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JUDGE ADVOCATE LEGAL SERVICE*

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

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

II. Court of Military Appeals Decisions Not Digested.

III. Court of Military Review Decisions.

IV. TJAG Actions Under Article 69, UCMJ.

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

1. (70*a*, MCM) **Military Judge's Failure To Find And Note For The Record That Accused Made A Knowing, Intelligent, And Conscious Waiver Of Rights In Guilty Plea Not Error.** *United States v. Palos,* No. 22,991, 6 Nov. 1970. Accused was tried at his request by a military judge sitting alone as a special court-martial. He pleaded guilty to four unauthorized absences in violation of article 86, and was sentenced to a bad-conduct discharge, confinement at hard labor for two months, and accessory penalties. Accused contended that his plea of guilty should not have been accepted because the military judge did not formally find, and note for the record, that accused made a knowing, intelligent and conscious waiver of the right to a trial of the facts by a court-martial composed of members, of the right to confront and cross-examine adverse witnesses and of the right not to incriminate himself.

The Court first reviewed the development of the guilty plea procedure and noted that "more comprehensive procedures than perviously utilized have been instituted to insure that an accused who proposes to plead guilty fully understands the nature of the charge against him, the meaning and effect of a plea of guilty, and that he has complete freedom to choose whether or not to enter a plea of guilty." One of the major objectives of this procedure was stated to be to guard against inadvertent waiver by accused of constitutional and statutory rights. *United States v. Care,* 18, U.S.C.M.A. 535, 40 C.M.R. 247 (1969), postulated that, before a plea of guilty can be accepted, the record must reflect that "the elements of each offense charged have been explained to the accused" and that the military judge "questioned the accused about what he did or did not do, and what he intended (where this is pertinent)." *Care* also requires that the military judge advise accused "personally" that the 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." The Court stated that the military judge's examination of accused in the present case complied with *Care* in every regard. In addition, *Care* commented on the affirmative duty of the military judge to "make a finding that there is a knowing, intelligent, and conscious waiver" by accused of his rights. However, *Care* did not prescribe the manner in which the finding should be indicated on the record.

The Court then compared paragraph 70*a*, MCM, 1969 (Rev.), which requires that the court not accept a guilty plea "without first determining that it is made voluntarily and with understanding of the nature of the charge," with Rule 11, Federal Rules of Criminal Procedure. Finding the two to be almost identical, the Court looked to federal civilian court decisions on Rule 11 for guidance. The cases reviewed held that the trial judge did not have to state, expressly and formally, on the record, that he had determined from his examination of accused that the guilty plea was voluntary and that accused understood the nature of the offense and the meaning and effect of his plea. *Bongiorno v. United States,* 424 F.2d 373 (8th Cir. 1970). *Nunley v. United*

***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 70-15 JALS [page number] (DA Pam 27-70-15).**

States, 294 F.2d 579 (10th Cir. 1961), *cert. denied,* 368 U.S. 991 (1962); *Bone v. United States,* 351 F.2d 11 (8th Cir. 1965). In *McCarthy v. United States,* 394 U.S. 459 (1969), the Supreme Court, while invalidating the acceptance of a plea of guilty and reviewing the requirements of Rule 11, did not disavow the earlier appellate gloss on the portion of Rule 11 relevant to this case. Further, in *Brady v. United States,* 397 U.S. 742 (1970), although it did not appear that the trial judge entered on the record an explicit finding that the plea was voluntary and made with understanding, the Supreme Court determined that the judge "found the plea voluntary before accepting it." *Contra, Barber v. United States,* 427 F.2d 70 (10th Cir. 1970). Looking to a related area the Court noted that in *Jackson v. Denno,* 378 U.S. 368 (1964), the Supreme Court held that when a confession is offered in evidence the trial judge must make "a proper determination of voluntariness . . . prior to the admission of the confession." In *Sims v. Georgia,* 385 U.S. 538 (1967), the Supreme Court stated that "although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." The Court concluded that when the military judge conducts a personal examination of accused to establish the factual basis for a ruling that the plea is voluntary, the ruling itself manifests, "with unmistakable clarity, the judge's conviction that his ruling is supported by the facts legally required for the result he reached." Finally, it was stated that a question of the voluntariness and understanding of a guilty plea is an interlocutory question (70*b*(5), MCM), which is normally made without formal explication of finding of fact.

It was held that the *Care* requirement for a "finding" merely required a "determination," which is a decision predicated upon the underlying facts, not a delineation of each fact essential to the determination. The Court stated that "neither constitutional requirement nor our decision in *Care* precluded acceptance of the plea of guilty without first setting out in the record formal and explicit findings of fact."

Accused also contended, and the Government conceded, that the military judge did make an erroneous statement with regard to a morning report entry showing the termination of one of accused's absences by apprehension. However, the error was noted by the staff judge advocate, and the sentence was reassessed in light of the error, thus according accused the relief he was entitled to. Accordingly, the decision of the Navy Court of Military Review was affirmed. (Opinion by Chief Judge Quinn, in which Judge Darden concurred.)

