

UNITED STATES

VS.

DESTEFANO, Lawrence M.

Seaman Recruit

U. S. Naval Reserve

586-64-4489

Naval Station

San Diego

No. Accused

RECORD OF TRIAL

BY

SPECIAL COURT-MARTIAL

APPOINTED BY THE

Commanding Officer

Naval Station

San Diego

TRIED AT

NAVY LEGAL SERVICE OFFICE, SAN DIEGO CALIFORNIA

ON

29 and 30 July 1981

**CHRONOLOGY SHEET<sup>1</sup>**

In the case of \_\_\_\_\_  
(Name of accused)

Date of alleged commission of earliest offense tried: \_\_\_\_\_ 19\_\_

Date record forwarded to supervisory authority: <sup>2</sup>\_\_\_\_\_ 19\_\_

\_\_\_\_\_  
(Signature and Grade of convening authority or his representative)

	<i>Date</i>	<i>Cumulative Elapsed Days<sup>3</sup></i>
	19__	
1. Accused arrested or confined by military authority of command in which trial held <sup>4</sup> . . . . .	_____	0
2. Charges preferred (date of affidavit). . . . .	_____	_____
3. Charges received by convening authority. . . . .	_____	_____
4. Charges referred for trial . . . . .	_____	_____
5. Sentence or acquittal . . . . .	_____	_____
Less days:		
Accused sick, in hospital, or AWOL . . . . .	_____	
Delay at request of defense . . . . .	_____	
Total authorized deductions <sup>5</sup> . . . . .	_____	_____
6. Net elapsed days to sentence or acquittal . . . . .		_____
7. Record received by convening authority . . . . .	_____	_____
Action of convening authority . . . . .	_____	_____

REMARKS:

RECORD OF TRIAL

OF

ESTEFANO, LAWERENCE M.

586-64-4489

Seaman Recruit

(LAST NAME, FIRST, MIDDLE)

(SSN)

(RANK/RATE)

Naval Station, San Diego, California

(ORGANIZATION AND ARMED FORCE)

(SHIP OR STATION)

BY

SPECIAL COURT-MARTIAL

APPOINTED BY THE  
Commanding Officer

Naval Station

San Diego, Ca

TRIED AT

NAVAL LEGAL SERVICE OFFICE, NAVAL STATION

SAN DIEGO, CALIFORNIA

ON

29 and 30 July 1981

HEAD, MILITARY PERSONNEL DEPARTMENT

NAVAL STATION  
SAN DIEGO, CALIFORNIA

DDMILPERS/OB  
SPCMO/359/81  
17 June 1981

Pursuant to the authority contained in Secretary of the Navy letter of 16 June 1965, a Special Court-Martial is hereby convened in the case of SR Lawrence Michael DESTEFANO, U. S. Naval Reserve, only. It may proceed at 0830, 18 June 1981, or as soon thereafter as practicable on board the Naval Station, San Diego, California. The court will be constituted as follows:

MILITARY JUDGE

Lieutenant Commander Thomas G. TURNER,  
JAGC, U. S. Navy

Certified in accordance with  
Article 26(b), UCMJ and previously  
sworn in accordance with Article  
42(a), UCMJ

MEMBERS

Lieutenant Commander Jo Ann SANDERS, U. S. Navy  
Lieutenant Robert T. KINNE, U. S. Navy  
Ensign Betsy A. WEYMSS, U. S. Naval Reserve


COUNSEL


Lieutenant Philip M. SMITH,  
JAGC, U. S. Naval Reserve

TRIAL COUNSEL, certified in  
accordance with Article 27(b), UCMJ  
and previously sworn in accordance  
with Article 42(a), UCMJ

Lieutenant Michael W. LOKER,  
JAGC, U. S. Naval Reserve

DEFENSE COUNSEL, certified in  
accordance with Article 27(b),  
UCMJ and previously sworn in  
accordance with Article 42(a), UCMJ

  
J. R. PEAK  
Commander, U. S. Navy  
Head, Military Personnel Department

 ATTEST:  
TRIAL COUNSEL

Proceedings of a special court-martial which  
met at the Naval Legal Service Office, Naval Station,  
San Diego, California, at 1336 hours, 29 July 1981,  
pursuant to the following orders:

CERTIFIED TO BE A TRUE COPY

  
ANTONIO R. MATTHEWS  
LN2, USN, COURT REPORTER  
FOR THE TRIAL COUNSEL

REQUEST FOR TRIAL BEFORE MILITARY JUDGE ALONE  
(ART. 16, UCMJ)

UNITED STATES OF AMERICA  
V.

LAWRENCE M. DESTEFANO

I have been informed that LCDR THOMAS TURNER  
is the military judge detailed to the court-martial to which the charges and specifications pending against  
me have been referred for trial. After consulting with my defense counsel, I hereby request that the court  
be composed of the military judge alone. I make this request with full knowledge of my right to be tried  
by a court-martial composed of ~~(commissioned)~~ <sup>1/</sup> officers (and, if I so request, enlisted personnel) <sup>2/</sup>.

29 July, 1981  
(Dated)

Lawrence M. Destefano  
(Signature of Accused)  
Lawrence M. Destefano, SR, USNR  
(Typed Name and Grade)

Prior to the signing of the foregoing request, I advised the above accused fully of his right to trial before  
a court-martial composed of ~~(commissioned)~~ <sup>1/</sup> officers (and of his right to have such court consist of at  
least one-third enlisted members not of his unit, upon his request) <sup>2/</sup>.

29 July, 1981  
(Dated)

Michael W. Loker  
(Signature of Defense Counsel)  
Michael W. Loker, LT, JAGC, USNR  
(Typed Name and Rank)

Argument is (not) requested.

29 July, 1981  
(Dated)

Phil Smith  
(Signature of Trial Counsel)  
Phil Smith, LT, JAGC, USNR  
(Typed Name and Rank)

The foregoing request for trial before me alone is hereby :

APPROVED       DISAPPROVED

29 July, 1981  
(Dated)

Thomas B. Turner  
(Signature of Military Judge)  
Thomas Turner, LCDR  
(Typed Name and Rank)

<sup>1/</sup> Delete when the accused is a warrant officer or enlisted member.  
<sup>2/</sup> Delete when the accused is a commissioned officer or warrant officer.

NAME, GRADE, AND ORGANIZATION OF ACCUSER: R. H. LANG, LNI, USN  
SIGNATURE: R. H. Lang LNI, USN

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 2 day of June, 1981, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

ENS, USNR  
GRADE AND ORGANIZATION OF OFFICER  
SIGNATURE: [Signature]

SUMMARY COURT  
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. (MCM, 29g, and Article 30g and 136)  
J. D. CERENIO  
TYPED NAME

Officer administering oath must be a commissioned officer.

3 June 81  
DATE

I have this date informed the accused of the charges against him (MCM, 32(1)).

J. D. CERENIO, ENS, USNR  
NAME, GRADE, AND ORGANIZATION OF IMMEDIATE COMMANDER  
SIGNATURE: [Signature]

Head Military Personnel Department  
Naval Station, San Diego, California  
3 June 81  
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT JURISDICTION PLACE DATE

The sworn charges above were received at 0800 hours, this date (MCM, 33b).

FOR THE: \_\_\_\_\_

J. R. PEAK, CDR, USN  
NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING  
SIGNATURE: [Signature]

1ST INDORSEMENT

Head, Military Personnel Department  
Naval Station, San Diego, California  
18 June 1981  
DESIGNATION OF COMMAND OF CONVENING AUTHORITY PLACE DATE

Referred for trial to the special court-martial appointed by \_\_\_\_\_  
my special court martial order 359/81  
of \_\_\_\_\_, 17 June 1981, subject to the following instructions:<sup>2</sup>  
none

BY: \_\_\_\_\_ of \_\_\_\_\_  
COMMAND OR ORDER

J. R. PEAK, CDR, USN  
NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING  
SIGNATURE: [Signature]

I have served a copy hereof on each of the above-named accused, this 18th day of June, 1981

JOHN I. SIMS, LT, JAGC, USNR  
NAME, GRADE, AND ORGANIZATION OF TRIAL COUNSEL  
SIGNATURE: [Signature]

<sup>1</sup> When an appropriate commander signs personally, inapplicable words are stricken out. <sup>2</sup> Relative to proper instructions which may be included in the indorsement of reference for trial, see MCM, 33(1). If none, so state.

**CHARGE SHEET**

PLACE Naval Station, San Diego, California		DATE 810602
ACCUSED (Last name, First name, Middle initial) (List aliases when material)	SOCIAL SECURITY ACCOUNT NUMBER	GRADE OR RANK AND PAY GRADE
DESTEFANO, Lawrence Michael	586 64 4489	SR E-1
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law)	DATE OF BIRTH	PAY PER MONTH
	21 July 1960	BASIC \$ 501.30
	CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126M2) (If none, so state)	SEA OR FOREIGN DUTY \$ None
	N/A	TOTAL \$ 501.30

**RECORD OF SERVICE**

INITIAL DATE OF CURRENT SERVICE 12 July 1978	TERM OF CURRENT SERVICE Six years
PRIOR SERVICE: _____ (As to each prior period of service, give inclusive dates of service and Armed Force, if available.) 6 YEARS MONTHS DAYS	

**DATA AS TO WITNESSES**  
(Summary Court Officer will line out and insert names as applicable (MCM, 79g) and initial changes)

NAME OF WITNESS	ADDRESS (Include ZIP Code)	WITNESSES FOR	
		PROSECUTION	ACCUSED
F. L. DEZAK, LT, JAGC, USNR	NLSO, NavSta, San Diego, Ca.	X	
R. BUSHE, WO, USN	Brig, Naval Station, San Diego, Ca.	X	
A. F. FARLANOVICZ, SML, USN	Brig, Naval Station, San Diego, Ca.	X	
J. D. B. IANMAN, MAC, USN	Naval Station, San Diego, Ca.	X	
L. G. JAMES, RM2, USN	Naval Station, San Diego, Ca.	X	
M. E. LEWIS, SM2, USN	Naval Station, San Diego, Ca.	X	
E. WISE, MA1, USN	Brig, Naval Station, San Diego, Ca.	X	
D. J. FORSMULLER, ABH2, USN	Brig, Naval Station, San Diego, Ca.	X	
V. PRICE, YN2, USN	Brig, Naval Station, San Diego, Ca.	X	
B. F. ROBINSON, SH1, USN	Brig, Naval Station, San Diego, Ca.	X	
T. E. FARROW, ENS, USNR	Brig, Naval Station, San Diego, Ca.	X	
W. R. KLESNER, GMGC, USN	Brig, Naval Station, San Diego, Ca.	X	

**DOCUMENTS AND OBJECTS**

LIST AND DESCRIBE (If not attached to charges, note where it may be found)

Service Record Entries

Statements held in the service record of the accused.

**DATA AS TO RESTRAINT**

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
Restriction	810429-810506	Naval Station, San Diego, Calif.
Confinement	810506- 25 June 1981	Naval Station, San Diego, Calif.



Charge I : Violation of the Uniform Code of Military Justice, Article 80.

Specification 1: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, did, at the Navy Brig, Naval Station, San Diego, California, at or about 0830, on or about 7 May 1981, attempt to escape from lawful confinement in the Navy Brig.

Specification 2: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, did, at the Navy Brig, Naval Station, San Diego, California, at or about 1400, on or about 7 May 1981, attempt to escape from lawful confinement in the Navy Brig.

Charge II: Violation of the Uniform Code of Military Justice, Article 86.

Specification: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, did, on board Naval Station, San Diego, California, on or about 6 May 1981, without proper authority, fail to go at the time prescribed to his appointed place of duty, to wit: 1130 Restricted Muster at the Restricted Barracks, Naval Station, San Diego, California.

Charge III: Violation of the Uniform Code of Military Justice, Article 89.

Specification: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, did, at the Navy Brig, Naval Station, San Diego, California, on or about 6 May 1981, behave himself with disrespect toward Lieutenant Frank L. Tezak, JAGC, USNR, on active duty, his superior commissioned officer and known by the said Destefano, to be his superior commissioned officer, by saying to him, "I don't know what ~~you're~~ <sup>you're</sup> doing in this fucking Canoe Club", or words to that effect.

Charge IV: Violation of the Uniform Code of Military Justice, Article 91.

Specification 1: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, having received a lawful order from Chief Warrant Officer R. Bushby, U.S. Navy, his superior chief warrant officer, and known by the said Destefano to be his superior chief warrant officer, to remain at attention and answer questions relating to a Disciplinary Hearing, did, at the Navy Brig, Naval Station, San Diego, California, on or about 8 May 1981, wilfully disobey the same.

Specification 2: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, having received a lawful order from Chief Warrant Officer R. Bushby, U.S. Navy, his superior chief warrant officer, and known by the said Destefano to be his superior chief warrant officer, to stay in the DSL Office for an Administrative Hearing, did, at the Navy Brig, Naval Station, San Diego, California, on or about 8 May 1981, wilfully disobey the same.

Specification 3: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, having received a lawful order from Signalman First Class Albert A. Fabianowicz, U.S. Navy, his superior petty officer, and known by the said Destefano to be his superior petty officer, to strip down to his skivies, did, at the Navy Brig, Naval Station, San Diego, California, on or about 7 May 1981, wilfully disobey the same.

PMS

"you must be crazy"

Charge : Violation of the Uniform Code of Military Justice, Article 91 (continued)

Specification

4: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, on board Naval Station, San Diego, California, on or about 6 May 1981, was disrespectful in language toward Chief Master-at-Arms Russell D. Buchanan, U.S. Navy, his superior chief petty officer, and known by the said Destefano to be his superior chief petty officer, who was then in the execution of his office, by saying to him "I don't want to talk to this fucking chief - not this fucking chief. Your fucking crazy. That fucking chief ain't shit", or words to that effect.

Specification 5: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, on board Naval Station, San Diego, California, on or about 6 May 1981, was disrespectful in language toward Boatswain's Mate Second Class Leonard G. James, U.S. Navy, his superior petty officer, and known by the said Destefano to be his superior petty officer, who was then in the execution of his office, by saying to him "Fuck you James, Fuck you, Fuck you.", or words to that effect.

