

# APPENDIX K

## SELECTED DECISIONS AFFECTING THE ADMINISTRATION OF MILITARY JUSTICE WITHIN THE ARMED FORCES <sup>1</sup>

### COMMAND INFLUENCE

The Court addressed an issue in United States v. Bartley, 47 MJ 182 (1997), which involved a defense allegation that the trial defense counsel had entered into a sub rosa agreement with the Government that the defense would not make a motion based on unlawful command influence in exchange for a favorable pretrial agreement. After earlier remanding the case for further fact-finding on this issue (43 MJ 426-27), the Court upon further review examined the evidence relating to the issue and concluded that it was not convinced beyond a reasonable doubt, based on the full record, that the command influence issue did not induce the guilty plea. Thus, the Court set aside the findings and sentence and authorized a rehearing.

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<sup>1</sup>This section of the Court's annual report is prepared solely as an informational tool by the staff of the Court. It is included for the convenience of the reader to assist in easily locating cases of interest during the term. The case summaries are not of precedential value and should not be cited in briefs filed with the Court. It is further noted that some of these decisions were not unanimous.

## COURTS OF CRIMINAL APPEALS

Noting the authority of the Courts of Criminal Appeals under Article 66(c), UCMJ, concerning the scope of their fact-finding powers, the Court held in United States v. Ginn, 47 MJ 236 (1997), that Congress intended such courts to act as fact-finder in an appellate-review capacity and not in the first instance as a trial court. Thus, the Court also ruled that it was inappropriate for a Court of Criminal Appeals to exercise its fact-finding authority to resolve a post-trial claim of ineffective assistance of counsel predicated, in part, on the submission of conflicting post-trial affidavits. However, the Court further noted that an evidentiary hearing was not required in all cases to resolve such collateral claims. In resolving a guilty-plea case when an ineffective assistance of counsel claim was made by an accused, the Court held that an evidentiary hearing need not be ordered if an appellate court can conclude that the motion and the files and records of the case conclusively show that an appellant is entitled to no relief, citing United States v. Giardino, 797 F.2d 30, 32 (1<sup>st</sup> Cir. 1986). Although the Court found that, under the circumstances presented in Ginn, the Court of Criminal Appeals had erroneously exercised its fact-finding powers, it nevertheless held that the appellant had not been harmed because he had not shown that he would not have pleaded guilty but for counsel's alleged deficient representation.

## PROCEDURE

Examining the requirements of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), as earlier applied in United States v. Moore, 28 MJ 366 (CMA 1989), concerning government peremptory challenges of court members of a military accused's own race, the Court noted in United States v. Tulloch, 47 MJ 283 (1997), that it had relied on differences between the military justice system and the civilian system in reaching its decision in Moore. In reliance on those differences in Moore, the Court further noted that it had rejected a requirement that the defense establish a prima facie case of discrimination. Addressing the issue of the Government's burden to justify a peremptory challenge in Tulloch, the Court held that once the convening authority has designated a servicemember as "best qualified" to serve on a court-martial panel, trial counsel may not strike that person on the basis of a proffered reason, under Batson and Moore, that is unreasonable, implausible, or that otherwise makes no sense. Thus, under the circumstances in Tulloch, the Court upheld the ruling of the Court of Criminal Appeals that the trial judge had erred in allowing the trial counsel to peremptorily challenge a court member.

Addressing the standard of review on appeal of an issue relating to the providency of pleas of guilty, the Court held in United States v. Peterson, 47 MJ 231 (1997), that

once a military judge has accepted a plea and entered findings of guilty thereon, an appellate court will not disturb the findings and plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record, quoting United States v. Garcia, 44 MJ 496, 498 (1996).

### **SUBSTANTIVE LAW**

In United States v. Solis, 46 MJ 31 (1997), the Court rejected a defense argument that there should be an "exculpatory no" exception in the military justice system to the offense of making a false official statement in violation of Article 107, UCMJ. After observing that there was a conflict among the federal circuit courts of appeals as to the application of an "exculpatory no" exception to 18 USC § 1001, the Court held that Article 107 differed from 18 USC § 1001 and that there were important reasons for such differences relative to the military mission of the armed forces. The Court held in this regard that the purpose of military criminal law was to maintain morale, good order, and discipline within the armed forces, an objective which had no parallel in civilian criminal law.<sup>2</sup>

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<sup>2</sup> Subsequent to the Court's decision in United States v. Solis, 46 MJ 31 (1997), the Supreme Court of the United States rejected the defense's interpretation of 18 USC § 1001 in Brogan v. United States, 66 LW 4111 (S. Ct. June 26, 1998).