Judge Ferguson, concurring in part and dissenting in part, agreed that the error regarding the morning report was cured at the convening authority level. However, he would hold that *United States v. Care, supra,* requires a specific finding on the record that accused knowingly, intelligently, and consciously waived his rights. Further, Judge Ferguson opined that the requirement of article 54 that each record set forth verbatim all of the proceedings would not be satisfied without the reflection in the record of the military judge's ruling on the guilty plea required by *Care.* Finally, the procedural requirement of *Care* was stated to be at least as important as that of *United States v. Donohew,* 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969), and the Court, in *United States v. Fortier,* 19 U.S. C.M.A. 149, 41 C.M.R. 149 (1969) summarily reversed for failure to follow *Donohew.*

Accord: *United States v. Buklerewicz,* No. 23,284, 6 Nov. 1970; *United States v. Crowell,* No. 23,417, 13 Nov. 1970; *United States v. Hill,* No. 23,083, 6 Nov. 1970; *United States v. Katz,* No. 23,142, 6 Nov. 1970; *United States v. Mize and Waywell,* Nos. 23,306 and 23,308, 6 Nov. 1970; *United States v. Salesman,* No. 23,370, 6 Nov. 1970; *United States v. Sprague,* No. 23,276, 6 Nov. 1970; *United States v. Vasquez,* No. 23,289, 6 Nov. 1970; *United States v. Villard,* No. 23,353, 6 Nov. 1970.

2. (53*d*(2)(b), MCM) **Accused Waived Right To Question Approval Of Request For Trial By Military Judge Alone.** *United States v. Jenkins,* No. 23,015, 6 Nov. 1970. Accused submitted a request for trial by military judge along, which was approved. Subsequently, pursuant to his plea of guilty, accused was found guilty of larceny and sentenced to a bad-conduct discharge, total forfeitures, confinement at hard labor for nine months, and reduction to Private E-1. Accused

questioned compliance with paragraph 53*d*(2)(b), MCM, since the record revealed only the military judge's assertion that accused's request to be tried by military judge alone had been submitted and approved.

The Court stated that this issue was not constitutional in nature, as members of the armed forced do have the right to indictment by grand jury and trial by petit jury for a capital or infamous crime. Further, provisions for trial by a court and for waiver of such a trial are statutory. A written request for trial by military judge was attached to the record. This document was the basis for accused's waiver of his statutory right to be tried by members of a court. Without deciding whether paragraph 53*d*(2)(b), MCM, requires that the military judge elicit from accused personally a reassurance that the latter's request was understandingly made, which was not done in this case, the court stated that the suggested procedure, outlined in 69-21 JALS 18, DA Pam 27-69-21, would satisfy any requirements. In the present case accused was represented by counsel, and neither questioned the military judge's announcement of the request or his approval of it. The request itself reflected accused's awareness of its consequences. Accused had not complained that he misunderstood the significance of his request, nor that he would elect trial by members of a court if the case were reversed. The Court held that "the absence of such a complaint indicates a waiver." *United States v. Donohew,* 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969).

In addition, the Court held that even if the error were not waived, accused's substantial rights were not prejudiced. Such a determination of prejudice to substantial rights would be required to reverse (article 59(a)). To do otherwise, the Court noted, would mean elevating the manual provision over this article of the Code. Accordingly, the decision of the United States Navy Court of Military Review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson, dissenting, stated that it was clear that the military judge failed to "assure himself at trial . . .that the request was understandingly made by the accused," as required by the Manual. Thus, the failure was clearly error. Further, due to the importance of the right, the error did prejudice accused's substantial rights. *United States v. Fortier,* 19 U.S.C.M.A. 149, 41 C.M.R. 149 (1969).

Accord: *United States v. DeYoung,* No.23,165, 6 Nov. 1970; *United States v. Ferreura,* No. 23,279, 6 Nov. 1970; *United States v. Hearn,* No. 23,202, 6 Nov. 1970; *United States v. Johnson,* No. 23,221, 6 Nov. 1970; *United States v. Kirby,* No. 23,275, 6 Nov. 1970; *United States v. LeJeune,* No. 23,317, 6 Nov. 1970; *United States v. McCoy,* No. 23,034, 6 Nov. 1970; *United States v. Nava,* No. 23,185, 6 Nov. 1970; *United States v. Sauer,* No. 23,435, 6 Nov. 1970; *United States v. Simmons,* No. 23,201, 6 Nov. 1970; *United States v. Sykes,* No. 23,271, 6 Nov. 1970; *United States v. Thurman,* No. 23,054, 6 Nov. 1970; *United States v. Williams,* No. 23,243, 6 Nov. 1970.

3. (8, MCM) **Court-Martial Lacked Jurisdiction To Try Accused For Offense Committed In Civilian Community.** *United States v. Snyder,* No. 22,937, 6 Nov. 1970. Accused was convicted by general court-martial of involuntary manslaughter and assault in violation of articles 119 and 128. The offenses occurred off post, in the civilian community, while accused was on pass. The Court of Military Review found that the offenses were service-connected because of the fact that the persons attacked were military dependents, the son and wife of accused.