Specification 6: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, did, at the Navy Brig, Naval Station, San Diego, California, on or about 7 May 1981, strike Signalman First Class Albert A. Fabianowicz, U.S. Navy, his superior petty officer, and known by the said Destefano to be his superior petty officer, who was then in the execution of his office, by kicking him in the calves with his feet and by grabbing his left leg with his hands and trying to prevent SML Fabianowicz from leaving the cell.

~~Specification 7: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, did, at the Navy Brig, Naval Station, San Diego, California, on or about 7 May 1981, strike Signalman First Class Albert A. Fabianowicz, U.S. Navy, his superior petty officer, and known by the said Destefano to be his superior petty officer, who was then in the execution of his office, by grabbing his left leg with his hands and trying to prevent him from leaving the cell.~~

Charge V: Violation of the Uniform Code of Military Justice, Article 117.

Specification: In that Seaman Recruit Lawrence Michael Destefano, U.S. Naval Reserve, Naval Station, San Diego, California, on active duty, did, on board Naval Station, San Diego, California, on or about 6 May 1981, wrongfully use provoking words, to wit: "Let me see you bull shitting with one Nigger in ranks", or words to that effect toward Boatswain's Mate Second Class Leonard G. James, U.S. Navy, a black petty officer.

The court was called to order at 1336 hours, 29 July 1981. The trial judge, Lieutenant Commander Thomas G. Turner, JAGC, U.S. Navy; the trial counsel, Lieutenant Philip M. Smith, JAGC, U.S. Naval Reserve; the defense counsel, Lieutenant Michael W. Loker, U.S. Naval Reserve and the accused, Seaman Recruit Lawrence M. Destefano, U.S. Naval Reserve were present. LN2 Antonio R. Matthews, U.S. Navy, properly detailed and previously sworn, was the reporter.

MJ: The court will come to order. My examination of the charge sheet and the convening order in the case of the United States v. Seaman Recruit Lawrence M. Destefano, United States Navy, indicates a proper referral and that I and counsel are properly detailed and that our qualifications are correctly stated. I know of no possible basis for challenging me. Trial counsel, is it correct that you have no corrections or modifications to the charge sheet or the convening order other than those previously made, this case has not been previously referred to this or another court, you have not acted in any prohibited capacity, you have no challenge for cause and you have no voir dire of the military judge.

TC: Your Honor, confinement should read on the bottom page -- bottom of page one as ending on 25 June 1981.

MJ: Very well. Let me indicate at this time that I have viewed the first two pages of the pre-trial agreement. That is the prefatory provisions of the pre-trial agreement. That the pre-trial agreement indicates that the accused is obligated to plead to the Specification and Charge III, the disrespect to Lieutenant Tezak. Is that correct?

DC: That is correct, Your Honor.

MJ: Alright now, as I look at the original charge sheet, it would seem to me that the charges referred fails to state an offense, so that Lieutenant Loker, you must be willing to -- that is you and your client, must be willing to specifically agree to this,

or these amendments. Otherwise, your client will be going to trial on an unsworn charge.

DC: That is correct, Your Honor, we are willing to waive the provisions of ...

MJ: Very well, let me ask your client that now. Seaman Recruit Destefano, do you realize what we're talking<sup>about</sup>? You don't have to stand up.

DC: May I have a moment to confer with my client?

MJ: Sure.

AC: Yes, Your Honor, in some sense, I do understand.

MJ: Alright, let me try to explain it to you. As I view that Charge and that Specification the words are not disrespectful to Lieutenant Tezak, as originally drafted and originally referred to trial on 18 June 1981...

AC: Yes, sir, I ...

MJ: ... So that the way it looks now that would constitute an unsworn charge because it hasn't gone through the procedures that you see outlined on page three.

AC: Yes, Your Honor.

MJ: In other words, the accuser didn't swear to it after the trial counsel made the changes.

AC: I understand that.

MJ: But if you want to get the benefit of the pre-trial agreement, it's permissible for you to agree to the trial counsel's amendment. Do you understand that?

AC: I agree to the trial counsel's amendment, sir.

MJ: You do agree to it?

AC: Yes, sir.

MJ: Very well. Well I am at that or excuse me while I am talking to you, let me explain something else. When I read over your counsel's motion, there was some discussion regarding Lieutenant O'Niel, who happens to be a defense counsel, over at the Naval Station and it indicated to me that he represented you at two magistrate hearings?

AC: Yes, Your Honor.

MJ: Is that correct?

AC: That's correct, Your Honor.

MJ: Alright let me explain that there may be a possibility that you formed an attorney/client relationship with him.

AC: I have excused him.

MJ: You want to excuse him today.

AC: Yes, Your Honor.

MJ: You don't want him here to help Lieutenant Loker, is that correct?

AC: No, Your Honor.

MJ: Alright, do you specifically relieve Lieutenant O'Neil from any duties or any obligation he might have in the defense of your case?

AC: Yes, Your Honor.

MJ: Very well. Now Lieutenant Loker is it correct that you have examined the original charge and convening order immediately before trial, you are satisfied that the first page of the charge sheet is correct, you have not acted in any prohibited capacity, you have no challenge and you have no voir dire of the military judge?

DC: That is correct, Your Honor.

MJ: Alright, now just a moment. Before I proceed further it's obvious that your client is out of uniform and I know why he's out of uniform from reading the motion. That is that he's in the hospital as a result of being burned in the brig. Now, Seaman Recruit Destefano, can you stand?

AC: Yes, Your Honor.

MJ: That doesn't present any pain to you?

AC: No -- No, Your Honor.

MJ: Are you, in fact, Seaman Recruit Lawrence M. Destefano, United States Navy?

AC: Yes, Your Honor.

MJ: Alright, now if you were in your proper uniform, would be wearing any ribbons or awards?

AC: Just one Medal of Combat, Expeditionary medal for being out in the IO.

MJ: Navy Expeditionary Medal, is that it?

AC: Yes, sir.

MJ: For the purpose of the trial we'll consider that you are in the proper uniform in all respects. In addition to Lieutenant Loker, you have the right to be represented by a civilian lawyer, provided by you at no expense to the government, or to be represented free of charge by a military lawyer of your selection if he or she is reasonably available. If you are represented by military or civilian lawyer of your selection, Lieutenant Loker would continue as your associate counsel, unless you want to excuse him. Do you understand your rights to counsel?

AC: Yes, Your Honor.

MJ: Do you have a lawyer in addition to Lieutenant Loker?

AC: No, Your Honor.

MJ: Are you satisfied in all respect with efforts in your behalf?

AC: Yes, Your Honor, very.

MJ: Lieutenant Loker, do you want the charges read?

DC: Your Honor, at this time we waive the reading of the charges:

MJ: Seaman Recruit Destefano, how do you plead, but first, Lieutenant Loker are there any motions to dismiss or to grant any other relief?

DC: Yes, Your Honor, at this time the defense would move for appropriate relief on the grounds that the accused was held in illegal pre-trial confinement from 6 May 1981 until 25 June 1981. And on the alternate grounds that he was subjected to punishment in violation of Article 13 of the Uniform Code of Military Justice that is prior punishment.

MJ: Very well, I have what has been previously marked as Appellate Exhibit I. Your motion for appropriate relief and the attachments thereto are SECNAV Instructions 1640.10 and the NCMR green card regarding the case of Jones. There are no other attachments to Appellate Exhibit I that will be considered on the motion. Now I believe you gentlemen have agreed on how to proceed with this motion. Is that correct?

TC: Yes, sir.

DC: That is correct.

MJ: Alright how will that be?

DC: Initially, Your Honor, I would like to introduce various documentary evidence and offer testimony and the trial counsel will have the same opportunity. Would you like to proceed initially or shall I?

TC: By documents, I assumed the defense counsel means is Appellate Exhibits I through VI.

DC: That's correct, I through VII.

DC: Actually right now they have been relabeled I through VI, you're correct. Why don't I introduce those first and my testimony ...

TC: May I see the SECNAV Instruction for a second.

DC: Sure.

MJ: The court will stand at recess.

The court recessed at 1346 hours, 29 July 1981.

The court was called to order at 1348 hours, 29 July 1981. All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Lieutenant Loker, you're offering at this time Appellate Exhibits II through and including VI?

DC: Yes, Your Honor, we do.

MJ: Any objections?

TC: Your Honor, we have no objections to any of those Exhibits but let's save Appellate Exhibit IV which we would like to reserve our objections to.

MJ: Very well. Appellate Exhibits II through and including VI will be considered on the motion subject to later motion to strike from the trial counsel.

DC: Your Honor, at this time we would like to call, Seaman Recruit Destefano, to the stand for the limited purposes of testifying as to the factual foundations of this motion.

MJ: Very well.

Seaman Recruit Lawrence M. Destefano, U. S. Naval Reserve, was called as a witness for the accused, was sworn and testified as follows:

#### DIRECT EXAMINATION

Questions by the defense:

Q. Seaman Recruit Destefano, are you the accused in this case?

A. Yes, sir.

Q. Would you tell the court what if anything happened on May the 7th 1981 to you?

A. May 7, 1981 I was placed in row six cell eighty-four, sir.

Q. Is that a deseg -- disciplinary segregation cell?

A. Yes, sir.

TC: Objection, Your Honor, there's no foundation for the witness' knowledge on this.

MJ: Just a second now, row six cell what?



A. Eighty-four, sir.

MJ: The objection is overruled.

Q. Would you tell the court why you were placed in that disciplinary segregation?

A. Sir, I was placed in there for an attempt to escape and an assault charge on Petty Officer Fabianowicz.

Q. During that period of time were there -- what if any restraints were you placed under in addition to being disciplinary segregation?

A. I was placed in leg irons and handcuffs, sir.

Q. Would you tell the court what if anything happened on the 8th of May 1981?

A. I was placed in a strip cell, sir.

Q. I see, is that also known as the tile cell?

A. Yes, sir.

Q. Would you tell us exactly what the nature of that tile cell?

A. What it consist of, sir?

Q. Yes, tell us about the cell itself.

A. All there is -- there's a hole in the floor for you to move your bowels and relieve your bladder. There's no other facilities.

Q. What is the nature of the uniform worn in that cell.

A. You're stripped down to your scivies, sir.

Q. Is there a lavatory or are you given any access to water in that cell?

A. No, sir.

Q. I would like you to tell the court Seaman Recruit Destefano, why you were placed in the tile cell on the 8th of May 1981.

A. I was placed in the tile, sir, because I was brought to a disciplinary hearing and I refused to answer questions and to stay in the office and I refused to strip down to my scivies.

Q. So you said -- you said it was essentially a reaction to those three disciplinary infractions?

A. Yes, sir.

DC: We have no further questions, thank you.

MJ: Cross-examination?

TC: One moment, Your Honor.

CROSS-EXAMINATION

Questions by the prosecution:

Q. Seaman Recruit Destefano, do you know what administrative segregation is?

A. Administrative segre -- yes, sir.

Q. What's the difference between administrative segregation and disciplinary segregation?

A. Administrative segregation is rows one through five and that's basically when you're being processed in the brig. That's the first stage you go through.

Q. Is disciplinary segregation used for any other purpose?

A. Disciplinary segregation is used ...

Q. I am sorry, I misspoke. Is administrative segregation used for any other purpose other ...

DC: ...Objection, Your Honor, this is beyond the scope of direct examination, we didn't mention administrative segregation.

MJ: Overruled.

Q. Would you like me to repeat the question?

A. Yes, sir.

Q. Do you know if administrative segregation is used for any other purpose besides that of the initial check-in procedure? W

A. Yes, sir.

Q. And what are those reasons?

A. Well, sir, if someone happens to get into a fight in the chow hall they'll take'em from the dormitory and place them in administrative segregation.

Q. Any other purposes?

A. There are various difference situations where you could wind up in administrative segregation, sir.

Q. Such as.

DC: Sir, I -- we're going to have to object. There has been no foundation laid for his knowledge of such things other than that of actual experience and we just established in direct that he had been placed in<sup>h</sup> <sup>disciplinary</sup> segregation not administrative. We have no foundation for his knowledge of rules and regulations of the confinement facilities at all.

MJ: Alright, just a second, I am confused. If you gentlemen don't give me a word picture, I can't very well rule on these objections. Let me try to straighten this out and then we'll come back to the objection. Maybe I did misunderstand your testimony. Your counsel asked you if on 7 May 1981 you were placed in row six cell 84, is that correct?

AC: Yes, Your Honor.

MJ: You said yes.

AC: Yes, Your Honor.

MJ: Alright, is that -- what's the name of that cell?

AC: That's cell 84, that's on d-seg row, that's disciplinary segregation row six.

MJ: So it is different from rows one through and including five ...

AC: Most definitely, sir.

MJ: Alright, I believe I will sustain the defense's objection, because of what appears that row one through and including five are different rows that six and it is outside of the scope of the direct examination.

Q. What time of the day were you put into desegregation?

A. Say again, sir.

Q. What time of the day were you put into d-seg?

A. It was anywhere between 0900 and lunch time, sir.

Q. You don't recall exactly?

A. No, sir, it's been awhile ago.

Q. Where were you before that?

A. Before that I was in row one, sir.

Q. Are you sure?

DC: Objection, Your Honor, that's beyond the scope of direct examination.

MJ: Sustained.

AC: Answer the question, sir.

MJ: No, you don't have <sup>x0</sup> I sustained your counsel's objection. If I sustain an objection you're not to answer the question.

AC: Yes, sir.

Q. When you said row one is admin seg, is that correct?

A. Yes, sir.

Q. Tell me about your escape attempts.

A. My attempted escape happened approximately at 0800, sometime before or after that time and I was brought back from screening class, which is a process you go through prior spending your time in the brig. And as I got to the front gate, I stopped there, they asked me why I was sent back early and I looked at the Petty Officer and I jumped off the steps and I ran to a fence that has a metal boarding on it. But I could/<sup>not</sup>climb it since it was just a flat surface and then I ran behind the brig up the steps to a fence and I stopped at the barbed wire, sir.

Q. Where was the barred wired?

A. On the top of the fence.

Q. So you stopped at the top of the fence?

A. Yes, sir.

Q. You were tangled up in the barred wire right?

A. Yes, sir.

Q. So if you could have gotten through the barred wire, you would've been over the fence?

A. Yes, sir.

TC: No further questions.

DC: We have nothing in redirect, Your Honor.

MJ: Very well, you may step down and resume your seat at the counsel table.