Citing its prior case law, the Court in United States v. Bygrave, 46 MJ 491 (1997), affirmed an accused's conviction of assault with a means likely to cause death or grievous bodily harm in violation of Article 128, UCMJ, where the charged misconduct consisted of the accused engaging in unprotected sex with a victim whom he previously informed as to his own HIV-positive condition. The Court ruled that since a form of aggravated assault was involved, the victim could not consent to an act that was likely to result in grievous injury or death.

#### **EVIDENCE**

In United States v. Miller, 46 MJ 63 (1997), the Court held that the military judge did not abuse his discretion by admitting evidence of the accused's prior molestation of another child to show intent, plan or scheme, or motive to molest the present victim under the provisions of Military Rule of Evidence 404(b), citing United States v. Hicks, 24 MJ 3 (CMA 1987). The Court also ruled that the accused's acquittal of the prior offense was not dispositive since the proper focus of the admissibility of such evidence was whether it was relevant and whether its probative value outweighed its prejudicial impact under the provisions of Military Rules of Evidence 401 and 403.

#### **EVIDENCE OF RETIREMENT BENEFITS**

In United States v. Greaves, 46 MJ 133 (1997), the Court held that a military judge erred in his response to questions from court members concerning the impact of a punitive discharge on the accused's eligibility for retirement by instructing the members that such matters constituted collateral consequences which they should not consider. Noting that the accused was very close to becoming retirement eligible, the Court held that its prior decision concerning a similar issue in United States v. Henderson, 29 MJ 221 (CMA 1989), was easily distinguishable from the present case, that each case must be examined on its facts and circumstances, and that the military judge in this case erred by rejecting evidence pertaining to the accused's potential monetary loss of retirement benefits.

#### **CHALLENGES FOR CAUSE**

In United States v. Minyard, 46 MJ 229 (1997), the Court held that a military judge erred by rejecting a defense challenge for cause against a court member who was married to an agent involved in the investigation of this case. The Court distinguished between actual bias and implied bias by noting that a challenge for cause based on actual bias is essentially one of credibility where the military judge's ruling is accorded great deference, whereas a challenge based on implied bias is reviewed under an objective standard (reasonable member of the public)

which, in turn, requires an examination under Rule for Courts-Martial 912(f)(1)(N) to determine if there is substantial doubt as to legality, fairness, and impartiality of the court-martial.

#### **ARTICLE 31 RIGHTS**

In United States v. Payne, 47 MJ 37 (1997), the Court addressed a question concerning whether a civilian polygraph examiner was required to inform a military person of his Article 31, UCMJ, rights as part of a security clearance investigation in order for his confession to a rape offense to be admissible in his subsequent court-martial. The Court held that where the military accused requested revalidation of his security clearance and a polygraph examination was conducted as part of such security clearance investigation, the person performing the examination was not required to give Article 31 warnings as a prerequisite to the admissibility of the accused's rape confession to the examiner at the subsequent court-martial on this charged offense. In reaching its decision the Court observed that the examiner was a civilian employed by the Defense Investigation Service, the examiner was outside the accused's branch of service, there was no ongoing criminal investigation of the accused, and the accused initiated the security investigation.

## **PRETRIAL CONFINEMENT**

Addressing a defense claim of unlawful pretrial punishment in United States v. McCarthy, 47 MJ 162 (1997), the Court held that the mere fact that an accused complained to authorities about the conditions of his pretrial confinement did not support the conclusion that he was improperly subjected to punishment prior to trial in violation of Article 13, UCMJ. The Court further held that the question of unlawful pretrial punishment under Article 13 was a mixed question of law and fact that required a de novo review, but that the question of whether there was a purpose or intent to punish an accused before trial involved basic, primary, or historical facts. Thus, the Court ruled that a military judge's finding of fact on the purpose or intent alleged in the case would be reversed only for a clear abuse of discretion. After examining the evidence of record in this case, the Court held that the military judge did not err by rejecting the accused's claim of unlawful pretrial punishment.