The Court disagreed, and held that the court-martial lacked jurisdiction to try the offenses on the basis of *O'Callahan v. Parker,* 395 U.S. 258 (1969). The status of the victims as military dependents did not provide the necessary service-connection. *United States v. Borys,* 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969); *United States v. Henderson,* 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969); *United States v. McGonigal,* 19 U.S.C. M.A. 94, 41 C.M.R. 94 (1969). Further, the fact that the victim of the charge of involuntary manslaughter expired while a patient at a military hospital was not viewed as providing the requires service-connection. The actions which led to the death had already taken place, and the death merely determined the nature and degree of the offense.

Since the offenses were not service-connected and were triable in the civilian courts, which were open and functioning, the Court held that

the court-martial was without jurisdiction. The decision of the Court of Military Review was reversed, and the charges and specifications were ordered dismissed. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn, dissenting, stated that he would sustain the exercise of court-martial jurisdiction on the basis of his dissent in *United States v. Borys, supra.*

4. (26, 74*b*, MCM) **Convictions Disapproved On Grounds Of Inconsistence.** *United States v. Clark,* No. 22,938, 13 Nov. 1970. Accused was convicted of three specifications each of bribery (article 134) and larceny (article 121), and sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for one year, and reduction to E-1. The persons who allegedly paid the bribes and the victims of the larceny specifications were the same. Accused was a sergeant assigned duties as a troop handler for some on-the-job trainees, of which group these persons were members. Accused let it be known to members of the group that if each of them paid him $20 he would see to it that they would be promoted to private first class. The money was allegedly paid, directly by one person, and through the class leader by the other two. Accused had no responsibilities in the area of promotion of his troops.

Accused contended that the two offenses alleged were mutually exclusive and that the findings of guilty must be disapproved on the ground of inconsistency. It was argued that the bribery offense required a finding by the court members that accused, at the time he accepted the money, actually intended to effect or assist in effecting, or at least not prevent, the promotions to private first class. On the other hand, the finding of false representation, as specified in the charge of larceny, required a determination that accused actually intended not to have his action influenced in regard to promotions or to refrain from fulfilling his part of the understanding. Accused contended that he could not have these two intents simultaneously. The offenses were considered multiplicious for sentencing.

The Court stated that since the maximum imposable punishment for bribery is greater than that for larceny, prejudice was apparent if accused was guilty only of larceny. The Court then cited *People v. Werner,* 29 Cal. App 2d 126, 84 P.2d 168 (1938) which held that it is proper, when doubt exists, to charge an accused with different crimes arising from the same facts, allowing the jury to determine the specific crime committed. However, the Court held that the two findings in the present case, as those in *Werner,* were mutally exclusive. The Court cautioned that nothing in the opinion may be construed as a departure from their adherence to the general law in the federal system that consistency in the verdict is not necessary. Accordingly, the decision of the Court of Military Review was reversed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

5. (UCMJ art. 31) **Law Officer's Questions In Connection With Motion To Dismiss Prejudiced Accused.** *United States v. Turnipseed,* No. 22,880, 13 Nov. 1970. After the court-martial was convened, defense counsel requested an out-of-court hearing at which he moved to dismiss all charges and specifications on the ground that accused had been denied his right to a speedy trial. Following a government witness who explained the delay, and argument of counsel, the law officer, without any preliminary advice, questioned accused relative to the charges and his knowledge of the manner in which the bases for the charges were obtained. The law officer found that articles 10 and 33 had been violated, but he denied the defense motion on the basis that the answers he had elicited from accused indicated that accused was aware of the reason why he had been confined.

The Court stated that it was apparent that the law officer utilized statements against interest, elicited from accused without a warning, when ruling on the motion. It was held that by the law officer's action accused was forced to become a witness against himself. The Court noted that the burden is on the Government to prove that accused was not prejudiced by the delay, and accused is under no obligation to aid the Government. Failure to object to the questioning was not considered as waiver by the Court, *(United States v. Philips,* 2 U.S.C.M.A. 534, 10 C.M.R. 32 (1953)), nor did his subsequent guilty plea deprive him of consideration of the issue on appeal. (*United States v. Keaton,* 18 U.S.C.M.A. 500, 46 C.M.R. 212 (1969).) Accordingly, the

decision of the Court of Military Review was reversed. (Opinion by Judge Ferguson, in which Judge Darden concurred.)

Chief Judge Quinn, dissenting, felt that defense counsel's statement that accused "was not told the nature of the offenses in this case" could fairly be construed as a representation of fact which opened the door to personal inquiry into the circumstances of his contention. In any event the inquiry was held outside of the hearing of the court members and had nothing to do with accused's guilt or innocence. Thus, the error only affected the disposition of the motion. Chief Judge Quinn would remand the case to a military judge for reconsideration of the motion to dismiss.

6. (140*a*, MCM) **Confession Sufficiently Corroborated To Sustain Conviction.** *United States v. Coates,* No. 22,793, 13 Nov. 1970. In a case arising under the *Manual for Courts-Martial, United States, 1951,* accused contended that there was insufficient independent evidence in the record of trial to corroborate his confession to the offense of larceny. Under the 1951 Manual, a confession could not be considered as evidence "unless there . . . [was] other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone." Para. 140*a*, MCM (1951). This provision was construed to require corroboration for "each element of the offense charged," except that the accused committed or participated in the crime. *United States v. Young,* 12 U.S.C.M.A. 211, 30 C.M.R. 211 (1961).