The witness was excused and resumed his seat as the accused at the counsel table.

DC: For the interest of judicial economy, Your Honor, we will -- at this point we'll like to defer<sup>to</sup> the trial counsel and allow ~~them~~<sup>him</sup> to present ~~their~~<sup>his</sup> evidence on the motion.

MJ: Very well, is that satisfactory, Lieutenant Smith?

TC: Yes, sir, as long as Mr. Kelly is here.

MJ: Alright, bailiff see if Lieutenant Commander Kelly is waiting to come in as a witness.

MJ: The court will stand at recess.

The court recessed at 1400 hours, 29 July 1981.

The court was called to order at 1402 hours, 29 July 1981.

All parties to the trial who were present when the court recessed are again present.

Lieutenant Commander David Kelly, U.S. Navy, was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. You are Lieutenant Commander David Kelly?

A. Yes, I am.

Q. And you're attached to the Naval Station?

A. Yes.

Q. You're in the United States Navy?

A. Yes.

Q. Mr. Kelly, did you ever have a conversation with Commander Corr regarding Seaman Recruit Destefano?

A. Yes, I did.

Q. When was that conversation, do you recall, roughly?

A. I think it was the 12th of May. Let me see, in my capacity as Staff Judge Advocate over at Naval Station, I had an occasion to call Commander Corr with regards to requesting a rehearing in the case of Destefano. For -- Commander Corr is the magistrate and I wanted to request a rehearing on his decision to release Destefano

from the brig. I think that decision was made on the 12th. I think he only comes on Tuesdays and Thursdays.

Q. Why did you feel that contacting him and requesting a re-hearing was necessary?

A. Because I had found that the material that was presented to him at the magistrate's hearing did not include the charges which involved Destefano's conduct in the brig. Which were the allegations that I believe are before this court. Two Specifications of attempted escape and some assaults and disrespect to Petty Officers. The paper work on those charges had been processed from the brig in the form of report chits, up to the discipline office and had not gone back through the legal system to get back into the magistrate's file and I knew that he had not considered those offenses in his decision to release Destefano. In fact, it was obvious from his comments on the rough of the magistrate's hearing that he had not taken those into account.

Q. How long does that processing of the report chits take?

A. Well, it depends on how long it takes to get past each person. Coming from the brig it could take anywhere from two to five days, depending on whether or not a weekend intervenes. In this case a weekend did intervene.

TC: Your Honor, at this time I would ask the court to take judicial notice of the calendar for the month of May 1981.

MJ: Alright, the court will judicially notice that the 7th of May was a Thursday and thereafter. Any objections?

DC: We have no objections, Your Honor.

Q. What time of the day was the hearing held, the first hearing on the 12th, do you know?

A. I don't know off the top of my head, I think it was sometime in the afternoon. Commander Corr is a civilian attorney downtown and he usually shows up around 1600 -- 1630 right around that time frame and sees five or six people. He only comes on Tuesdays and Thursdays, if I recall correctly.

Q. You have any other magistrates? Did any of the magistrates during that week visit the brig to conduct hearings?

A. No.

Q. What was the schedule for the week before, do you recall?

A. I -- I don't recall, no I don't.

Q. When you talked to Commander Corr on the 12th was that over the telephone, I assume?

A. Yes, it was.

Q. Where did you call him from?

A. I have to take that back, I am not -- Yes, it was over the phone. I had another occasion to talk to a magistrate, but it wasn't Commander Corr, on this issue. I talked to -- I talked to him from me office.

Q. And where did you call him at?

A. Contacted him via my secretary, I assume she contacted him either at his home or at his office, downtown.

Q. What time of day was that?

A. I don't remember.

Q. Would you related<sup>e</sup> to us as completely and as exactly as possible the entire content of that conversation?

A. Well, I got him on the phone and I cited him to U.S. v. Malia, which I think is in Six MJ and under the provisions of that case I requested a rehearing. I told him I had additional information to -- that he had not considered. I didn't tell him anything about what the information was but I requested that he hold a rehearing in the case of Destefano.

Q. What other authority did you feel that you had for making such a request?

A. Well, when I was approached by the discipline officer, who had heard that Destefano had been ordered released by the magistrate, I looked up the magistrate's instruction, which is SECNAV Instruction 10 -- something or another. And saw that the magistrate's decision... I think it says that the magistrate's decision is final and then I researched the case law and found only U.S. v. Malia and I

Shepardized that and found nothing beyond U.S. v. Malia. U.S. v. Malia says that a rehearing may be held on the magistrate's own motion, on the motion of the confinee, or at the request of the command. So I requested a rehearing.

Q. And when you read the instruction for the magistrate what do you recall are the requirements for holding a rehearing?

A. I can't -- I can't remember the exact wording of the instruction but I have read Malia carefully and to my reading of Malia a rehearing could not be ex parte. So I contacted Lieutenant O'Neill, who had given Destefano his 48 hours rights. In our system over there at Naval Station, we see to it that a lawyer is appointed to represent the individual as far as his brig time and brig status is concern, during the time it takes to process the charge sheet and get them over to the Naval Legal Service Office, for a lawyer to be technically detailed. That attorney in this case happens to be Lieutenant (jg) O'Neill, now Lieutenant O'Neill. I contacted him, I explained exactly what I had intended to do, gave him a copy of everything that I had on Destefano. He went down right away and talked to Destefano.

Q. Right away on the 12th, 13th, or 14th, what day was that, do you recall?

A. I don't remember -- I really don't remember what day it was.

Q. What is your understanding of the definition of ex parte communication?

A. As regards to this magistrate thing?

Q. Yes, sir.

A. Well, simply that the command is precluded from making an ex parte presentation before the magistrate, because it's an adversary proceeding according to U.S. v. Malia. And therefore, no presentation of evidence should be done outside the presence of counsel. The only counsel that happened to be available at the time was the counsel appointed for 48 hour advice since no counsel



had been detailed, since the case had not been referred to court-martial yet. So I got Lieutenant (jg) O'Neill and made sure that anything that was presented before the magistrate was done in his presence.

Q. Rather than submitting the package of paper of perhaps 40 or 50 pages thick, can you recall essentially what was included in the package that you were asking the magistrate to consider on the second hearing?

A. Obviously not verbatim but there were several statements written by Petty Officer with regards to both escape attempts, statements regarding the assaults, statements regarding the disrespect,

DC: Your Honor, at this point I'd like to object. I don't understand the relevancy of this testimony in regards to the issue of the ex parte conversation. We're discussing now what happened and what was considered at the second magistrate's hearing.

TC: There are several issues addressed in counsel's motion, if my questions aren't allowed to develop those then we could go back and forth.

MJ: I understand what's going on. The objection is overruled. He's just presenting as much evidence as he can. You may continue, you can complete your answer, Commander Kelly.

A. Well basically that was it, a bunch of report chits regarding those incidents and supporting statements which had not been included in the initial package that went down to the magistrate with the magistrate's letter -- initial magistrate's letter. Also, there were several of the petty officers who happened to be on duty the day of the second magistrate's hearing. Those petty officers happened to be the same petty officers who were involved in the escape attempts and the assaults and the disrespects. And they came in and as the magistrate spoke to each of them, they told their story and their version of what happened during each of the incidents.

Q. And how did that compare to the first hearing?

A. I wasn't at the first hearing so I have no idea. I've been at several hearings and usually the magistrate considers what's in the package, talks to the individual and make a determination.

Q. Did you see the package that the magistrate had for the first time.

A. I did not see it before it went down, afterwards I did see it, yes.

Q. I hand you what is a copy of Appellate Exhibit II. Which I believe is the magistrate's report from the first hearing. Did you see this at the time that you requested the rehearing?

A. Yes, I did.

Q. Did you see anything else besides this?

A. I had seen the package that it was attached to. The magistrate's letter -- 72 hour letter required by the instruction and this information on that said that Commander Corr did not consider Destefano an escape risk. Which I thought was <sup>i</sup>ridiculous in light of his escape attempt. So once I'd tracked down what had happened and got the request from the <sup>H</sup>Head of Military Personnel to represent the government, researched the issue, I requested a rehearing.

Q. I'd like to hand you what I believe has been previously marked as a portion of Appellate Exhibit I, SECNAV Instruction 1640.1. I'd like to invite your attention to the last page on paragraph (d) entitled "Rehearing". Is this the portion of the instruction that you were referring to earlier?

A. Yes, it is, this addresses the rehearing at the motion of the service member concerning new circumstances which have arisen. This does not speak to the issue of the command's requesting a rehearing. That is only spoken to by U.S. v. Malia.

Q. Did you feel in anyway that this instruction precluded you from taking the advantages of your interpretation of U.S. v. Malia?

A. Certainly not.

Q. When -- or let me ask, do you know when Commander Corr was first requested to conduct the magistrate's hearing?

A. I think Destefano was put in the brig on the 6th of May and the letter request reached Midge McGee from the command on the 8th of May. Which is within the 72 hour period, we try to get'em out within 72 hours.

Q. Midge McGee is?

A. Midge McGee is my secretary and she has a collateral duty of being the secretary for the magistrate's program -- the overall magistrate's program in San Diego.

Q. And when was -- and that's when she was receiving that request for Commander Corr?

A. That's correct.

Q. And do you know when he was personally made aware of the need for a magistrate's hearing ... for Destefano.

A. I think that Midge contacted Commander Corr on Monday -- either Friday night or Monday morning she contacted him and told him. As I said, Commander Corr only comes on Tuesday and Thursdays, that's the only time his schedule allows him to show up at the magistrate's function here at Naval Station.

TC: I have no other questions.

#### CROSS-EXAMINATION

Questions by the defense:

Q. Commander Kelly I'd like to first talk about perhaps getting this chronology correct. You suggested that the conversation you had with Commander Corr was on the 12th of May, 1981?

A. I think so.

Q. Think so, could it possibly had been the 13th? Do you still have Appellate Exhibit I -- Appellate Exhibit II?

A. No.

Q. I would like to show you a copy of that which has been marked Appellate Exhibit II. You'll note, Commander Kelly, on the top right hand corner of Appellate Exhibit II, someone has made the notation, on Appellate Exhibit II, apparently indicating a decision

and that <sup>the decision would be reconsidered</sup> ~~court was reentered~~ as per telephone conversation and it's dated 13 May, could that possibly be the conversation that we're discussing here today?

A. Well this is my secretary's handwriting and this very well could be -- like I said I thought it was on the 12th.

Q. Are you aware that the 12th was the day of the initial magistrate's rehearing?

A. Yes, I am, but this is Mitch's handwriting so I could be mistaking it could've happened on the 13th.

Q. Regarding the first rehearing, at which you testified you weren't present, do you know who was present at that rehearing, Commander Kelly?

A. The first hearing.

Q. The first -- yes, the first hearing.

A. As far as I know, Destefano and the magistrate.

Q. Are you aware of whether or not Lieutenant Eugene O'Neill <sup>was</sup> was present at that hearing?

A. I have no idea. I would guess not.

Q. Now when asked by the trial counsel about your conversation with Commander Corr, on what you suggested may have been the 12th of May, you suggested that you also talked to another magistrate regarding the issue of Destefano, who was that magistrate you spoke to?

A. I didn't say I'd talked about Destefano with another magistrate...

Q. What did you say?

A. ... When the trial counsel asked me about speaking to Commander Corr, he asked me if I've had this conversation over the telephone...

Q. ...That's correct.

A. I said, "Yes" and in the middle of that answer I recalled having spoken to another magistrate setting in the office -- in my office.

Q. I believe you said you had spoken to another magistrate on this issue, was there any connections between these conversations?

A. No. On another issue to another magistrate.

Q. So you didn't speak to another magistrate regarding Seaman Recruit Destefano?

A. That's correct counsel.

Q. Okay, you called Commander Corr, you testified, because at the first rehearing<sup>(sic)</sup> you noticed that several infractions were committed while in the brig/<sup>that</sup>were not considered at his first rehearing -- hearing. During your conversation with Commander Corr did you bring it to his attention that he hadn't considered some of these infractions that were committed at the first hearing?

A. All I told Commander Corr was that I had additional information for him to consider.

Q. You did not mention any escape attempts?

A. Nope.

Q. Could you had mentioned any assault attempts?

A. No.

Q. Did you mention any disobedience of orders?

A. No.

Q. Did you mention any disrespects, to Commander Corr?

A. No.

Q. You simply requested a rehearing?

A. I told -- that's correct I told him ...

Q. ... What was his response to your request?

Witness: Your Honor, can I answer one question at a time?

Q. I am sorry, complete the first question. And did -- go ahead.

A. Now you've lost me as to where I was.

MJ: Excuse me, slow down gentlemen. We've got all afternoon. Now as to my notes indicate you said you didn't mention any specifics?

Witness: That's correct.

MJ: And you were responding to each one of these questions...

Witness: Yes, sir.

MJ: But you never mentioned those specifics about what the evidence would show, is that correct?

Witness: That's correct.

MJ: Alright.

Q. At that point did Commander Corr attempt to illicit any further information from you?

A. I don't remember him doing so.

Q. You don't recall...

A. I told him -- I cited him U.S. v. Malia and I told him that I did not want to discuss the case with him over the phone, ex parte, 'cause I didn't want to run afoul of U.S. v. Malia.

Q. You suggested that to him, what was his response to that, do you recall?

A. He was -- as I recall he was upset but that's his normal mode of operation. And then he told me that he would hold a rehearing on the following Thursday.

Q. Why was he upset Commander Kelly?

A. As I said, that's his normal mode of operation; he's usually gruff.

Q. Okay, you suggested that Lieutenant O'Neill was contacted, that you gave him a copy of -- you gave him certain documents at that point at the time that you contacted him, what did you give him?

A. What did I give him?

Q. Yes.

A. I gave him everything that I had regarding Destefano. That included all of the report chits, all of the statements, everything that I had and was going to show to the magistrate on the rehearing. I made a copy of and gave -- well, I won't swear to that -- I either had him make a copy or I gave him a copy that I had made. One of the two.

Q. Do you remember the day when you gave him that information?

A. No, not precisely, it was the day that I requested the rehearing. I am pretty sure, because I wanted to get a counsel assigned and have a counsel talk to Destefano, so he'd be prepared to go to the magistrate's hearing.