## **ELECTRONIC CRIME**

The Court examined the constitutional protection of an individual's receipt and transmission of electronic data in the context of the transmission of child pornography in United States v. Maxwell, 45 MJ 406 (1996). Therein the Court observed that a person has a limited expectation of privacy in e-mail messages received on a computer



subscription service and that law enforcement officials must establish probable cause to enter into a personal and private computer. However, the Court noted that, after an electronic message is transmitted, the Fourth Amendment expectation of privacy diminished and that, after a message is transmitted and received by another person, the transmitter no longer controls its destiny. The Court further distinguished between an electronic message which had been transmitted via a network service such as America Online (AOL) and direct "real time" transmissions, noting that in the former the transmission is stored in a centralized computer. The Court also distinguished between information provided by an individual after he received it through normal channels, noting the loss of the expectation of privacy after its transmission, and the search of the computer files of AOL where there was a greater expectation of privacy which required a warrant. After examining the information provided for the search warrant of the computer files of AOL in this case, the Court held that the search was valid in part and invalid in part. Specifically, noting that AOL allowed users to select various screen names, as the warrant was issued in terms of a specific screen name, the Court held that the conversion of the screen name to a user name by AOL resulting in the search of all screen names of the user was overly broad. Rather, the Court held that the search pertaining to the screen name provided in the warrant, after viewing a mistake in

spelling to be inconsequential, was valid but that the search under another screen name utilized by the same accused was invalid.

#### **PRIOR PUNISHMENT**

Analyzing the concept of prior punishment in United States v. Zamberlan, 45 MJ 491 (1997), the Court held that the military judge did not err by rejecting a defense requested instruction on prior punishment where the accused had a nonjudicial punishment previously imposed under Article 15, UCMJ, which was suspended but subsequently imposed due to a vacation of the suspension for later misconduct. Distinguishing its earlier decision in United States v. Pierce, 27 MJ 367 (CMA 1989), which involved a prior nonjudicial punishment for the same misconduct involved in the later court-martial, the Court held that, in this case, the misconduct giving rise to the court-martial was not the same misconduct as resulted in the Article 15 punishment, but was only utilized to vacate the suspended punishment of that prior proceeding.

#### **CAPITAL PUNISHMENT**

The Court previously affirmed a sentence of death in United States v. Curtis, 44 MJ 106 (1996). Thereafter, the Court granted a defense petition for reconsideration in this case, 46 MJ 129 (1997), and held that the accused had been denied effective assistance of counsel during the

sentencing hearing. Accordingly, the Court reversed the decision of the United States Navy-Marine Corps Court of Military Review (now the Court of Criminal Appeals) as to the sentence and remanded the case with directions to either affirm a sentence of life imprisonment with accessory penalties or conduct a rehearing on the sentence.

Another death sentence was reviewed by the Court in United States v. Thomas, 46 MJ 311 (1997). Therein the Court held that the military judge had erred by instructing the members to vote on a sentence to death before voting on a less severe sentence. The Court ruled that the military judge's erroneous instructions undermined confidence in the reliability of this sentence because they created an intolerable risk that this ultimate sanction was erroneously imposed. Thus, the Court reversed the decision of the United States Navy-Marine Corps Court of Criminal Appeals as to sentence and remanded the record with direction that a rehearing on sentence may be ordered.

#### **JURISDICTION**

Noting the literal language of Article 3(b), UCMJ, the Court affirmed the decision of the United States Army Court of Criminal Appeals in United States v. Reid, 46 MJ 236 (1997), which held that an accused must be tried and convicted on a charge of fraudulent discharge before he can be tried for misconduct which occurred prior to such

discharge. The Court held that a fraudulent discharge is merely voidable, not void, and that a court-martial provided an appropriate forum for adjudicating such matter. Rejecting the Government's argument of efficiency and effectiveness as to allowing all charges to be tried by one court-martial, the Court ruled that this was a matter of policy to be addressed to Congress, not the Court.

The Court held in United States v. Edwards, 46 MJ 41 (1997), that it had no jurisdiction to directly review nonjudicial proceedings under the provisions of Article 15, UCMJ, but held it may review the question of the admissibility of a record of an Article 15 proceeding at a court-martial. Thus, the Court addressed the issue of whether the operational status of a Navy vessel was relevant to the "vessel exception" of Article 15(a) concerning a servicemember's right to demand trial by court-martial. Citing United States v. Yatchak, 35 MJ 379 (CMA 1992), which construed the term "attached to or embarked in a vessel" as used in Article 15(b)(2)(A) concerning the punishment of confinement on bread and water, the Court held that the limitation should be defined in the same manner as the term was used in Article 15(a). As Yatchak held that the operational status of a vessel was relevant, the Court remanded Edwards for further proceedings.