

APPENDIX K

SELECTED DECISIONS AFFECTING THE ADMINISTRATION OF MILITARY JUSTICE WITHIN THE ARMED FORCES ¹

PUBLIC ACCESS TO ARTICLE 32 PROCEEDINGS

Citing previous cases of the Court which held that the right to a public trial set forth in the Sixth Amendment to the Constitution applied to courts-martial, the Court held in ABC, Inc. v. Powell, 47 MJ 363 (1997), that in the absence of cause shown that outweighs the value of openness, a military accused is entitled to a public Article 32, UCMJ, pretrial investigative hearing. The Court further held that when an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied. However, the Court declined to adopt a position advanced by the news media that requiring a witness to testify about personal sexual history never qualified as a basis for closing such a pretrial hearing. Rather, the Court held that a decision on this specific issue must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis as to whether closure is necessary to protect the welfare of a victim or alleged victim of sexual assault. After noting that the decision to close the Article 32 hearing in the case at hand had been made for unsubstantiated reasons, the Court ordered it opened to the public and the news media unless future compelling circumstances dictated a different result.

¹This 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.

FORFEITURES AND REDUCTION IN GRADE

In United States v. Gorski, 47 MJ 370 (1997), the Court held that the 1996 addition of Article 58b, UCMJ, and the amendment of Article 57(a)(1), UCMJ, mandating forfeitures for certain sentences and providing an earlier reduction in grade violate the Ex Post Facto Clause of Article I, § 9, of the Constitution when applied to court-martial offenses committed prior to the effective date of this legislation. The Court held in this regard that a change in a minimum sentence was protected by Article I, § 9, and that the same rationale should apply to forfeiture of pay and allowances since they constitute a form of punishment under the military justice system.

Similarly, the Court held in Goldsmith v. Clinton, 48 MJ 84 (1998), that a statute which had been enacted after an accused military officer was tried and sentenced could not be used to drop him from the rolls and place him in a non-pay status.²

MENTAL RESPONSIBILITY

Reviewing a decision by a Court of Criminal Appeals that limited the proof of lack of mental responsibility by an accused to objective evidence, the Court in United States v. Dubose, 47 MJ 386 (1998), ruled that such a holding was error since all relevant evidence, both objective and subjective, should be considered by the trier of fact. In this regard, the Court ruled that the testimony of experts in the fields of psychology and neuropsychology was relevant and properly admissible in evaluating whether a military accused had met the statutory burden of proving lack of mental responsibility by clear and convincing evidence.

EXPERT TESTIMONY

Examining the parameters of expert testimony in United States v. Birdsall, 47 MJ 404 (1998), the Court held that certain opinion testimony of a medical doctor and a psychologist exceeded the scope of Military Rule of Evidence 701 and resulted in reversible error in a sexual assault case. The Court held in this regard that the trial

² The Supreme Court of the United States subsequently reversed this decision in Clinton, et al., v. Goldsmith, 119 S.Ct. 1538 (1999).

judge erred by allowing a medical doctor to express his opinion as to whether the alleged child sexual victims had been sexually abused and by allowing a psychologist to state her opinion on the credibility of the same alleged victims. The Court emphasized in its ruling on this issue that the testimony in question involved the ultimate issue which the court-martial members were equally capable of resolving and constituted an improper comment on the victims' credibility.