Q. Did Lieutenant O'Neill at that point indicate that he was loosely familiar with Seaman Recruit Destefano and his case?

A. I don't think we discussed it. I doubt seriously if Lieutenant O'Neill knew Destefano from anybody else down in the brig. As I said, he was only the 48 hour advice lawyer.

Q. Were you aware that Destefano was not seen by Lieutenant O'Neill until approximately five minutes before the second rehearing?

A. No, I wasn't.

Q. I'd like to go briefly through the chronology of the letter request. The letter request, you suggested the request came in the command which is, according to SECNAV Instruction 1640.10, to reach -- to be delivered within 72 hours, arrived at approximately two days after the 6th of May. After Seaman Recruit Destefano's commitment to confinement?

A. That's correct. That's correct. The instruction provides that it should reach the magistrate within 72 hours unless a weekend intervenes, then it will be the following Monday.

Q. The following Monday...

A. And I think this -- this got to my office on the 8th -- late on the 8th.

Q. Late on the 8th of May. What day of the week was the 8th of May?

A. Friday.

Q. It was Friday.

A: If I recall correctly.

DC: We have no further questions.

**REDIRECT EXAMINATION**

**Questions by the prosecution:**

Q. Would you recognize the package of materials that you gave Commander Corr if you saw them again?

A. Not precisely. I can give you a pretty good "estimate" on what it was. The package you had in your hand earlier looked like -- about the magistrate's file we had on him.

MJ: Just a second I see no reason to put that in the record. Right now you can hold off on that. Why don't you have him identify it but don't offer it at this time.

TC: I haven't offered it, yet.

MJ: Alright, but I don't want to you put that in the record unless you have to.

Q. Sir, I have a package of papers here with the first page being dated 8 May, from Commanding Officer Enlisted Personnel, Naval Station to Military Magistrate.

MJ: Excuse me, let me...

Q. Can you identify that package?

RPT. The letter dated 8 May 1981, from Commanding Officer Enlisted Personnel, Naval Station to Military Magistrate was marked as Appellate Exhibit IX.

A. I think this looks like the package of materials that discussed the offenses that took place, both in the brig and prior to Destefano being placed in the brig. I cannot tell you which of these bunches of papers was before the magistrate at the first hearing and which was before the magistrate at the second hearing. I know that the package of statements and report chits about the escape attempts was not before the magistrate at the first hearing. That's why I wanted a second hearing.

Q. As a matter of course, would the package that comes back from the magistrate contain everything that was sent to him?

A. Oh, yes.

Q. Would there be anything additional?

A. Only what he wrote up concerning release or not to release or his opinions about the escape risk or custody risk. And of course anything that the defense counsel might've offered out of



the service record.

TC: Your Honor, I know that you don't want to receive this entire package as an Appellate Exhibit but I think it would perhaps be important for the court to at least know what is contained in this.

MJ: Well, I feel that he's indicated pretty well what's in it. Let me see it. Is that the second letter to the magistrate, Lieutenant Commander Kelly?

Witness: If I recall correctly the letter is <sup>but</sup> one; there was only one magistrate letter. I won't swear to that but that's my recollection.

MJ: Well, let's take -- let's take the basic letter from the Commanding Officer to the Military Magistrate, that dated 8 May. may introduce that into evidence. I don't think we need the enclosures. Any objections?

TC: Thank you.

DC: We have no objections to the letter dated 8 May, Your Honor.

MJ: Alright.

DC: What is the Appellate Exhibit numberial sequence <sup>for</sup> ~~in~~ that?

RPT: Nine.

MJ: Nine.

MJ: Let me hand you this letter that's been marked Appellate Exhibit IX and ask you if that is the original letter to the magistrate concerning Destefano?

Witness: I think so. This is a copy of the original. I think this is the one that I received...

MJ: Was there only one or did you do another one when you were granted permission to have the rehearing?

Witness: As I recall there was only one drawn up.

DC: May I see that"

MJ: Excuse me, go ahead and finish, Commander.

Witness: This letter discusses the offenses which took place in the brig. But in the package that went down to the magistrate,

the report chits and the statements to indicate to the magistrate that there was probable cause to detain were not included in the package. Even though the letter itself mentioned the offenses, the evidence was not packaged and sent down to the magistrate.

Q. Alright, Commander Kelly, I would invite your attention to some of the comments in this letter, escape attempts under Article 80, various disrespect violations. What is your understanding of what Commander Corr's knowledge was with regard to those?

A. As regard to those, all he had in front of him was this letter. The supporting documentation, there was four chits, the statements of witnesses, were all still down in the discipline office and had not been packed up inside the magistrate's letter. And so the purpose of the rehearing was for him to consider that evidence.

Q. Now what I am getting at, perhaps in a roundabout way, and maybe it's because of the obvious. Had the magistrate come to you and inquired about any of those offenses or had -- did you know of him going to anyone else and inquiring about the evidence regarding any of those offenses?

A. No, he briefly made a comment on the initial magistrate's rough, which you showed me earlier, Appellate Exhibit something or another, to the effect that the whole incident stemmed from a mis-handled 12 minute UA and this man is not an escape risk, based on not having seen any of the statements concerning the escape attempts.

Q. Do magistrates normally ask for more information when -- when if all they're presented with is a letter such as this without supporting documents?

A. Occasionally.

Q. Do you know what Commander Corr's practice was with regards to that?

A. I could say. I wouldn't want to say one way or the other.

Q. Let's switch it here for a second. You conducted an informal JAG Manual Investigation into an incident that occurred on the 25th of June and ...

MJ: Excuse me counsel, not to interrupt -- I hate to interrupt and I apologize, but let's see if we can't see if there's any further questions on this area before moving on to the JAG Manual, if you don't mind.

TC: I have no other questions on this area.

MJ: Lieutenant Loker.

DC: Yes, Your Honor, briefly.

**RE-CROSS-EXAMINATION**

**Questions by the defense:**

Q. Commander Kelly, I am little confused, if you would bare with me for a moment, if you will. Regarding that which has been marked Appellate Exhibit IX, which is the letter dated 8 May. That, the letter which was received in your office? Rather, that is the letter which was submitted by the Commanding Officer.

RPT: One moment please, Your Honor.

Q. That letter was that which was considered by the magistrate at the first rehearing?

A. I believe so.

Q. To repeat that was the letter which was considered by the magistrate at the first hearing?

A. I believe so.

Q. Your previous testimony has been that you contacted Commander Corr on the 12th or the 13th, whatever the case maybe, regarding Seaman Recruit Destefano. Because, as your testimony indicates, your concern that he had not considered everything that which had taken place in the case of Seaman Recruit Destefano, is that correct?

A. That's right.

Q. This letter of 8 May, which you testified, he considered at the first hearing contained all of the allegations apparently which with he is now charged. Is that a discrepancies and if so

how do you explain that?

A. It's not a discrepancy. The magistrate's duty is to determine whether there's probable cause that an offense has been committed and whether or not there's an escape risk possibility and whether to keep the man in the brig. Commander Corr had seen by the letter there was an allegation of escape, assault, disrespect, etc, with no supporting evidence whatsoever and he had then issued a release order.

Q. So your concern was that he had not had adequate supporting evidence?

A. That's correct.

Q. Even though he had those charges before him. In your discussion with him on the 13th of May, the telephone -- subject telephone conversation, was he not curious about the fact that you not mentioned the fact that he was aware of the previous allegations that would be evidence before him at the first rehearing pursuant to this letter?

A. I think he may have, something about it but I said, "I told him that I did not want to discuss it, ex parte, because I did not want to run afoul of U.S. v. Malia."

Q. I see, how long approximately have you been aware of U.S. v. Malia, the existence of the case law?

A. Must have been -- I don't remember if Destefano was the first rehearing I held or the second but just since I've been over at Naval Station. I've been at Naval Station since November.

DC: We have no further questions.

MJ: Alright, anything further from the government in this area?

TC: Not on the grounds we've covered so far.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Lieutenant Commander Kelly, please mark on Appellate Exhibit IX with your initials on the left hand margin, those

allegations that occurred prior to the 7th and 8th of May when he was put in the brig.

A. Prior to him going in the brig, Your Honor.

Q. Or better yet, just tell us which allegations...

A. The letter speaks for itself in this regard, sir. There's a section under paragraph three, that speaks to Article 86, 92 and then it says a copy of reports and disposition of offenses violated after confinement as follows. So the second paragraph where it starts with the copy of reports is what happened after he went to the brig.

Q. Very well. Now for the reader of the record the brig is right next to your office, is it not?

A. Yes, sir.

Q. Commander Corr knew full well that you were the SJA for the Naval Station?

A. Yes, sir.

Q. And all he had to do is to pick up the phone and call you or walk over and ask you about the enclosures or the lacking enclosures to the magistrate's package, is that not correct?

A. That's true, depending on what time he got there. As I said, "I don't remember exactly..."

Q. It might had been late in the afternoon.

A. If it was late in the afternoon...

Q. And you had already gone.

A. As Mr. Loker has pointed out, I may not have requested this rehearing until the following day. Which would indicate to me that I wasn't there that afternoon. Had I known about it and had a chance that afternoon, I would had leaped right on it. I can't remember if it was that day ~~of~~ the following day.

Q. So is it a fair statement to make or to at least infer that Commander Corr, because of his limited availability to perform his job as a military magistrate, might have <sup>e</sup> become upset because he had to decide the case based on a lack of evidence?

A. Initially?

Q. Yes, initially?

A. I couldn't say, sir.

Q. It's not his habit to come back in the morning before he goes to work perhaps or during lunch hour to straighten any such matters?

A. Oh, no, sir.

Q. <sup>Usually</sup> If he wants to get it done that day according to his schedule, is that right?

A. Yes, sir, he only comes on Tuesdays and Thursdays and he usually handles only about five cases.

MJ: Alright, gentlemen, unless there anything further, let's move on to the area of the JAG Manual investigation.

TC: Your Honor, as much as this investigation was completed today, I hope you will <sup>care</sup> bear with us.

MJ: Alright, just a second now, what we have here is the defense's finding of facts, As far as I know that's the only part that's admissible in a court-martial, so...

DC: Correct, Your Honor.

TC: Unless there are two copies of the findings of facts.

MJ: I am sorry.

TC: May I.

MJ: Certainly.

DC: I think I've got an extra copy. Well go ahead if you're just going to show him the findings.

#### REDIRECT EXAMINATION

Questions by the prosecution:

Q. Commander Kelly I am handing you Appellate Exhibit IV, it's marked findings of facts, would you tell us where that comes from and how it was prepared and who prepared it?

A. This appears to be a copy of the findings of fact from the investigation to inquire into the circumstances surrounding the injuries to Seaman Recruit Destefano, which I was tasked to make along with opinions and recommendations to the Commanding Officer of Naval Station. The Commanding Officer of Naval Station

convened this informal JAG Manual investigation.

Q. Since you learned of this or since you assumed this duty of preparing this investigation, have you had any contact with Seaman Recruit Destefano's court-martial case?

A. With his court-martial case?

Q. Yes, sir.

A. Uh, I was approached by you in the brig and you asked me about the pre-trial negotiations in the case. At that time, I told you that I was washing my hands of any pre-trial negotiations in Destefano's court-martial case because I did not want the appearance of impropriety in my dealings with the -- with the informal JAG Manual investigation and I turned all of the dealings with regard to the pre-trial negotiations in Destefano's case over to my assistance, Lieutenant Denise Lepore. Since that time I have not discussed the case with the Commanding Officer other than the fact we had to figure out what to do with Destefano when the hospital told us that he was ambulatory. This morning you came over to my office and requested some materials to deal with the motions, which I think, are before this court at this time; but other than that, nothing.

Q. Do you feel that your objectivity is intact with regards to your investigation in this case?

A. I think so, I think a reading of the findings of facts will demonstrate that.

Q. Would you summarize the findings of facts for us, please, in regards to what happened on the 25th in the brig, specifically.

A. I would prefer not to summarize that. I think, they're clearly laid out in the findings. I couldn't state...

DC: We would make an objection on the basis of cumulative-ness, Your Honor, this...

MJ: The objection is sustained. He doesn't have to read his findings of facts.

Q. Specifically, what I would like to ask you about this is, what knowledge did you have of any defects in the hearing

prior to the 25th?

A. Did I have?

Q. Yes, sir.

A. None.

Q. Now, you have reached the findings of facts. What are these findings of facts based on?

A. These findings of facts are based on interviews with about 25 individuals including prisoners, brig petty officers, the Executive Officer of Naval Station, they're all listed at the beginning of the investigation. By the way, these findings of facts, Appellate Exhibit IV, are incomplete. I think there are some seven or eight pages missing. The findings of facts go beyond the chronology of Destefano's conduct and the heat under the deck in row one.

MJ: Well, we're only concerned with the issue at hand. I believe he had submitted them only as regards to what happened to him.

DC: Well, I submitted all the findings of facts, I have up to page 26, which is where the recommendations begin.

Witness: The thing that I was handed goes up to page 14. This Appellate Exhibit in my hand goes up to page 14.

DC: On, 14.

MJ: Excuse me gentlemen, let's not think out loud on the record. We'll straighten this out later.

Q. Where I am getting at Mr. Kelly, is -- are these findings -- where -- is the substance of these findings of facts?

MJ: Excuse me counsel, these findings of facts either these or another completed Appellate Exhibit are going to speak for themselves.

TC: Okay, Your Honor, then, based upon Lieutenant Commander Kelly's last answer, I am going to object to Appellate Exhibit IV as much as it's hearsay on hearsay.

MJ: Response from defense counsel?



DC: I am sorry, Your Honor, I didn't hear that.

MJ: He's objecting to your Appellate Exhibit IV.

DC: I've already heard that, did you ask for a response from me, Your Honor?

MJ: Yes, I did.

DC: Okay, Your Honor, military rules of evidence -- maybe it's 803 subparagraph (8) and the official comments under the analysis would tend to allow the admission of such evidence.

MJ: You have any further use for Lieutenant Commander Kelly?

TC: I have no other questions.

DC: I have no other questions on that.

MJ: Thank you, Lieutenant Commander Kelly, you're excused. The witness was excused and withdrew from the courtroom.