In his confession accused recounted a scheme entered into with an English-speaking Vietnamese for the theft of cargo unloaded from a ship at a government pier in Saigon. Independent evidence indicated that part of the cargo was removed from the pier in unauthorized vehicles. Further, there was a material shortage in an inventory of the cargo which was delivered at the warehouse. There was no direct testimony that all of the cargo had left the pier, although this was the usual practice. However, the absence of direct proof of a probable shortage was not determinative. The necessary corroborative evidence may be circumstantial in nature. The Court concluded that the independent evidence as to the probable existence of every element of the offense was sufficient to corroborate accused's pretrial statement admitting his participation in the larceny.

Accused also questioned the sufficiency of the instructions as to corroboration that were given the court members. The Court noted that there is substantial authority to the effect that the question of corroboration is one of law for the judge, not one of fact for determination by the court members. However, there is also authority to indicate that the triers of fact should receive instructions regarding the requirement of corroboration.

The Court held that if instructions on corroboration are proper, those given in this case were sufficient to present the issue in terms of the standard prescribed by the 1951 Manual. Accordingly, the decision of the Court of Military Review was affirmed. (Opinion by Chief Judge Quinn, in which Judges Ferguson and Darden concurred.)

7. (UCMJ art. 38(b)) **Law Officer Failed To Comply With Requirements Of** *United States v. Donohew. United States v. Bowman,* No. 22,969, 6 Nov. 1970. Accused pleaded guilty to possession of marihuana and violation of a lawful regulation, in violation of articles 134 and 92. His sentence included total forfeitures, confinement at hard labor for nine months, and reduction to the grade of Private E-1. The only issue before the court was whether the law officer failed to comply with the requirements of *United States v. Donohew,* 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969), with respect to accused's understanding of his right to the advice and assistance of counsel as prescribed in article 38(b).

The Court noted that *Donohew* placed upon the law officer the personal responsibility for making the determination of whether accused understood his rights. Further, the determination must be made by accused's personal response to direct questions incorporating the elements of article 38(b), as well as accused's understanding of his entitlement thereunder. In the present case, the law officer viewed a document which stated that accused had been informed of his rights under article 38(b) by his defense counsel. Each element of article 38(b) was listed, and accused had initiated each element, as well as signing the document. The law officer then asked if he under-

stood "everything that is stated on there and was it explained to you thoroughly before you came into court." Accused responded in the affirmative.

The Court held that while this procedure would have minimally complied with the law prior to *Donohew*, it "cannot be a substitute for the in-court, on-the-record, advice and determination of understanding and choice, to be made by the law officer in all cases tried thirty days . . ." after Donohew. Noting that accused had been released from confinement and restored to duty the Court ordered the charge and its specifications dismissed. (Opinion by Judge Ferguson, in which Judge Darden concurred.)

Chief Judge Quinn, dissenting, stated that the law officer did comply with *Donohew*, in that the inquiry made it clear that accused received proper advice and voluntarily and understandingly elected to be represented by appointment defense counsel alone. He noted that "[t]o conclude otherwise is to give more weight to the form of the inquiry than its substance."

8. (46*d*, MCM, UCMJ art. 38(b)) **Military Judge Failed To Comply With Requirements of** *United States v. Donohew. United States v. Carter,* No. 23,386, 13 Nov. 1970. The record revealed the following coloquy:

MJ: All right, Captain *A*, have you advised the accused of his right to be represented by a lawyer under the meaning of Article 38b of the Code?

DC: Yes, sir. I have. I have informed him that he had the right to be defended by a civilian lawyer at his own expense and that if he so chose, that I would also act as assistant defense counsel to the attorney or to a military counsel of his own selection. He was fully apprised of this, sir.

MJ: PFC Carter, did you understand that advice he gave you with respect to a lawyer?

Accused: Yes, sir.

MJ: Now you have already stated, Captain *A*, that you will defend him. Is that correct?

DC: Yes, sir.

The Court stated that in *United States v. Donohew*, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969) the presiding officer of a court-martial was given the responsibility of determining, by personally questioning accused, whether he was aware of and completely understood his right to counsel as provided by article 38(b). The Court held that the inquiry in this case, as reflected by the above quoted portion of the record, did not comply with *Donohew*. Accordingly, the decision of the Court of Military Review was reversed. (Opinion by Judge Ferguson, in which Judge Darden concurred.)

Chief Judge Quinn, dissenting, would affirm the decision on the basis of his dissent in *United States v. Fortier*, 19 U.S.C.M.A. 149, 41 C.M.R. 149 (1969).

9. (70*a*, 75*d*, MCM) **Accused Prejudiced By Use Of Article 15 Punishment During Presentencing.** *United States v. Beasley,* No. 23,029, 6 Nov. 1970. Accused's claim of error in regard to the acceptance of his plea of guilty was held to be without merit for the reasons set forth in *United States v. Palos,* 20 U.S.C.M.A. ——, 42 C.M.R. ——(1970, digested *supra*). Since the offense charged was committed prior to the effective date of the new Manual, the military judge's receipt in evidence during presentencing of records of nonjudical punishment was prejudicial. *United States v. Johnson,* 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970, digested 70-7 JALS 5); *United States v. Worrell,* 19 U.S.C.M.A. 487, 42 C.M.R. 89 (1970). Accordingly, the decision of the Army Court of Military Review was reversed as to sentence.