EXTRAORDINARY PROCEEDINGS IN A CAPITAL CASE

The Court in Loving v. Hart, 47 MJ 438 (1998), addressed the constitutionality of a death sentence in the context of an extraordinary writ-appeal case after the Court of Criminal Appeals denied a petition for extraordinary relief which challenged such a sentence. The extraordinary relief challenge was litigated after the Court had affirmed the death sentence in this case on direct review, United States v. Loving, 41 MJ 213 (1994), modified on reconsideration, 42 MJ 109 (1995), and after the Supreme Court of the United States had affirmed this decision (517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996)). Citing a number of its prior decisions the Court concluded it had jurisdiction to consider the merits of the accused's claim under the provisions of the All Writs Act, 28 USC § 1651(a). The accused's claim was predicated on a question raised during oral argument before the Supreme Court of the United States as to the validity of an aggravating factor set forth in Rule for Courts-Martial 1004(c)(8) which used the phrase "actual perpetrator of the killing" in reference to a felony murder conviction under Article 118(4), UCMJ. In ruling thereon, the Court held the conviction and death sentence to be sufficient to withstand such a constitutional challenge. Citing several Supreme Court cases concerning this issue, the Court held that the military judge's failure to define the phrase "actual perpetrator of the killing" in a manner to require an intent to kill was not constitutionally deficient in view of existing Supreme Court precedent and the evidence of record, since there was no reasonable possibility that the court members understood the term "actual perpetrator of the killing" to mean anything other than an intentional killing. In addition, the Court ruled that, even assuming arguendo that the phrase should have been further defined by the military judge, such error was harmless beyond a reasonable doubt under the circumstances of this case.

STATUTE OF LIMITATIONS

Recognizing that the Uniform Code of Military Justice constituted the primary expression by Congress of the rights and responsibilities of servicemembers, the Court addressed the scope and purpose of the Right to Financial Privacy Act (RFPA), 12 USC §§ 3401-3422, in United States v. Dowty, 48 MJ 102 (1998), and ruled that such act provided protection to military servicemembers charged with violations of the Uniform Code. Thus, the Court held that a military accused could properly contest the Government's attempt to obtain his financial records by filing a motion in the appropriate United States District Court. However, disagreeing with the ruling of the military trial judge on a statute of limitations issue in the context of an appeal by the United States under Article 62, UCMJ, the Court ruled that the provisions of the RFPA that tolled the statute of limitations also applied to Article 43, UCMJ, and that the military trial judge had erroneously dismissed certain charges against this accused. The Court held in this regard that a citizen, whether military or civilian, cannot claim coverage of the RFPA to protect against intrusion by the Government into his private records while, at the same time, disclaiming coverage of the RFPA to toll the running of a statute of limitations during their exercise of the very process under the statute by which they claim that protection.

DEFENSE COUNSEL

Resolving an allegation by an accused in United States v. Russell, 48 MJ 139 (1998), that his trial defense counsel was ineffective for failure to locate a witness, the Court established a standard for review of such claims by holding that an accused must allege specific information that counsel could have located the witness after a reasonable investigation, that the witness would have been available to testify, and that the substance of the witness's testimony would have assisted the accused's defense. After analyzing the record, the Court held that the established standard had not been satisfied by the accused in this particular case.

In United States v. Calhoun, 49 MJ 485 (1998), the Court addressed an issue of first impression by rejecting a defense assertion that no defense counsel employed by the

Government could be free from command influence when his prior defense counsel's office was searched by military investigators after a question was raised that such defense counsel may have been involved in the subornation of perjury. Rather, the Court refused to adopt a per se rule and held that the government funding of a civilian defense counsel was not required unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence over all military and other government defense counsel. The Court noted in this regard the extraordinary measures undertaken by the Government to protect the attorney-client privilege in military court-martial cases and ruled that no such finding was required in the case at hand.

In United States v. Clark, 49 MJ 98 (1998), the Court held that the appellant's post-trial affidavit asserting ineffective assistance of his trial defense counsel was sufficient to require a factual inquiry under its earlier decision in United States v. Ginn, 47 MJ 236 (1997). The Court noted in this negligent homicide case that appellant's allegations concerning the failure of his defense counsel to call an accident reconstruction expert witness, if left un rebutted, would overcome the presumption of competence and, thus, would suffice to establish ineffective assistance of counsel.