DC: To continue, Your Honor, military rules of evidence 803 8(c) would appear to make admissible factual findings resulting from an investigation may pursuant to a authority granted by law unless circumstance indicate the untrustworthiness of the investigation, and this is certainly an investigation that falls squarely within the meaning of the exception to the hearsay rule, delineated in that rule. Specifically, 803 8(c), Your Honor, and the official analysis thereunder.

MJ: Trial counsel.

TC: No response, Your Honor.

MJ: The objection is overruled. Now, Lieutenant Loker, what do you want to be before the court, the findings of facts presented in Appellate Exhibit IV or a complete findings of facts.

DC: I wish a complete findings of facts which should be the correct pagination for Appellate Exhibit IV. It should be the pages six through pages nineteen.

MJ: Alright, what we're going to do is to take a recess and then conform Appellate Exhibit IV to your representation and, for the reader of the record, it did not come out clearly but Lieutenant Commander Kelly was the investigating officer in this investigation and these are his findings of facts. The court will stand in

recess.

The court recessed at 1450 hours, 29 July 1981.

The court was called to order at 1510 hours, 29 July 1981.

All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Before we continue with live testimony, there are a couple of matters to clear up with regard to the Appellate Exhibits. First of all, Appellate Exhibit IV is now in its entirety; is that correct, Lieutenant Loker?

DC: Taht's correct, Your Honor.

MJ: Alright, now with regard to Appellate Exhibit V, counsel has offered to enter into a stipulation of the expected testimony from witness, Lieutenant Michael P. Koumajian. The stipulation has been marked Appellate Exhibit V. Seaman Recruit Destefano have you read it over?

AC: Yes, Your Honor.

MJ: You understand that by entering into this stipulation you agree that the doctor would testify in substantial accordance with this stipulation, if he or she was actually called to testify in this case?

AC: Yes, Your Honor.

MJ: Do you desire that I consider it -- this stipulation, in your behalf as evidence bearing on the motion presently being considered?

AC: Yes, Your Honor.

MJ: Very well, the stipulation of expected testimony is accepted. Now, you can call your next witness, Lieutenant Loker.

DC: At this time we would ask that Lieutenant Eugene O'Neill be called to the stand and sworn as a witness.

Lieutenant Eugene O'Neill, U.S. Navy, was called as a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the defense:

Q. Lieutenant O'Neill, would you state your present duty

station?

A. I am a Defense Counsel at Naval Station Legal Office.

Q. Is that here in San Diego?

A. Yes.

Q. Do you know the accused in this case?

A. I do, yes.

Q. Will you point to him.

A. He's setting at the defense counsel's table.

MJ: What's his name, Lieutenant O'Neil?

Witness: Destefano.

MJ: Thank you.

Q. Lieutenant O'Neil, what was your initial contact and when was your initial contact of Seaman Recruit Destefano?

A. I can't tell you the dates exactly, I don't remember them. But I was initially in contact with Destefano when I gave 48 hour advice in the brig sometime back in May.

Q. What if any contact did you have with Seaman Recruit Destefano subsequent to that?

A. I was assigned as his counsel during a magistrate's rehearing shortly thereafter.

Q. I see. Would you tell the court the circumstances surrounding your assignment as a counsel to represent Seaman Recruit Destefano at a magistrate's rehearing?

A. It was late in the afternoon the day before, I don't know, I guess around 1600 and I was leaving the Legal Office that day, Commander Kelly greeted me on the quarterdeck of the building and mentioned to me that I had a magistrate's rehearing the following day with Destefano as my client. It came as kind of a surprize to me and I said, "why me" and he said "well, you <sup>were</sup> assigned to him because of your 48 hour advice and how I could keep the continuity there." So I went home that night not seeing Destefano the night -- that day at all because I had three trials to prepare and I was kind of green about the whole thing, ~~a~~About trials in general and about being at a magistrate's rehearing, ~~q~~And

concentrated on the trials not on Destefano's case at all. I did not secure any records until the next day and that's only five or ten minutes before I actually went into the magistrate's rehearing. I had been in trial, in fact, no more than five minutes before I went downstairs. Was pulled out of the courtroom once I'd given my final argument and was directed to go straight to the brig to represent Destefano.

Q. At the time you were told you would be representing Destefano, were you aware that he had had an initial hearing?

A. Yes, I was. I was aware that he had been given a hearing I guess the Friday before.

Q. At the time you were told by Commander Kelly to be prepared to represent Destefano at a magistrate's rehearing the following day, were you aware of any conversations or interactions between Commander Kelly and the magistrate in the case?

A. No, I can't say that I knew of anything going on between the magistrate and the commander, but I do know that when news came to the second deck of the building that Destefano is going to be released there was a flurry of activity concerning it and I obviously heard a lot of "scuttlebutt" about it. But the details I surely wasn't given.

Q. At the magistrate's hearing the following day, what if anything transpired?

A. Well, I asked for a few minutes to speak with Destefano. I took him aside into a room, he was shackled at the time and remained shackled, not only during my interview with him but during the time he was speaking with the magistrate. And a petty officer was accompanying us at the time. I asked him to leave the room, it was one of the chief counsel rooms in the basement of the building of the brig. And I spoke to Destefano about what had gone on at the earlier hearing and he kept re-emphasizing the fact to me, well, "how can they do this, how can they keep me in if they already let me go on the Friday before." And not really knowing a lot, I really don't know Destefano, I am just going to

have to go in and take him in and come and tell you what I found out later after looking at what the law says. So I just got a general idea of the facts. Commander Kelly came by during the course of the interview and said, "we're waiting for you." So feeling rather "raw" about the whole thing, I just decided to go in and see what I could say for Destefano.

Q. Did that terminate your interview with Seaman Recruit Destefano at the time Commander Kelly said, "let's go" or said, "come on?"

A. No, it didn't. I spoke to Destefano for maybe five or ten minutes longer. But I'll be honest, and that is it made its impression on me.

Q. Who was present at the magistrate's hearing?

A. Well, I can't identify all the people involved but sitting in front of the magistrate were the discipline officer, Lieutenant Dodge<sup>and</sup> Commander Kelly. Destefano set to my left and then a seat for myself. In the rear of the room, it's a large conference room, there was at least eight or ten petty officers and chiefs together from the discipline barracks and the brig.

Q. Were any of the individuals at the magistrate's hearing there to testify on behalf of Seaman Recruit Destefano?

A. No, they were all there against him.

Q. During the course of the magistrate's hearing did you, and what way did you raise the issue -- raise the fact that Seaman Recruit Destefano had been ordered released from pre-trial confinement at the first hearing and yet subsequently the government was seeking a recommittal to confinement? Did you raise that part to the magistrate and what if any was his response?

A. Well, I am sorry cause I don't really remember much about it at the time but, to the best of my recollection, I kept saying, "well, what's changed. The government had the chance to keep the guy in the last time and all of a sudden they decided they needed another rehearing to establish the facts. Everything was on the paper before you last time and nothing had changed." And I never --

I don't recollect leaving the room at that time feeling absolutely confident I got an answer to that question. I got the impression that the Commander was stuck in a tough situation and he was kind of feeling Destefano out from time to time. Destefano was in shackles, as I mentioned, and when he made a comment or a gesture it was an exaggerated comment because of the situation, obviously, and when he was frustrated he couldn't exhaust any energy by moving himself easily or comfortably in the room.

Q. Why is that?

A. Well, because of the shackles. If he moved anywhere, it looked as though they were an aggressive motion. But any ordinary motion that you or I would make in the course of being momentarily frustrated by the procedure would come out as something antagonistic. And in the course of the conversation going on between or among all of us, Destefano obviously grew frustrated because he and I began to realize that there was little or no hope -- no hope for him at the time. If I had been more experienced there's no doubt in my mind that I would've not allowed Destefano...

TC: Objection, Your Honor, that's irrelevant.

MJ: The objection is sustained.

Q. Okay, Lieutenant O'Neill, during the course of the magistrate's hearing did the magistrate indicate that there was any basis for his decision other than that which is in the record such as did he indicate...

TC: Objection, Your Honor, leading.

MJ: Overruled.

Q. Did he indicate possibly that he thought he had been betrayed by -- by...

MJ: Just a second, just ask him what if anything additional he said with regards to the rationale for his decision.

Q. Very well... Lieutenant O'Neill.

MJ: Did you hear the question?

A. Yes, sir. My understanding was, of the whole thing was

that the Commander kept Destefano in based on his inability to control himself; that he lost control in the course of the conversation with the Commander and with everybody there; and surmised consequently that if he released Destefano, he would continue to lose control under the circumstances.

Q. Okay, did he indicate that perhaps Seaman Recruit Destefano had prevaricated in the prior hearing?

A. Yes, he did. He -- probably Destefano had told him that he expected to be released...

TC: Objection, Your Honor, there's no foundation for the basis of this testimony.

MJ: Overruled.

Q. Apparently, Destefano had said that -- uh...

TC: Objection, Your Honor, hearsay.

MJ: Alright, you can relate what he said.

DC: May I rephrase the question, Your Honor?

MJ: Let me explain. You can relate what he said that would give you some indication of his state of mind, that is, why did he make his decision. But you can't relate hearsay that occurred prior to that, alright. So do you know -- did he indicate to you the basis of his decision other than that which he recorded on his report?

Witness: Destefano...?

MJ: ... and not for you to surmise, just what you heard or saw.

Witness: Destefano lied about the fact that he had been promised release from the Navy on the day he was confined.

Q. That information was not before the magistrate in the documentary evidence on the testimony presented that day, is that correct?

A. I don't recollect, sir.

DC: I see, we have no further questions. Thank you.

TC: No cross.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Alright, let me clarify that last response. Now, Commander Corr indicated to all who were present that he considered that Destefano lied, is that the correct -- your testimony?

A. Yes, he did.

Q. Alright now, what did he lie about?

A. Destefano was explaining his frustrations to the Commander. His frustrations were based on the fact that he was going to be let go the day of his confinement. His OTH had come through and that he carried on the way he did because it was -- I don't remember the exact words he used but they were keeping him there, words to that effect. The idea was that they were picking up on small little things just to frustrate him even more.

Q. Right there at the hearing?

A. No, this was -- this was the original reason for Destefano's confinement. That they had -- Destefano had come into -- the situation that arose, that Destefano had come back late from a chow and that apparently he had told the petty officer that he was back late and the circumstances snowballed and the next thing Destefano knew he was sitting up in the holding cell. And he was upset because he didn't understand why they would put him in a holding cell simply from coming back 15 minutes late from failing to make a muster. And he explained his subsequent conduct because of what -- he was under the impression that he would be let <sup>dg</sup> that day. And he thought that they were just "breaking his chops," that's all, by confing<sup>n</sup> him.

Q. What's the lie part of it?

A. The fact that he wasn't going to be let go that day.

MJ: Any further questions?

TC: No, sir.

MJ: Thank you, Lieutenant O'Neill, you're excused.

The witness was excused and withdrew from the courtroom.



TC: The government at this time would call Lieutenant Commander Taylor.

MJ: Very well.

Lieutenant Commander Francis S. Taylor, III, U. S. Navy, was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Would you state your full name, please?

A. Francis Stewart Taylor, III.

Q. And you're a Lieutenant Commander in the United States Navy?

A. That's correct.

Q. What is your current duty?

A. I am the Officer-in-Charge of the Navy Brig at Naval Station, San Diego.

Q. Sir, did you give a sworn statement to Lieutenant Commander David Kelly, recently.

A. Yes, I did.

Q. I'd like to hand you what I am going to have marked the Appellate Exhibit next in order.

RPT. Appellate Exhibit X, Your Honor.

Q. Would you look at Appellate Exhibit X? You recognize that as your sworn statement?

A. Yes, I do.

Q. Does it <sup>SV</sup> bear your signature?

A. Yes, it does.

Q. Is that statement accurate in all respects?

A. Yes, it is.

Q. You had a chance to examine it before signing it.

A. Yes, I did.

Q. Would you adopt that as your sworn testimony here today in this court?

A. Yes.

TC: Your Honor, at this time the government would offer Appellate Exhibit X.

MJ: Very well, any objections?

DC: We have no objection, Your Honor.

MJ: Cross-examination?

DC: Yes, Your Honor.

TC: Your Honor, if I may.

MJ: Yes, excuse me.

TC: Would you please mark this as the Appellate Exhibit next in order?

RPT: Appellate Exhibit XI.

Q. Sir, would you please tell the court what this is?

A. Okay, these are readouts that we have every day on the condition of the cell block where prisons are placed in the different cells. We get one of these every morning, except the weekend.

Q. You say we get, what do you mean by we?

A. These are distributed to the Boatswain, who is our operations officer, they're also distributed to the Master Chief, who acts as our brig supervisor and I get a copy.

Q. Have you had a chance to examine this document prior to just now.

A. I believe those are the ones I had passed along this morning, counsel. They're dated the 7th or 8th or 9th or 6, 7 or 8, I believe of May. I did examine those this morning.

Q. This document prepared in accordance with all applicable regulations and procedures?

A. It's actually an in house type of document, which just gives us information. It is prepared in keeping with those ...

Q. This in house regulation is the required preparation, is that what you're saying?

A. It's a -- actually a tool for us to keep up with the status of the brig. It's not exactly in a regulation anywhere.

It's just a requirement of the section to do this.

Q. Is it kept in the normal course of business?

A. Yes, it is.

Q. And is that document accurate to the best of your knowledge?

A. Yes, it is accurate.

Q. Would you explain to the court please, what the significance is of the different rules?

A. Yes.

DC: Your Honor, is this document going to be introduced into evidence, excuse me?

MJ: I don't know. Trial counsel can you answer...

TC: Well, I could offer it now, Your Honor, or I can offer it later...

DC: Are you establishing a foundation?

TC: If counsel has no objection, I'll offer it now.

DC: I would like to see it just for a moment, if I might?

DC: Excuse me, Your Honor, if I may.

DC: Frankly, Your Honor, I am going to object on the basis of <sup>lev</sup>revelancy. I don't understand the <sup>lev</sup>revelancy of this document to the motion being argued before the court.

MJ: Why don't you give him a chance to go further in his testimony and maybe we'll find out the <sup>lev</sup>revelancy.

DC: Very well, Your Honor.

Q. Could you recall without looking at this document, what rows and what -- Seaman Recruit Destefano was being kept at on what days?

A. Actually without having such a tool available to me, I couldn't go with the exact dates and the exact <sup>capt</sup> cells. That's one of the reasons for preparing such a report.