Judge Ferguson, concurring in part and dissenting in part, disagreed with the opinion for the reasons set forth in his separate opinion in *United States v. Palos, supra.*

Accord: *United States v. Marsala,* No. 23,074, 6 Nov. 1970.

II. COURT OF MILITARY APPEALS DECISIONS NOT DIGESTED.

Convening Authority Was Not Authorized To Appoint Special Court-Martial. *United States v. Riley,* No. 23,373, 13 Nov. 1970. Reversed on the basis of *United States v. Grunwall,* 19 U.S.C.M.A. 460, 42 C.M.R. 62 (1970, digested 70-7 JALS 7).

III. COURT OF MILITARY REVIEW DECISIONS.

1. PM (152, MCM) **Probable Cause To Search Found.** *United States v. Weshenfelder,* CM 421945, 21 Sep. 1970. Conviction: violation of a lawful general regulation and carrying a concealed weapon (arts. 92 and 134), contrary to his pleas.

Sentence: F of $1,000 per mo for one mo and to be reprimanded. The convening authority reduced the forfeiture to $500.

The record revealed that on 2 Jun. 1969, Agent *T* of the CID received a call from a senior noncommissioned officer assigned to military intelligence who reported that an unidentified, but reliable, informer had stated that a major and an enlisted man had attempted to sell ration cards at a bar in Saigon. Agent *T* and others placed the bar under surveillance. The military intelligence agent identified accused in the bar. The enlisted man was observed in the latrine talking to a Vietnamese. The enlisted man returned to the bar and conversed with the major. Enough of the conversation was overheard to make it clear that the agents had been spotted by the suspects. The two men were stopped on the street as they left the bar. A frisk search revealed a pistol carried by accused. Blank ration and identification cards were found on the other suspect. A Vietnamese also testified that the two had attempted to sell him military items, including ration cards.

Accused's commanding officer was contacted and told of the arrest and that a companion had possession of blank ration cards. The commander authorized a search of accused's desk in the command's Adjutant General's Office. Blank ration cards, a dangerous drug, and marihuana were found in the desk. Accused admitted possession of the weapon and the ration cards, but denied knowledge of the other contraband, and was acquitted of those charges.

Accused had made a motion to suppress the weapon and ration cards at trial, and contended that this motion was erroneously denied. The court first considered the legality of the seizure of the weapon. It was noted that in order for a military search to be reasonable there must be probable cause. *United States v. Goldman,* 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1068). However, probable cause was not seen as "an inelastic standard demanding a measured degree of evidence without regard to the nature and gravity of police action undertaken. La Fave, "Streat Encounters and the Constitution," 67 Mich. L. Rev. 40, 54 (1968). The court viewed the requirement of probable cause as a device used to balance the interests of the public in crime prosecution and of the individual to privacy and security. If there is a limited invasion of privacy, lower standards of probable cause are required. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *Terry v. Ohio,* 392 U.S. 1 (1968). Applying this standard, the court concluded that the "corroboration of the information reported justifies the detaining of the suspect briefly in a legitimate effort to determine whether the suspect's presence was innocent or an act done in the furtherance of the scheme reported by the informant." Having detained the suspect, the court held that a limited search for weapons may be made when the suspect is reported to be armed, has noticeable bulges in his clothes, or when other circumstances give rise to a substantial possibility that he is dangerous. *Terry v. Ohio, supra.* The military judge's ruling was said to be "reviewable only for abuse of discretion."

As to the search of the desk, the court held that this was also a reasonable search. The commander had been informed reliably and officially that there was good reason to believe that accused was engaged in an unlawful enterprise. Accordingly, the findings of guilty and the sentence were affirmed. (Opinion by Finkelstein, J., in which Bailey, J., concurred. Porcella, S.J., concurred in the result.)

2. (70*b*, MCM) **Guilty Pleas May Not Be Discouraged.** *United States v. Clevenger.* CM 423766, 1 Oct. 1970. Conviction: unauthorized absence (art. 86), in accord with his plea. Sentence: BCD, TF, 10 mos CHL, and red E-1.

The court was concerned with a colloquy between the military judge and trial defense counsel following the entry of the guilty plea. The military judge indicated that in AWOL cases it was "preferable that the accused plead not guilty." The military judge further stated that accused had a right to plead guilty but that a not guilty plea saves "time, effort, and expense to the government." The reason given for this view was that the mechanical requirements involved in explaining the meaning and effect of a guilty plea are frequently the subject of error, requiring a rehearing. The military judge, following this conversation, fully complied with the requirements of *United States v. Care,* 18 U.S.C.M.A. 534, 40 C.M.R. 247 (1969).

The court expressed the opinion that "a mili-

tary judge policy that affirmatively encourages an accused to foresake his right to plead guilty for purposes of expediency is improper and erroneous." The court noted that a guilty plea is a mitigating factor, and they were not convinced that it did not result in an increased sentence in this case.