JURISDICTION - RESERVISTS

The Court in Willenbring v. Neurauter, 48 MJ 152 (1998), resolved an issue which questioned the applicability of Article 2(d), UCMJ, to a reservist who had committed offenses while serving on active duty not as a member of the reserves, but rather as a member of a regular component of the Armed Forces. In rejecting a defense argument that Article 2(d) was limited to an offense committed while a member of a reserve component, the Court emphasized the historical development of military criminal jurisdiction as set forth by the Supreme Court of the United States in various cases, the intent of Congress as expressed in documents formulated during consideration of the legislative proposals which led to enactment of the Uniform Code of Military Justice and amendments thereto, the Court's own prior cases, and the evolution of the reserve components into a component of the "total force" concept of the Armed Forces. The Court ruled that, in the

context of such historical development, the phrase "active duty" as used in Article 2(d) did not distinguish between reserve and regular components and that such phrase was inconsistent with the restrictive definition argued by the appellant in this case.

SELECTION OF COURT MEMBERS

In United States v. White, 48 MJ 251 (1998), the Court rejected a defense argument that the selection of a disproportionately high number of commanders for service as court members violated Article 25, UCMJ, and held that since the qualities required for selection for command were totally compatible with the statutory requirements for selection as court members, evidence that more commanders than non-commanders were selected for a court-martial panel was not sufficient to raise an issue of court packing, absent some evidence of improper motives or systematic exclusion of a class or group of eligible candidates.

MILITARY INSPECTIONS

In United States v. Jackson, 48 MJ 292 (1998), the Court rejected a defense argument that a commander's receipt of specific information about the presence of contraband in his unit precluded a valid inspection pursuant to Military Rule of Evidence 313. The Court held in this case that so long as the primary purpose of the inspection is "unit readiness" and not disciplinary proceedings, it is permissible both (1) for an inspection to take place after the commander receives specific information about the presence of contraband and (2) for an inspection for weapons or contraband to result in disciplinary proceedings. In addition, the Court ruled that a military judge could take into account the nature of the contraband in determining whether unit readiness rather than criminal prosecution of an individual was the primary purpose for conducting a particular inspection.

DURESS

In United States v. Vasquez, 48 MJ 426 (1998), the Court held that the military judge properly rejected a defense requested instruction on the defense of duress. After noting the genesis and purpose of this specific defense, the Court ruled that the issue was not raised by the accused's claim that he was concerned about the

potential mistreatment of his friends in a foreign prison, since he had a reasonable opportunity to seek appropriate legal advice concerning his apprehension about their safety. Thus, the Court noted that a nexus or causal relationship between the threat and the wrongful act was ensured by the requirement of the immediacy element of the defense of duress, which encouraged individuals to promptly report threats rather than breaking the law, and that this element directly related to the requirement of a reasonable apprehension of death or serious bodily harm.

SUBSTANTIVE LAW

In United States v. Arriaga, 49 MJ 9 (1998), the Court held that an accused could be convicted of the offense of obstruction of justice under Article 134, UCMJ, by lying to military police investigators. In reaching this decision the Court specifically rejected a defense argument that the holding of the Supreme Court in United States v. Aguilar, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), that interpreted 18 USC § 1503 as precluding prosecution for lying to investigative agents alone, applied to an Article 134 prosecution for obstruction of justice. The Court emphasized that the Supreme Court's decision in Aguilar rested on a particular analysis of the repeated references in 18 USC § 1503 to "grand juror" and "petit juror" in the context of an ongoing grand jury investigation or trial and that such a restrictive analysis was inapplicable to the prosecution of obstruction of justice in military law.

NEW TRIAL

In United States v. Brooks, 49 MJ 64 (1998), the Court examined the procedures for resolving a petition for new trial under the provisions of Article 73, UCMJ, and Rule for Courts-Martial 1210(f)(2). The Court stressed that the three elements set forth in Rule 1210(f)(2) for evaluating newly discovered evidence required a determination as to whether post-trial affidavits raised any material issues of fact that must be resolved by a factfinding hearing under the criteria set out in United States v. Ginn, 47 MJ 236 (1997).

RESIDUAL HEARSAY EVIDENCE

In addressing the admissibility of an out-of-court statement made by an alleged victim under Military Rule of

Evidence 803(24), the Court held in United States v. Johnson, 49 MJ 467 (1998), that a trial judge, in evaluating the requirement for indicia of reliability, should consider both those indicia that add to a statement's reliability as well as those indicia that detract from a statement's reliability in determining its admissibility. After reviewing the record in this case, the Court concluded that the trial judge had properly admitted the statement in question.