DC: So it would appropriately be used for <sup>refreshing</sup>rehearing-recollection, Your Honor, we admit but beyond we would object to <sup>lev</sup>revelancy.

MJ: Just a second counsel. He hasn't finished his inquiry.

MJ: Alright now, then he was moved away from row four, when?

Witness: To row six on the 7th.

MJ: Was that after his attempted escape?

Witness: Yes, sir.

MJ: Alright now, row six is ordinarily for what purpose?

Witness: Normally they're for disciplinary segregation purposes.

MJ: Well isn't that what happened to him after he attempted to escape?

Witness: No it wasn't, Your Honor. He was not placed in disciplinary segregation at that particular time.

MJ: He was still as if he were a normal detainee after two or three days, but yet he was put on row six because of the overcrowded conditions?

Witness: On row one. I would normally place him on row one as an administratively segregated prisoner. You'll notice on the document, row one is filled with prisoners at that point.

MJ: Alright...

TC: Your Honor, perhaps...

MJ: Row one is normally for people who've come in, a foul with some brig reg, is that correct?

Witness: It's normally for people we want to keep an eye on and keep them segregated from other prisoners in the cell block.

TC: Your Honor, if I may at this point, perhaps it would clarify matters, if I could allow you to see where I am going and the instructions that I believe are relevant to the point of the questions that I was asking.

MJ: Okay, there's one more question. In other words you're telling me that on the 8th the status did not change?

Witness: On the 9th he was in administrative segregation, yes.

MJ: That's where he was when he first came in?

Witness: No he was not. He was on screening status when he first came in, Your Honor.

MJ: What's the difference between screening status and administrative segregation?

Witness: Screening status is a close custody situation. Every prisoner who comes into the brig goes into a screening status so that we might take a look at him, unless he is an unusual prisoner. If he is sent to us as an assault risk, an escape risk, or a suicide risk, we then place him on max custody and place him onto row one or the cell block, which is out administrative segregation row.

TC: Your Honor, I would ask the court to...

Witness: On the 7th...

MJ: Just a second counsel, I am talking with the witness.

Witness: On the 7th of the month of May, we had the incident which we had an unauthorized movement and as a result of that I administratively segregated him to get him away from the screening population and changed his custody to max custody.

MJ: Very well, now...

TC: Your Honor, what I was trying to do, if I may at this time, is offer Appellate Exhibit XII, which is SECNAV Instruction 1640.9, paragraph 506 and 507 which relate the disciplinary administrative segregation unit and also discuss behavior and custody problems.

MJ: Very well, any objections?

DC: We have no objections.

MJ: Appellate Exhibit XII will be considered on the motion.

Q. Lieutenant Commander Taylor, you were addressing the difference between administrative segregation and disciplinary segregation. During the move, that you were describing, after the escape attempt, was that pursuant to administrative segregation or disciplinary segregation?

A. He was placed on administrative segregation at that time. The difference being, basically, that we wanted to isolate him from the other population. The difference in privileges is the basic issue in disciplinary segregation and administrative

segregation. And at that particular time his privileges were not revoked. We forwarded a formal report chit on him to the command regarding the escape and for that reason, since I didn't want to cause any possible problems of double jeopardy with the case, I did not punish him for the incident and simply segregated him out. Administrative discipline is not punishment. He still retains some of his privileges that a disciplinary segregated prisoner does not receive.

Q. Was he ever placed in disciplinary segregation?

A. Yes, he was.

Q. When was that?

A. I am not certain as to specific dates. I would have to look at his record to get those dates.

Q. Do you recall what the basis were for him being placed there?

A. His -- the basis for it in every case with this man has been insubordination.

Q. Do you have anything with you that would refresh your memory as to what time...?

A. I don't have it in the presence of court. I have it -- it's close by but I do not have it with me.

TC: Your Honor, could we ask the bailiff to...

MJ: Certainly.

Witness: It's uh -- there's a record -- his prisoner's record is in Judge Yuhas' office. It's a file there on top of the desk.

MJ: Very well.

Q. Sir, would you please find in the file what it is that would refresh your memory as to when and why Destefano was placed in disciplinary segregation?

A. Alright, the offense report...

MJ: ... Alright, excuse me, you're going to have to hand it back to counsel.

A. The offense report which he was placed on disciplinary segregation was a uh -- about a month after he was actually in the brig and was kept on A-seg for a long period of time. And it was for remaining seated on his head during the inspection by -- of the cell area. And not coming to attention for the officer's approach to the cell block. We forwarded that request up to the Head of MILPERS, who acts in this case for the Commanding Officer, in rewarding disciplinary segregation. Commander Peak signed that particular offense report.

Q. So it was at that point that he was first placed in disciplinary segregation?

A. That's correct, on that date.

Q. How long be -- I believe you answered it, but when was this inspection, if you recall the date?

A. I believe it was on the 9th of June.

Q. How long had he been at -- let me ask the question this way, how long had he been in the brig before he had been placed in disciplinary segregation?

A. He was actually in the brig about a month. He'd come in the brig on the 6th and I believe it was on the 9th that this event took place. He was on administrative segregation until that point.

Q. Would you tell us what the privileges are and the difference between privileges of those on administrative segregation vice those that are on disciplinary segregation?

A. Yes, those who are on administrative segregation for good order and discipline privileges -- for good order and disciplinary have some of their gear in their cells with them. In addition to that they have some privileges that during rec call, being able to read more material, during rec call they could also have some rack time. People on disciplinary segregation have none of these and they also have their smoking privileges revoked and they keep none of their gear in their cells with them.

Q. Are any of the creature comforts such as sleep at night, eating, restrooms, any of those comforts infringed upon?

A. They are not considered privileges, they are their rights. They're not infringed upon.

TC: Your Honor, we have no more questions of this witness.

MJ: Very well, cross-examination?

DC: No, I think I'll -- yea, I will keep that for a moment.

CROSS-EXAMINATION

Questions by the defense:

Q. Commander Taylor, in administrative segregation, you testified, that no rights are infringed upon. Has it ever been in your experience -- has it ever occurred that any individuals that are in administrative segregation have been denied their mattresses?

A. They should not be denied their mattresses.

Q. Have they ever in your experience, to your knowledge been denied their mattresses?

A. I've had mattresses denied to two prisoners that I am aware of in the brig.

Q. So occasionally you have personnel -- petty officers in the brig who in contravention of what are basically the rules and regulations, nonetheless, denied rights?

A. That's -- I've found that in two occasions. Yes, I have.

Q. You testified that on the 12th of June 1981, according to this document which refreshed your recollection, that Seaman Recruit Destefano was sent to D-seg, is that correct?

A. That's correct.

Q. SECNAV Instruction, the Corrections Manual, are you familiar with the Corrections Manual?

A. Yes, I am.

Q. Sixteen point -- sixteen-fourth point nine requires that, as well as other sections of the Corrections Manual, require that unintelligible segregation must be approved by COMNAVBASE rather than the Commander or the C.O. of Enlisted Personnel, is that correct?



A. No, that's not correct.

Q. Is that part of the local rules and regulations which require ...?

A. No, it's not COMNAVBASE. It's the Commanding Officer of the Naval Station.

Q. I see ...

A. ... and the Commanding Officer of Naval Station has delegated that responsibility to the Head of MILPERS here.

Q. To the Head of MILPERS, okay. Is that not in violation of this Corrections Manual in that that is a non-delegable duty?

A. I've found during the subsequent investigation to an injury by Seaman Recruit Destefano, that indeed that is not supposed to be delegated. The -- it's a long standing history with this that's in excess of four years prior to the time I came here. And I was not even aware it was not supposed to be delegated. It has been done so long as I am aware here at Naval Station.

Q. Are you familiar with the JAGMAN Investigation that arose out of this incident?

A. I am aware of it, yes. My testimony, which has been taken into evidence, is part of it.

Q. Yes, and you agree that it's the conclusion of the JAGMAN Investigation that this desegregation was imposed in violation of the SECNAV Instruction contrary to law?

TC: Objection, Your Honor, there's no foundation for this witness' opinion or agreement with that question.

MJ: The objection is sustained.

DC: Your Honor, he's indicated that he's familiar with the JAGMAN Investigation.

MJ: He's indicated the operative facts. I believe that that decision is mine.

DC: Very well, I believe we have no further questions. Thanks

Commander Taylor.

MJ: Now just a moment. What was that date once again that he went into d-seg?

Witness: I believe it was the 12th or 13th.

DC: Twelve June 1981, Your Honor.

MJ: Is that what the document says that refreshed his memory?

Witness: Yes, it was 12 June, Your Honor.

MJ: Was he in that status continuously until the day he was burned?

Witness: It's my understanding he was, Your Honor.

MJ: Alright, now once again, he did not go into d-seg until the 12th?

Witness: That's correct.

MJ: Prior to that, commencing on the 8th of May 1981, was he continuously in administrative segregation?

Witness: That's correct, Your Honor.

MJ: Alright, was there anything that can be construed as punishment or extra measures that were taken on the basis of alleged infractions between the 8th of May and the 12th of June 1981?

Witness: No, Your Honor, he remained on a-seg during all that time. The a-seg prisoners have one restriction that's quite a large one placed on them compared to the prisoners who are not in administrative segregation or disciplinary segregation. That is that they are not free to move from their cells and must eat all their meals in their cells. And that's one of the biggest impositions placed on them.

MJ: Alright, let me ask you this. Does the prisoner hold the key for his own release from a-seg?

Witness: You mean by the key ...

MJ: By his behavior.

Witness: His behavior is the main reason by which we determine whether or not he seems to have stabilized enough for us to take him off administrative segregation. He was placed on admini-

strative segregation for escape risk and an assault risk reasons.

MJ: Who make that determination?

Witness: That determination is made by me.

MJ: Give us an idea of the normal time span if an individual behaves himself in A-seg.

Witness: I can tell you from a confinement -- beginning of a confinement, if we have a person that comes in on an assault risk and an escape risk status he usually stays in that status for about four or five days until we've had a chance for a counsel to see him and see that he has stablized. And also, 'til we've had a chance to observe his behavior in the brig itself. And how he gets along with the guards and his fellow prisoners and how he obeys out regulations. If he's doing okay in that status and we feel that he's stablized to a great degree than we'll take him off and put him in our screening process. And again watching for a few more days while he goes through our orientation within the brig.

MJ: Is that the same screening process that he would've undergone if he had not attempted to escape?

Witness: That's correct.

MJ: No further questions, any questions based on mine?

DC: Yes, Your Honor, based on that I would like to ask one brief question.

#### REXCROSS-EXAMINATION

Questions by the defense:

DC: May I retrieve the Appellate Exhibit. Appellate Exhibit VI?

MJ: You may, let me find it.

DC: I have a copy of it.

Q. Commander Taylor, I would like you look at what has been marked Appellate Exhibit VI for a moment. That which appears to be a prisoner's conduct report. There's an entry on Appellate Exhibit VI dated may the 8th, 1981.

A. Yes, I see that.

Q. Where Seaman Recruit Destefano was moved to the tile cell. Would you tell us is the tile-cell an administrative segregation?

A. It's in our disciplinary segregation row but can be used for administratively segregated prisoners.

DC: We have no further questions, thank you, Your Honor.

MJ: When was he moved to the tile-cell?

Witness: He was moved on the 8th of May for one period. When we have a prisoner who gets into banging himself around in the cell block or it appears that he's kicking things or shaking his rack or things like this then we'll place him in one of the tile-cells because he cannot damage the cell and he has less likelihood of harming himself. The only other occasion when I use the tile-cell is when a person's deportment is such that he does not obey rules like coming to attention or he would throw things on people then I put him there to keep that barricade between him and anybody else walking down the row. And the only other time I use it is when a prisoner would pass food to bread and water prisoners who might be on the same row. It's basically to create a barrier between him and other people or to keep him from harming himself as much as he would in one of the regular cells.

MJ: How long did he stay in the tile-cell?

Witness: I don't believe he stayed in there very long that time. I don't know the exact date, I think there was an entry when he moved back to the regular cell.

MJ: What is the cell and row number of the tile-cell?

Witness: Okay, the tile-cells are, I think it's 76, 77, and 78. Those cells have no projection sticking out of them and they also have a head which is embeded in the deck, it's just a hole in the deck.

MJ: Alright, other than the configuration of the tile cell is there any other differences between the A-seg cells in row six and the tile-cells.

Witness: The door on them is a closed door.

MJ: Can they wear their uniforms in both?

Witness: Yes, they can.

MJ: There's nothing difference about them expect for the physical layout of the cell, is that correct? ll

Witness: There's nothing difference<sup>r</sup>, however, that's of great sufficient to me. I personally don't like to keep a person in the tile cell any longer than I have to because of the sensory deprivation involved in it. He does not have much contact with people outside of his cell and I am concerned as to what that does to him psychology.

MJ: But after he moved into the d-seg status he found himself back ~~in~~<sup>to</sup> the tile cell, did he not?

Witness: That's correct. He's been in the tile cell on several occasions during his confinement in the brig.

MJ: What's the difference between an individual who goes to the tile cell out of a-seg and an individual who goes to tile cell out of d-seg?

Witness: Very little. Basically because he's in there to keep from harming himself and having anything around in that cell with him that he could do that with.

MJ: Now take a look at the original charge sheet in this case and indicate which if any of these alleged offenses resulted in Destefano being place either in d-seg or in the tile cell or having any other special events occurring to him.

TC: Your Honor, we're going to have to object to that question, there's no indication that Lieutenant Commander Taylor knows anything about the specific charges against him and what happened as a result of them.

MJ: Well, I would think he should know, since he's the warden. The objection is overruled.

Witness: Your Honor, I am not certain which one of these charges would've placed him in a tile cell. There were many charges, many in-house types of disciplinary reports written on ✓

Seaman Recruit Destefano that were never forwarded as report chits. And it was many of those types of action and the requirement on the part of the staff to use force on him to make him comply with even movements from the cell block to the shower and back. There were times in which he would bang himself around in the cell or slam things around in the cells to the degree that we had to place him in. I am not certain that any one of these in particular would've had him placed in that tile-cell. There are other offenses which may have done that. They are not on report chits...

MJ: Very well, thank you...

Witness: There's one here, Your Honor, if I may mention it that is dealing with him kicking and grabbing at people.