The court indicated that in the future it will "closely scrutinize for improper influence those records of trial where accused plead not guilty to unauthorized absences and no defenses or objections were raised." Accordingly, the findings of guilty were affirmed, and the sentence reassessed to provide for a BCD, 6 mos CHL, TF and red E-1 (Opinion by Taylor, J., in which Kelso, S.J., concurred.)

3. (70*b*, MCM) **Plea Of Guilty To Violation Of Lawful General Regulation Improvident.** Regulation Did Not Apply To Accused. *United States v. Strickland.* SPCM 5751, 28 Sep. 1970. Conviction: escape from custody, violation of a lawful general regulation, absence without leave, and fleeing the scene of an accident. Sentence: BCD, F or $82 per mo for 6 mos, 6 mos CHL, and red E-1. Accused's conviction of violation of a lawful general regulation was based upon his driving of a car of which he was not the owner and which was equipped with bald tires. Accused contended that the regulation applied only to owners of privately owned vehicles, and not owners and operators.

The court noted that regulations which form the basis for criminal prosecutions must be measured by the standards set for penal statutes. *United States v. Baker,* 18 U.S.C.M.A. 504, 40 C.M.R. 214 (1969). Thus, a penal regulation must be definite and certain, strictly construed, and doubt must be resolved in favor of the accused. The regulation in question prescribed the rules relating to the "registration and operation of privately owned motor vehicles in Germany." By its own terms various sections apply solely to owners and others apply to operators without regard to ownership. The section involved appeared in a section applying to owners alone. While the sentence prohibiting operation of a car with bald tires might be argued to apply to all operators, the court construed that sentence in light of the entre regulation and the section in which it appeared, and found that it applied only to owners. Accordingly, the finding of guilty of violation of a lawful general regulation was set aside and the charge dismissed. The sentence was reassessed to provide for a BCD, 5 mos CHL, F of $50 per mo for 5 mos, and red E-1. (Opinion by Chalk, S.J., in which Folawn, J., concurred.)

4. (154*a*(4), 171(b), MCM) **Government Failed To Demonstrate That Accused Received Order To Active Duty In Court-Martial For AWOL.** *United States v. Dolan,* SPCM 6166, 29 Sep. 1970. Conviction: unauthorized absence (art. 86), contrary to his plea. Sentence: BCD and red E-1. Accused had been a member of an Army National Guard Unit in California. Upon his failure to attend meetings he was involuntarily ordered to active duty. His address and home of record at that time was Copenhagen, Denmark.

The court stated that the proof was deficient in that it did not establish that the order to active duty was received by accused, either actually or constructively. An order that is individual in its application becomes effective when notice of such order, actual or constructive, has been received by the individual concerned. Para. 14*b*, AR 310-1; *United States v. Bennet,* 4 U.S. C.M.A. 309, 15 C.M.R 309 (1954). The regulation upon which accused's call to active duty was based provides that such an order will be forwarded to the individual concerned "by certified mail with a return receipt requested" para 14*h* (3), AR 135-91. Further, upon the failure of the individual to report, the appropriate commander is to conduct an investigation to determine whether the individual received the order or was chargeable with knowledge of its contents. The presumption of regularity was destroyed in this case by comments of the staff judge advocate in his pretrial advice which stated that there was nothing in the file to indicate that accused received the order. Since the court was dealing with a question of jurisdiction over the person it was permitted to go outside the record to resolve the question. *United States v. Wheeler,* 27 C.M.R. 981 (AFBR 1959). Accordingly, the findings of guilty and sentence were set aside and the charge was dismissed. (Opinion by Chalk, J.J., in which Folawn, J., concurred.)

IV. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Conviction of violating a lawful general regulation by distributing a newspaper on post without the prior approval of the Post Commander set aside since the evidence fails to establish that the alleged distribution was *without the prior approval of the Post Commander,* an essential element of the offense charged. JAGVJ SPCM 1970/1036.

2. The Special Court-Martial Order in the case erroneously reflected that the accused was found guilty of Specification 1 of Charge I, an offense that was dismissed by the Military Judge on the prosection's motion. Relief granted dismissing Specification 1 of Charge I; approved sentence deemed appropriate. JAGVJ SPCM 1970/1083.

3. Conviction of wrongful possession of marihuana set aside since the only evidence introduced to establish that the substance possessed was marihuana was a laboratory report, which is inadmissible hearsay. JAGVJ SPCM 1970/1094.

4. Conviction of wrongful possession of marihuana set aside since it appears that the accused, who was represented by a non-lawyer pleaded guilty; he testified in extenuation and mitigation a) that he had been told by his C.O. that if he had anything to turn in, he should do so before the inspection and that he could turn anything in without punishment; b) that he could not get to his locker because he had to wait outside; and c) when he did get inside he voluntarily turned the marihuana over to his C.O. The President of the court-martial erred to the prejudice of the accused's substantial rights by failing to make further inquiry into the providence of the guilty plea. JAGVJ SPCM 1970/1154.

5. Conviction of wrongful possession of marihuana set aside since the search of accused's quarters which produced the marihuana was not based on probable cause that the marihuana was *located in the place searched,* although there may have been probable cause to search accused's person, which search proved unsuccessful. JAGVJ SPCM 1970/1160.