PEREMPTORY CHALLENGE

In United States v. Ruiz, 49 MJ 340 (1998), the Court held that a peremptory challenge of the only female member of a court-martial panel by the trial counsel required some explanation after the defense counsel contested such challenge. Noting that it had previously decided in United States v. Whitham, 47 MJ 297 (1997), that a gender-based challenge involved the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), requirement for some explanation by the challenging counsel, the Court further held that the per se rule formulated in United States v. Moore, 28 MJ 366 (CMA 1989), concerning a race-based peremptory challenge, should be extended to a gender-based peremptory challenge.

REHEARING

In United States v. Ruppel, 49 MJ 247 (1998), the Court rejected a defense argument that a military judge violated Rule for Courts-Martial 810(a)(3) by admitting evidence underlying an accused's conviction of a sex offense involving his natural daughter at a separate rehearing on the merits regarding offenses against the same accused involving his stepdaughter. The Court ruled in this regard that such evidence was admissible if it qualified for admissibility under Military Rule of Evidence 404(b). The Court also held that the relationship between Rule 810(a)(3) and Rule 404(b) was similar to the relationship between Rule for Courts-Martial 910(g)(3), relating to the prohibition against notifying court members of a guilty plea of an accused prior to findings on contested offenses, and Military Rule of Evidence 404(b), citing United States v. Rivera, 23 MJ 89 (CMA 1986).

SENTENCING EVIDENCE

The Court held in United States v. Loya, 49 MJ 104 (1998), that the military judge committed reversible error by rejecting defense evidence, during sentencing proceedings, of the quality of medical treatment provided to the victim when the accused was convicted of involuntary manslaughter. The Court observed that the proffered defense evidence tended to show additional facts and circumstances surrounding the death of the victim which would provide a more complete picture of the tragic event.

EVIDENCE

In United States v. Morris, 49 MJ 227 (1998), the Court considered whether an appellate court could disagree with the ruling of a trial judge that excluded an accused's confession in determining whether other evidence that was admitted at trial was tainted and thereby constituted improper derivative evidence of that confession. Citing its own prior cases the Court held that, by considering the accused's confession, the Court of Criminal Appeals did not reverse the trial judge's ruling since the circumstances surrounding the confession were being considered only with respect to whether other evidence which was admitted at trial was properly admissible or was tainted. In addition, the Court held that the enactment of Article 62, UCMJ, which gave the Government the right to appeal certain rulings of the trial judge, did not overrule its earlier decision in United States v. Nargi, 2 MJ 96 (CMA 1977), but that Article 62 and Nargi are complementary: Nargi allowing an appellate court to examine the underlying basis for a ruling which excludes evidence, and Article 62 providing a procedure for reversing a ruling on admissibility and compelling the military judge to admit evidence.

In United States v. Blanchard, 48 MJ 306 (1998), the Court addressed a question concerning the standards for admissibility of taped conversations and rejected appellant's argument that the seven-prong test employed in some federal circuits for admissibility of a taped conversation should be applied in courts-martial. Noting that disagreement existed among the federal circuits as to the appropriate test for authentication and admissibility of taped conversations and that Military Rule of Evidence 901(b)(5) particularly addressed authentication of voices on tape recordings and expressly contemplated the more

flexible approach employed by several federal circuits for this type of evidence, the Court held that the tape recordings in this case were properly presented to the court members for their determination as to authenticity.

CHALLENGES FOR CAUSE

In reviewing a military judge's denial of a defense challenge for cause for abuse of discretion the Court ruled in United States v. Ovando-Moran, 48 MJ 300 (1998), that in order for a court member's vocational or professional experience to be disqualifying, the member must demonstrate a bias or prejudice resulting from or inseparable from this experience. Thus, the Court held that the military judge in this sexual assault case did not err in denying a challenge for cause against a medical doctor who had limited experience in the subject matter of the expert testimony given at trial, since there was no indication that this court member would thereby be rendered unable to impartially listen to and evaluate such testimony.