, in *Dash* v. *Commanding General,* 307 F. Supp. 849 (D. S.C., 1970), plaintiffs attacked Army Regulation 210-10, and its local implementing regulation, and attempted to force the Commanding General, Fort Jackson, to provide

them with a place to hold post-wide meetings at which various subjects, including the war in Vietnam, would be discussed and a petition to Congress could be drafted concerning the war. The District Court upheld Army Regulation 210-10, and the local regulation, concluded that the installation commander need not permit meetings which endangered good order, discipline, and morale, and determined that on the facts the commander properly refused to permit plaintiffs' meeting. The Court of Appeals for the Fourth Circuit affirmed.

While the facts of these cases differ, they all clearly indicate that the Federal courts will recognize and honor the right of installation commanders to protect their commands by excluding persons, publications, or activities which will interfere with their mission or endanger the loyalty, discipline or morale of the military personnel on their post. It is equally clear, however, that commanders will bear the burden of convincing the courts that their determinations were not arbitrary and capricious. Staff judge advocates must insure that they are able to present substantial evidence that at the time of the installation commander's determination the excluded person, object, or activity would have interfered with his mission or endangered the loyalty, discipline, or morale of his troops. Generalized statements will not suffice, nor will personal distaste, or mere fanciful speculation as to what may occur, as in *Kliskila,* be accepted by the courts as evidence. JAGL-X, 12 Oct. 70.

VI. MISCELLANEOUS

1. CLE Program On Defense Of Drug Cases. The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association will sponsor a program on the defense of drug abuse cases which may be of interest to judge advocates.

The program will be held between 12-14 November in the New York Hilton in New York City. It will consist of presentations describing the medical properties of the drugs commonly used, sociological and physiological reasons for drug abuse, methods of drug identification, problems raised by search and seizure, arrest, and other police activities, pretrial and trial defense strategy, and arguments on sentencing. Marihuana offenses will be given special attention.

The registration fee is $225 for the course is payable to the Joint Committee on Continuing Legal Education, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

2. Valley Forge Patriots Award. Awards will be given this year for letters of not less than 100 nor more than 500 words in length for members of the Armed Forces and Reserve Forces on the subject: Freedom—Privilege or Obligation. Entries should be submitted before 1 November 1970 to Freedoms Foundation, Valley Forge, Pennsylvania 19481. Entries should include name, rank, serial number, branch of service, unit address, home state address and zip code.

3. Articles Of Interest To Judge Advocates: Kent, *Rights Retained by the People Under the Ninth Amendment.* 29 Fed. Bar J. 219 (1970).

4. AR's Of Interest To Judge Advocates. AR 15-185, 28 Aug. 1970, Army Board for Correction of Military Records, effective 1 Oct. 1970. This revision clarifies who may make application for correction of records; release of classified material and official records; and provides for settlement of claims.

5. Distribution Of The Advocate. The Advocate is now distributed directly by Defense Appellate Division. Thus they are now in a position to make a direct mailing to any persons, civilian or military, who so request it. Names and addresses should be sent directly to the Defense Appellate Division, Headquarters, U.S. Army Judiciary, OTJAG, Department of the Army, Washington, D.C. 20310, on official letterhead. Due to diminishing supplies, it is increasingly difficult to honor request for back copies of The Advocate.

6. PLI Program On Representing The Serviceman Under Military Law. The Practising Law Institute will present two institutes on "Representing The Service Man." The first will be held on 6-7 November at the Essex House in New York City, and the second from 11-12 December at the St. Francis Hotel in San Francisco. Registration forms may be obtained from the Practising Law Institute, 1133 Avenue of the Americas, New York, N.Y. 10036. Fee is $75.00.

7. Teaching Positions At The United States Military Academy. Officers interested in a teaching position, which will become vacant during the summer of 1971 in the Department of Law, United States Military Academy, West Point, New York, are encouraged to correspond directly with Personnel, Plans and Training Office, OTJAG, ATTN: Captain Franks, Washington, D.C. 20310.

Applications are limited to officers in the grade of captain with a minimum of 12 to 24 months' active duty service. A position at USMA is a three-year stablized tour which may require the officer to have to extend his service obligation to meet this requirement.

8. Graduate Level Civil Schooling Under The Provisions Of AR 350-200. Officers interested in graduate level civil schooling for Fiscal Year 1972 should contact Personnel, Plans and Training Office, OTJAG, ATTN: Captain Franks, Washington, D.C. 20310.

Schooling will be of one year's duration and should result in a LL.M. degree in one of the following fields.

a. Procurement Law
b. International Law
c. Criminal Law
d. Patent Law

The training will be fully funded by the Government and carries a three-year service obligation. Applicants should meet the prerequisite of the Advanced Class, as announced in 70-9 JALS 15. Under no circumstances is graduate level civil schooling considered in lieu of the Advanced Course.

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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