6. Evidence held to be clearly insufficient to establish beyond a reasonable doubt that the accused shot the M-16 rifle at the victim of the assault; however, evidence does support an assault with a dangerous weapon by pointing a loaded M-16 rifle at the victim. Findings reduced; sentence upon reassessment deemed appropriate. JAGVJ SPCM 1970/1163.

7. Conviction of reckless driving set aside since the evidence is insufficient to establish beyond a reasonable doubt that the accused operated a motor vehicle in a reckless manner, as alleged. No eye-witnesses testified, other than the accused. His testimony as to a mechanical failure was consistent with an MP's testimony, a prosecution witness, who testified as to skid marks, weaving and condition of the road after the incident. JAGVJ SPCM 1970/1170.

8. Assault conviction set aside since it appears that the accused was acting in self-defense at the time of the alleged assault. A group of soldiers, in the evening after lights were out, approached accused, one of whom had a blanket over his arm; there had been a rumor that the accused was due for a "blanket party" as he had taken money from one of the group to pull KP for him but had failed to do so and was financially unable to repay the money, although the evidence showed he had tried to borrow it by pledging his wedding ring; accused struck at the group cutting two of them with a razor blade; and the "victims" did not report the assault but the accused did report the incident to the CQ. The record was silent as to whether there had been an instruction on self-defense and counsel stated that they could not remember. JAGVJ SPCM 1970/1008.

9. Conviction of wrongful possession of marihuana set aside. The record which only shows that a member of the unit told the C.O. that he saw the accused with a plastic bag that he believed contained marihuana fails to indicate sufficient underlying facts and circumstances supporting the authority ordering the search to conclude that the first time informant was reliable and that his information was supported by corroborating circumstances, other than that the search was successful. Probable cause was thus lacking. JAGVJ 1970/1061.

10. Evidence of record held to be insufficient to support the findings of guilty to unlawfully communicating a threat to kill First Sergeant K, since the evidence establishes that the accused

was distraught and merely said "he was going to kill every GI between here and Saigon." A notation by the examiner in the SJA office at the supervisory authority level appears to indicate that the record was deficient since testimony that might be crucial with respect to the threat offense was omitted from the record. In this connection it should be noted that a Certificate of Correction is the proper method for supplying an omission in the record of trial. Sentence reassessed on remaining finding of guilty. JAGVJ SPCM 1970/1066.

11. Conviction of wrongful possession of marihuana set aside since the search which resulted in the finding of a trace of marihuana in a shirt was not based on probable cause; and additionally the evidence was insufficient to connect the accused with the trace of marihuana found in a shirt. JAGVJ 1970/1102.

12. Evidence held to be insufficient to establish beyond a reasonable doubt that the accused discharged a .45 caliber pistol through carelessness. The only significant evidence was a report by the accused, who was on guard, that he shot himself. No evidence was introduced as to the circumstances under which the weapon was discharged. The evidence does not exclude an intentional discharge of the weapon or that it discharged accidentally without any fault on accused's part. The doctrine of *res ipsa loquitur* is not appropriate. JAGVJ SPCM 1970/1124.

13. Accused was erroneously tried in the grade of SP4 when he was actually a SP5, as a purported reduction UP Article 15 from SP 5 to SP4 was held by higher authority in the chain of command to be void *ab initio* as the officer imposing the reduction did not have promotion authority. Sentence reassessed, in part, to provide for a one-grade reduction from SP5 to SP4. JAGVJ SPCM 1970/1153.

V. CLAIMS.

1. Collection pursuant to AR 27-38

(Medical Care Recovery Program)

3d Quarter	1970
1 Jul-30 Sep	1970
All Activities	$462,842.39
CONUS	
First United States Army	$113,377.77
Third United States Army	93,211.01
Fourth United States Army	63,563.60
Fifth United States Army	52,479.74
Sixth United States Army	62,297.79
MDW	35,119.34
DA	1,742.72
OVERSEAS	
U.S. Army Alaska	500.00
U.S. Army Forces Southern Command	xxxxxxxxxx
U.S. Army Europe	37,477.90
U.S. Army Pacific	3,072.45

JAGL-T, 18 Nov. 1970

2. Recovery Action Against Carriers, Warehousemen, and other Third Parties

Carrier Response to Claims Correspondence. The Department of the Army Inspector General's Office advises that a recent inspection of USAREUR installations revealed many complaints from claims offices that carriers were not promptly responding to claims correspondence, and in many cases made no response, resulting in costly and time consuming follow up action.

Attention is invited to Army Regulation 55-356 which contain a sample copy of the tender of service submitted by all carriers handling household goods and unaccompanied baggage for the Government. The tender of service requires a carrier to acknowledge receipt of a claim within ten days after its receipt, and to pay, or make a firm offer in writing within 120 days after receipt of the claim. If the claim is not processed and disposed of within 120 days after receipt thereof, the carrier will at that time and at the expiration of each succeeding 30-day period while the claim remains open, advise in writing of the status of the claim and the reasons for the delay in making final settlement thereof. Failure to comply with the above provisions constitutes a violation of the tender of service for which the carrier may be suspended or disqualified.