MJ: Alright, is that one that has not been marked out as withdrawn?

Witness: Is this entire thing withdrawn or just this bottom part, Your Honor.

MJ: The Specification 7 of Charge IV has been withdrawn. Perhaps you're referring to Specification <sup>6</sup>VI.

Witness: Specification <sup>6</sup>VI includes the kicking and grabbing and on occasions we have done that with a prisoner. Generally, however, I don't place a prisoner in that tile-cell unless he is causing such a disturbance in a regular cell and making so much noise in a regular cell that we have to place him in the tile-cell. Mainly because many of them deteriorate to some degree in there if they're kept in there very long. I don't like to use the cells. I've used the cells, and I can only estimate, approximately 12 to 15 prisoners over the last three years.

MJ: Alright, so you can't be sure as to the caused<sup>al</sup> relationship that exists between any of those allegations that occurred in the brig and him going into the tile-cell?

Witness: No, I can't and not only that but it would appear to me that none of these charges here would be a cause for such a placement of him.

MJ: Alright, the whistle drowned out your response on the record so answer the question again.

Witness: Actually it would appear to me that none of the charges on here are of the type that would've had him placed in the tile cell. It would've been for some other in-house infraction or some instance in which we would've had to control him and his movements.

MJ: Thank you, very much, any further questions?

DC: I have a brief redirect, Your Honor.

DC: If the government has no further questions, I would like briefly to requestion Commander Taylor.

MJ: Very well.

#### REXCROSS-EXAMINATION

Questions by the defense:

Q. I would again like to show him that which has been marked Appellate Exhibit VI. Commander Taylor, drawing your attention to the Exhibit to the entry marked 5-8-81 once again.

A. Yes, sir.

Q. I suggest that Seaman Recruit Destefano was moved to the tile cell for a disrespect, for leaving appointed place of duty without permission, disobedience of a lawful order. If you'll look at the charge sheet once again, do you see the correlation between such charges as disobedience of lawful orders and disrespect. Is there a possible correlation -- a possible correlation between those charges on the charge sheet and his possible removal?

TC: Objection, Your Honor, it calls for speculation on the ground that we've already covered several times.

MJ: Overruled.

Q. My -- again I am going to have to speculate some. This instance in which the man left his appointed place of duty without permission, was when he was brought into a disciplinary hearing with Boatswain Bushby. And at that time Destefano decided he just wanted to leave. He didn't want to put up with us any more. And he walked out, Boatswain told him not to walk out, he had to be

restrained and the issue developed into a issue which we had to control him. As a consequence to that, he was placed into the tile-cell rather than going back to his normal administrative segregation cell.

Q. I see, there's another charge based on the incident, apparently at the same time that he was -- apparently the second Specification of Charge IV on the charge sheet relates to the same incident, would you say that's a correct approximation that it could've also...

A. The second Specification of Charge I?

Q. Of Charge IV. You're referring to the incident of Chief Warrant Officer Bushby, you see those two Specifications are apparently related...

A. Yes.

Q. With your statement pertain to approximately both of those incidents, is it consequent that he was taken...

A. Yes...

TC: Your Honor, we would object to this, there's no basis for the witness' personal knowledge on any of this.

MJ: Well, just a second counsel. He is being probed by the defense counsel and under this probing he's had his memory refreshed. And I've seen that that occurred just a moment ago and counsel is merely trying to jog his memory. Please answer Lieutenant Loker's question.

Q. I would state this, okay. It does not appear that it's involved with that incident, with that Charge -- Specification 2 of Charge IV and in these instances when this does happen the Boatswain will call me for concurrence with his decision to place a person in there because I am the alternate person that controls people in the tile-cells. And the Boatswain would've called me either for his concurrence with that decision on his part, or would've asked my permission to place this in there. So I would have some knowledge of the actual event.



Q. Yes, we're certain of your knowledge, Commander Taylor. Were there any incidents where he was placed in desegregation or tile cell in which you were not notified?

A. There should've been none.

Q. To your knowledge were there?

A. Not to my knowledge.

Q. Okay, thank you, Commander Taylor.

A. One thing I should state. I was not -- I was on leave at one period of time during the time he was on disciplinary segregation. In that case as the Boatswain was acting for me and was given permission to do so in writing by the Commanding Officer, he may have been placed in the tile cell without my knowledge.

Q. Is that authority delegable?

A. Yes, that would be delegable, along with the job.

DC: Thank you, Commander Taylor.

MJ: Any further questions?

TC: No, sir.

MJ: Very well, thank you very much, Lieutenant Commander Taylor, you're excused.

Witness: Thank you.

The witness was excused and withdrew from the courtroom.

MJ: Gentlemen, it's getting to be 1605, let's take a recess.

The court recessed at 1605 hours, 29 July 1981.

The court was called to order at 1606 hours, 29 July 1981.

All parties to the trial who were present when the court recessed are again present.

MJ: Any further evidence?

DC: We have no further evidence, Your Honor.

MJ: Trial counsel?

TC: One second, sir. No, sir.

MJ: Very well, both sides prepared to argue?

DC: Defense is, Your Honor.

TC: Yes, sir.

MJ: There are so many issues in this case and rather than to try to sort out who has the burden of production, I'll just give both sides ample opportunity to speak and, also, the same opportunity to speak. So, trial counsel, why don't you lead off.

TC: Your Honor, inasmuch<sup>as</sup> you have no written answer to the motion from myself, I'll attempt to deal with<sup>an</sup> statement of the facts and perhaps just comment on the facts that's outlined by the defense counsel's motion. We have no contentions with the first paragraph of facts. The second paragraph, Your Honor, I believe the testimony by Lieutenant Commander Kelly clearly indicates that there was no ex parte communication in the sense of the word as it is used in the case law. The delay which the defense counsel refers to in the third paragraph of his facts is attributable to government administrative delay in execution of the magistrate's order. There simply was no administrative delay, Your Honor, unless you can characterize the time it take to get a stack of report chits written up and routed around to the different people in order for the magistrate to consider them. I think that became fairly clear from Lieutenant Commander Kelly's testimony that that in fact was the basis for what he felt and what the command felt was an erroneous first decision to release Destefano. That was the only delay. Also the delay may be accounted for by the fact that the magistrate visits the brig twice a week. The next hearing was held as quickly as possible and as quickly as the system allows for it. Towards the bottom of page two of the defense counsel's motion, the statement is made: "Seaman Recruit Destefano was represented by Lieutenant Eugene O'Neill at the magistrate's hearing." I would like to emphasize that fact. Seaman Recruit Destefano, apparently -- or not Seaman Recruit Destefano but Lieutenant (jg) O'Neill may've not ~~have~~ known what was going on. At that point it's his duty to take what ever measures are appropriate. We're not here to discuss his adequacy -- Seaman Recruit Destefano's adequacy to counsel. The government's unclear what

the purpose of Lieutenant O'Neill's testimony was if that was not, the fact, the result or the intended result. There's also a statement, Your Honor on the -- in the first paragraph, page three, JAGMAN Investigation, resulted in findings of facts which indicated that a member of the brig staff had acted illegally and contrary to orders. Findings of facts had not even been prepared at the time that defense counsel prepared this motion. We're rather <sup>not</sup> lost <sup>at</sup> to understand where he came up with this information. I believe that an examination of the findings of facts as submitted today would indicate that this is not the case. As far as the first issue which defense counsel raises, violation of SECNAV Instruction 1640.10 paragraph 6(b), by not promptly affording the accused a magistrate's hearing, <sup>we</sup> We'd ask the court to note that the facts up to the time that the first hearing was held were uncontroverted. The escape attempt has been testified to, whether the fact it was by definition of the UCMJ an escape attempt is not at issue, but in fact there were several disciplinary problems that, which lead up to numerous report chits being written. There was a weekend which intervened between the first day that Seaman Recruit Destefano was taken to the brig. All of these things lead to the necessity of the first hearing being held on the 12th. We also ask the court to note that no charges accrued against Seaman Recruit Destefano, or no charges here today have accrued against Seaman Recruit Destefano after the first three days of confinement. I'd like to emphasize that fact very clearly. As far as the question of delay in the magistrate's hearing, the government is aware of the requirement that within 72 hours the command informed the magistrate of the confinement of one of its members. Also we're aware of a prompt hearing being required. We direct -- we invite the court's attention to the case of the United States v. Dorn, which <sup>was</sup> decided 25 February 1981. The court dealt with the issue directly before us today in discussing the delay in that case is six days between the time of confinement, and the time when the magistrate's hearing was first held.

MJ: Just a second counsel, I hate to interrupt but our equipment is sound<sup>ing</sup> very sick. The court will stand in recess.

The court recessed at 1641 hours, 29 July 1981.

The court was called to order at 1615 hours, 29 July 1981. All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Excuse me, Lieutenant Smith, you may continue with your argument.

TC: The second issue which is raised by the defense counsel, Your Honor, is closely interwoven with some of the matters I addressed as far as the first issue, delay between hearings, that is the 12th of May to the 14th of May. Clearly this delay is the result of the magistrate not being available on a 24 hour basis. The first occasion for a rehearing was on the 14th, as soon as possible. Perhaps this raises the question of whether or not Destefano would've been released on the 14th or should he have been released on the 14th and then the rehearing held on, excuse me on the 12th and the rehearing held on the 14th. But as a practical matter, according to Lieutenant Commander Kelly's testimony, he called the magistrate as soon as possible, asked him to have a rehearing to consider new evidence and, based on that, the magistrate rescinded his word. Perhaps at that point the magistrate realized that he had not complied with what was expected of him or asked of him in this Instruction 1640.10. There is a paragraph we would invite your attention to, paragraph 7 of that instruction, titled "decision." Subparagraph (c), continuation of confinement: "if the decision of the magistrate is that the service member should continue in confinement." And it goes on to discuss documentary evidence which the magistrate should consider. It -- pardon me, Your Honor, I am addressing the wrong paragraph. The hearing procedures on paragraph six, subparagraph (e), "continuance." Clearly the magistrate is permitted to continue his investigation until he has all of the documents and the paper work necessary in conducting this inquiry. The magistrate in this case did not take

such a continuance when not presented with the documents and the paperwork on all of the report chits that were outstanding. Lieutenant Commander Kelly, by contacting the magistrate, was simply trying to get the magistrate, in effect, <sup>to</sup> affect a continuance of his decision. As a practical matter this was not a rehearing, this was but a continuance imposed or necessitated because the magistrate, candidly, did not do the job that he should've done at the first hearing. And that is to say inquire as to where the documentary evidence, where were the witnesses in support of the matters presented to him the first time? Enough said. The third issue, abuse of discretion in rescinding his order of the 12th of May, Your Honor, there's simply no abuse of discretion because if there -- there was no abuse of discretion in the second decision. The abuse of discretion, if any existed, would've been at the first hearing where the magistrate made a decision absent any evidence. Little more than guesswork would result from such decision-making process. This abuse of discretion is an issue addressed in the case of United States v. Lamb, where the standard of review question is discussed. Defense counsel states, in the latter situation, the court suggested that de novo determination is required. A misstatement, Your Honor. The court is the majority opinion which stated that the appropriate standard of review is abuse of discretion. It was a concurring opinion, which concurred in the result only, not in the means of which the result was reached, that said a de novo would be more appropriate. We ask the court to note that the magistrate is in a sense a judge who conducts a factual inquiry. It would be inappropriate to have a de novo determination of such an inquiry by such a person. It would be certainly inappropriate. I am not an expert on administrative law, Your Honor, if defense counsel is prepare to rebut that last point, then I'll stand corrected, but it seems clear that the Lamb case does spell out exactly what the standard of review should be. Very little has been presented here which indicates that the magistrate did

abuse his discretion. In fact his discretion is clearly spelled out in three different places in the SECNAV Instruction 1640.10. He's allowed to continue it, he's allowed to conduct a rehearing based upon several different sets of circumstances which have arisen since the initial determination or any new information as to whether or not the service member should be continued in confinement. That's pretty wide open. It's pretty hard to abuse that discretion, especially in light of the facts that we have here today. The fourth issue and perhaps the most important issue, Your Honor, that of prior punishment, indicates -- it is indicated in the defense counsel's motion that somehow, because of being in administrative segregation or disciplinary segregation status... the government is unclear of what exactly is the basis for such an allegation, that the status somehow was punishment. Your Honor, there's two problems with that. First of all, is it really punishment and, second of all, is that punishment related to anything which is before the court. Is the command trying to punish him again for something that they already got their licks in on? The only thing that comes close to that is what Lieutenant Commander Taylor testified to, is the time when Destefano was being asked to answer questions and he wouldn't do so and he wouldn't stand at attention and he wouldn't leave -- or did leave, and they had to restrain him and put him in the tile-cell. He went on to list the other circumstances surrounding that event. The question then becomes why was he put into that place? He was not put in there to be punished, he was being put in there because they couldn't keep him in one place and behave in an orderly fashion. It was the only place where they could keep him and control his movement. And controlling movement is the whole purpose behind pre-trial confinement and post trial confinement; however, there is a distinct difference between the motive for each: that one is to insure presence at trial, the other is punishment. We'd like again to emphasize the difference between putting someone in the tile-cell or disciplinary segregation for punishment of minor offenses and

putting them in there because of the need to control their actions and movement because they're so unruly and disorderly that they're disrupting the whole prison -- the brig. I believe the court is well familiar with the case the United States v. Williams, 28 <sup>CMR</sup> <sub>MJ</sub> 181. Finally, on closing, Your Honor, we would hope that you would take careful note of all of the items listed as findings of facts by Lieutenant Commander Kelly in the JAG Manual Investigation. There's nothing in there and you'll find nothing in there which anyhow correlates to any of the charges which Seaman Recruit Destefano has before him today. The handcuffing, the burning, the other restraints applied to Seaman Recruit Destefano were applied because he could not be controlled, because he had to be controlled, where he went, and how he affected the other detainees and prisoners and not as a purpose of punishment. Finally, Your Honor, page nine of the defense counsel's motion contained very little which we can agree with either factually, philosophically or legally. I hope that Your Honor will take careful note of all of the things that have been said today and all of the instructions that have been presented. I'd like to make two final points. One, Commander Corr had a duty to inquire further and conduct a second rehearing; he did so, it was not an abuse of discretion. His decision did not reflect an abuse of discretion in either holding the hearing or changing his first decision. Second of all, all types of restraint that was applied to Seaman Recruit Destefano was necessary in the early stages of his pre-trial confinement in order to control his movements and to keep him from disrupting the brig and the brig population.