When a field claims office encounters unnecessary delay in responding or failing to respond, it is recommended that the above provisions be pointed out to the carrier. If this does not produce a reply, then a letter should be forwarded to the origin transportation officer setting forth complete details and requesting suspension action for the violation.

Suggestions for Improvement of Recovery Actions. This review of personnel claims files by the U.S. Army Claims Service discloses continuing improvement in the processing of recovery actions by the field claims offices. Most claims offices are doing an outstanding job on recovery actions. There are a few offices, however, which should be improved in this respect.

Some deficiencies which have been noted and suggestions for improved operations are as follows:

a. Demands on third parties are being dispatched which do not have all pertinent information entered thereon, are unsigned, and date of dispatch is not shown. The value of such documents as evidence is questionable.

b. Files are being received which do not:

(1) Show the adjudication figures on the DA Form 1089-1.

(2) Contain a copy of the cash collection voucher or other accounting for third party payments.

(3) Contain legible copies of all required documents.

c. Claim files forwarded for further recovery action should contain a complete and legible copy of the "Inventory Comparison Chart" as shown in Figure 11-8, AR 27-20. A photostatic copy of this chart is routinely forwarded by the U.S. Army Claims Service to each third party for use as a basis for determination of liability. Use of this chart by field offices will eliminate lenghty letters and result in surprisingly increased recoveries.

d. It is noted that some field offices are not claiming credit for all amounts recovered in their areas of responsibility. Amounts paid by third parties to a claimant should be reported even though no claim is presented to the Government or, if presented, is withdrawn after third party satisfaction. Automatic Data Processing of certain claims records and reports will start in January 1971. Thereafter, reports, quarterly or more often if desired, will be furnished each claims supervisory authority showing the amount recovered by each field office within his area of geographic jurisdiction. Each head of a field claims office will probably need to claim credit for all recoveries made by his office.

e. Claims for loss or damage to privately owned vehicles by ocean carriers are to be processed pursuant to paragraph 11-38a, AR 27-20. Do not forward files of such claims to this Service.

f. Demands on carriers should be directed to the home office of the carrier named on the Government bill of lading. Many offices are writing several times to the agent of the carrier who neither responds nor notifies the principal carrier. The MTMTS list of authorized carriers has been published and distributed, and future lists will be distributed as received from MTMTS. This list contains the home office address of authorized carriers.

g. Many files are forwarded to the U.S. Army Claims Service as an "Impasse" which contain one letter to the carrier demanding a certain amount with no accompanying inventory comparison chart or other explanation of what constitutes the amount demanded, and the carrier response with an itemized offer of a lesser amount than demanded. If the offer is reasonable under the law and facts of the case, the offer should be accepted. If not, you should discuss liability with the carrier in an effort to arrive at a satisfactory settlement.

h. The Government's method of shipping through multiple third parties in many cases makes it almost impossible to fix liability on any one party. Don't waste too much time on recovery action in such cases.

i. Under the provisions of the Government bill of lading, the carrier is entitled to prompt notice of loss or damage and the opportunity to inspect if he desires. Exceptions at delivery of course is prompt notice. Failure to except at delivery does not bar a claim. For later discovered loss or damage the letter "Notice of Loss or Damage" Figure 11-6, AR 27-20, is the most vital document. Please work closely with your transportation officer to insure that he dispatches this letter within 24 hours from the time he received notice of the loss or damage. Missing items should be identified as fully as possible to assist the carrier in tracer action.

j. When the claimant has made no exceptions at delivery; has not notified the proper parties of his loss or damage within 30 days from date of delivery; and the carrier denies liability on

these grounds, consideration should be given to the provisions of paragraph 11-36, AR 27-20.

k. The facts and circumstances as shown on page 1 of DA Form 1089 should be as detailed and complete as possible. Unusual circumstances should be set forth, and on what document exceptions were noted or an explanation of why exceptions were not noted in writing.

l. When a claim file is returned to a field claims office for any reason it is given a suspense date in this office. If the file has not been returned at the expiration of the suspense, a letter of inquiry as to status is dispatched to the field office. Prompt reply to this letter of inquiry is requested.

The Recovery Division, U.S. Army Claims Service is available to answer questions and to assist in any way in improving the recovery program (Autovon 231-1546, Ext 5214).

V. MISCELLANEOUS.

1. Error In Court Of Military Appeals Slip Opinion, *United States v. Beasley,* **No. 23,029, 6 Nov. 1970.** The second sentence beginning on page 2 of the slip opinion which currently reads: "Since the *punishment was imposed* before the effective date of the 1969 Manual for Courts-Martial which authorized consideration of such evidence, the record should not have been considered," should be changed to read: "Since the *offense charged was committed* before the effective date . . ."

Beasley, therefore, does not change the rule of admissibility of records of Article 15 punishments set out in *United States v. Johnson,* 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970). JAGUZ, 16 Nov. 1970.

2. Pamphlets Of Interest To Judge Advocates. DA Pam 27-2, 28 Jul 1970, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised Edition).

DA Pam 27-17, 10 Jun. 1970, Procedural Guide for Article 32(b) Investigating Officer.

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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