DC: Your Honor, first, preliminarily, I'd like to respond to a point that I think needs to be clarified. Trial counsel indicated that in our brief, where we mentioned that the JAG Manual Investigation resulted in findings of facts which would indicate that members of the brig staff did act illegally and contrary to orders and we think if you read the findings of facts, you'll find that

is in fact the case, numerous instances I mentioned. To proceed to the motion. Our first issue that we raise, a delay of six days in holding a magistrate's hearing is not prompt. I won't belabor the evidence and the testimony before you. We feel it isn't prompt. We feel that, on the basis of the six day delay, the military judge should find -- you should find and direct administrative credit for the six day period. Trial counsel suggested to our second issue that administrative delay is attributable to normal government delay, a delay to be incurred as administrative action. I say that's non sense. When a magistrate orders a man released, that man is in confinement, <sup>and the magistrate's found that he is no longer to be held in confinement,</sup> it takes a phone call, and if the government can't release that man when it is ordered to, then they have to bear the burden. If there is an administrative delay, as trial counsel has conceded, if it is due to government delay, as trial counsel has conceded, then it should not be, and he should be credited with that three day period. It takes a phone call, a simple order. If they need a little administrative steamlining then perhaps it's time that the government was told that they should perhaps dovetail their procedures to conform with the order of the magistrate. We've heard a lot of testimony today on the third issue, that is, the issue we raised based on U.S. v. Malia that there was an ex parte communication which would render subsequent confinement illegal in this case. Commander Kelly testified... among other things, he testified that he didn't recall exactly what Commander Corr's response was during that conversation. He said that he may had said something about those allegation -- Commander Corr may had said something. The point is, evidence reveals that Commander Kelly knew that Lieutenant Eugene O'Neill had formed, or, at least, had contact, possibly amounting to an attorney/client relationship. We feel that U.S. v. Malia stands for the simple proposition that where new evidence is discussed without the concurrence or presence or knowledge of the



detailed counsel, then that renders the subsequent confinement illegal. That Commander Kelly did not broach this subject does not mean that there was not an ex parte communication and that this evidence wasn't discussed. He could not remember precisely what Commander Corr said. Our position is that it is quite likely some of the subject matter was discussed, it renders it an ex parte conversation. The defense feels that the government should have to do exactly what the defense does. I have to submit a chit for a magistrate's rehearing which uniformly takes ten days to two weeks.

TC: Objection, Your Honor, I am going to have to object to this. Counsel is arguing facts that'<sup>re</sup> not in evidence. st

MJ: He's correct counsel...

DC: We're maintaining...

MJ: if you want to reopen your case you may but you are arguing facts that aren't in evidence and it is not common knowledge to the bench.

DC: It's not common knowledge. Well, in that case, briefly I would like to reopen the case.

MJ: Alright, we've going to have to stand in recess at this time. The court will stand in recess.

The court recessed at 1632 hours, 29 July 1981.

The court was called to order at 1641 hours, 29 July 1981.

All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Now, the way we're going to handle this is as follows and by this I mean the trial defense counsel's representation as to the chit procedure. Now both of you gentlemen have been unable to agree. I am not going to hold up proceeding solely to straighten this out. So now both of you can put on your representations as officers of the court as to how you perceive the system for a defense's rehearing of a magistrate's decision. Lieutenant Loker, very briefly, please.

DC: Very briefly, Your Honor, the defense is required at NLSO, Naval Station, in order to obtain a rehearing, to fill out a standard form indicating a request for a rehearing, to sign it and be forwarded it addressed by mail to the magistrate. A process which takes between seven and fifteen days, commonly two weeks. Thank

MJ: Lieutenant Smith.

TC: The process which is required for a detainee to get a rehearing is that as just outlined by the defense counsel. That is the only way the detainee has of bringing it to the magistrate's hearing that he wants a rehearing. The defense counsel is able to go to or call either Lieutenant Commander Kelly or someone at the Naval Station, simply verbally request a rehearing, and that request would be transferred to the magistrate who will at his earliest convenience, for lack of a better word, will conduct a rehearing -- earliest opportunity.

MJ: Alright, now that assumes, of course, the man has been assigned a defense counsel, either from the Naval Station of the NLSO. Isn't that correct?

TC: That's exactly what I said. The only way the man has of bringing it to someone's attention himself is to put in a chit. If the man has a defense counsel, that defense counsel can make a verbal request.

MJ: Alright, when you were assigned to defend Destefano here? Approximately?

DC: I have the exact day, I believe, Your Honor. Actually, I do not have the exact date. It was approximately early June, Your Honor.

MJ: Alright, in your experience as a defense counsel here at the NLSO, how many times do you get assigned to an individual within, say, a week or two of pre-trial confinement?

DC: Never, Your Honor. Charges are simply not preferred in that period of time.

MJ: Alright, that should take care of this issue. Now continue with your argument.

DC: Your Honor, the point we're trying to make, ~~is~~ perhaps more artfully phrased, is that the government should be held to that which the accused is required to do, which is to petition for a rehearing. We suggested through the testimony of -- it has been suggested through the testimony of Commander Kelly that it's quite likely that things were brought up and discussed. We feel that the government should be held to the same procedure as we suggested the accused is. By not utilizing that procedure and attempting to utilize ex parte communications to inform the judge(Sic) as Commander Kelly suggested, perhaps he hadn't told the whole story, is in violation of the doctrine announced in U.S. v. Malia. We feel the trial judge should declare that the subsequent confinement was illegal as a result of that and we ask you to direct credit on a day per day basis for all confinement at hard labor subsequently served. We discussed also and raised the issue -- the accused has raised the issue of whether he has suffered prior punishment under Article 13 of the UCMJ. On that issue we've heard the testimony of Seaman Recruit Destefano as well as Lieutenant Commander Taylor. Seaman Recruit Destefano testified, while looking at that which was marked Appellate Exhibit VI, that he was placed in the tile-cell as the consequence of -- that he made several moves: one, that he was placed in the tile cell as a consequence of having committed what he alleged was an assault and an attempted escape on the 8th of May -- on the 7th of May -- rather on the 7th of May. On the 8th of May he suggested that he was moved to the tile-cell in response to what the government alleges are Charge IV, Specifications 1, 2, and 3. And that representation was corroborated, I believe, by Commander Taylor as to the latter -- as to the Specifications 1, 2, and 3 of Charge IV. If I am not mistaken, that perhaps may have been the basis. Commander Taylor just testified as to Specifications 1 and 2. We suggest that Specifications 1, 2, and 3 of Charge IV, as well as Specification 6 of Charge IV, were the result of those, where

that he was moved into, one, a tile cell or two, administrative segregation. Of that point, Lieutenant Commander Taylor testified, in response to cross-examination, suggested that he had had experience of whereby the privileges, and we think this is brought out by the JAG Manual investigation in evidence by the court, whereby certain privileges, rights, as he termed them, and denied privileges, in contravention of orders and regulations to be sure, but are nonetheless denied. We think this reasonably gives the color of desegregation, disciplinary segregation, to administrative segregation. Now, the case law suggested by trial counsel, U.S. v. Williams, at 28 CMR 181, does indeed suggest that offenses relative to the maintenance of discipline and order within the brig, and actions taken as a result of that, are punishment and are not necessarily administrative actions. Clearly the Specifications under Charge IV, 1, 2, and 3, would fall within that purview. We're recommending -- we're suggesting that the other specifications which lead to the segregation: assault, attempted escape, are also administrative actions. In response to this, it might be suggested that Charge IV of the Specification 6 (sic) is not serious within the meaning of Article 13. That is...

MJ: You mean that it is serious.

DC: That it is serious. One might also suggest in response to my argument, that there is no causal relationship between the incident of 25 June, which is the subject, of course, of the JAG Manual Investigation and those offenses committed on the 7th, 8th, and 9th. The defense's response to this is in two parts. We feel there is a causal relationship. There's a causal relationship because he was placed in confinement under the conditions he was placed and which ultimately lead to his injury. Because those offenses lead directly to that segregation. That is, there is a causal connection. We feel that the Article 13 definition of minor punishments, as well as that of infractions of discipline, is something of a sliding scale. We feel the word of punishment --

or any punishment which may be incurred while in confinement, where that punishment is not lighter, then neither are the so called infractions of discipline to be measured by the same scale of minority. We feel that the definition of infraction of discipline should be concomitantly expanded to include such things as assaults and attempts. However, there's another branch of this argument and that is an Article 13 argument-- Article 13 of the UCMJ clearly states that punishment should be no more vigorous than circumstances require. If you look at the JAGMAN, I think the inevitable and <sup>ineluctable</sup> ~~indecible~~ conclusion is that Seaman Recruit Destefano was punished, that he was punished and received injuries in contravention of the rules and regulations of the laws of this land. The circumstances of his confinement were much more vigorous than those dictated by the circumstances and that is substantial government culpability in this punishment. On its face, its a violation of Article 13. We ask that all of those charges that accrued while he was in the brig be dismissed on that basis, or, in the alternative, that substantial administrative credit be directed for that period of time that he spent in pre-trial confinement at hard labor. We suggest that it be done so on a two to one basis, due to the unique circumstances involved in this case. I would like to reiterate, Commander Taylor by his own testimony, supplemented and augmented by the findings of fact in the JAGMAN Investigation, where when he suggested that, for instance, Seaman Recruit Destefano had been committed to desegregation on 12 June, in violation of SECNAV Instruction 1640.9. The findings of facts bear that out. Commander Taylor also suggested that administrative segregation may have resulted in his denial and had in the past resulted in the denial of certain rights to prisoners. Briefly, as to the burden of proof to be used, perhaps trial counsel misconstrued our argument based on U.S. v. Lamb. We don't suggest, on page five of our motion, that U.S. v. Lamb stands for the proposition that abuse of discretion is the appropriate measure in this case. We do suggest that it may be but we do suggest that based on the concurring opinion of

Judge Granger. By either standard we feel that the implementation of SECNAV Instruction 1640.10, the policy changes express therein, require that when a trial judge reviews matters of this nature, that he uses a de novo determination. We ask, in total, based on all the evidence before the court, that the trial court find that all of these charges, with the exception of those charges which accrued prior to Seaman Recruit Destefano's being placed in pre-trial confinement, be dismissed. Or, in the alternative, that he be granted and that you direct substantial administrative credit for the entire time which he served in pre-trial confinement. Thank you, Your Honor.

MJ: Thank you, counsel. Trial counsel do have anything further by way of argument?

TC: Briefly, Your Honor. We'd ask you to perhaps reread United States v. Malia. The conversation which Lieutenant Commander Kelly had with Commander Corr amounted to nothing which begins to approach the conversations and the ex parte communications that occurred<sup>in</sup> that case, in Malia. What Commander Corr may have said to Commander Kelly is of no import. He knew no new evidence. Nothing to indicate that he could've communicated new evidence to Commander Kelly and, even if he did it, it would've made no difference because the decision was already made. The only one in that conversation and what they say that has any importance to us today is what Lieutenant Commander Kelly said. He is the only one who could've said anything that would've, in any way, prejudiced the accused. And all he did was simply ask for a rehearing. We feel that it's irrelevant and perhaps interesting, but irrelevant, what the defense counsel or what has been represented here in court what defense counsel has to do to get a rehearing. The bottom line is that Destefano had a counsel at his hearing and that he is required -- he being the counsel, is required to either be confidence or become confidence before he represents someone. Not to confuse the issue, but that counsel at that rehearing had a duty to represent this man. If he did not represent the man than that's another

issue for someone else to decide, not for us here today. As far as prior punishment, Lieutenant Commander Taylor's testimony indicated that no punishment had been given to Seaman Recruit Destefano for any of the offenses which we're talking about here today. As I stated before and as he stated, all of the incidents involving Seaman Recruit Destefano being placed in the tile-cell or any kind of segregated status were because they could not control him and had to control his movements and his behavior so as not to adversely impact on the rest of the population or to, in fact, leave the brig.

DC: Objection, Your Honor, I believe he's mischaracterizing the testimony of Lieutenant Commander Taylor.

MJ: Very well, I'll sort that out when I review my notes.

TC: There's been no evidence presented here by the defense as to what minor offenses are or what they may be. There's also no argument or law indicating what minor offenses are or what they may be. The sliding scale which the defense counsel proposes is meaningless in light of what we've got here because we have nothing to compare it to. No starting place, no indication what the past considerations of what minor offenses are. Charge IV and the Specifications, the claim that they resulted in desegregation, lack causal relationship. There's no causal relationship. The two to one ratio, which he suggests, has no basis either in law or in equity. We have no indications that that's appropriate in this situation, no comparative indications. Also, in the findings of facts, you'll find that one of the conclusions is that there was no harm resulted<sup>ing</sup> from Lieutenant Commander Taylor's actions in placing people in disciplinary segregation. Essentially that is harmless error and that is a finding in the findings of facts. And finally, Your Honor, if the de novo hearing, in your decision-making is required, the government would ask that this entire process be restarted in<sup>as</sup> much as the facts and testimony presented by defense and trial counsel do not begin to approach that required by a de novo hearing. The fact is, we would have to start from scratch

on each and every offense which occurred on each and every report  
chit that was presented to the magistrate for his consideration  
and all of the offenses that were not, if any existed that were  
not considered by him. Thank you.

MJ: Thank you counsel. Anything further from the defense?

DC: We have nothing further, Your Honor.

MJ: Very well. Can we get started again tomorrow at 0830?

DC: Yes, sir.

TC: Yes, sir.

MJ: Very well, court is adjourned until 0830 tomorrow  
morning.

The court was adjourned at 1700 hours, 29 July 1981.

The court was called to order at 0839 hours, 30 July 1981.

All parties to the trial who were present when the court adjourned  
are again present.

MJ: The court will come to order. Gentlemen, let me explain.  
I am not quite ready to announce my decision on the defense's  
motion. As you will recall, yesterday, I asked the trial counsel  
not to offer the supporting documents to Appellate Exhibit IX, the  
supporting documents to the letter to the magistrate. I did this  
to diminish the record of trial and to avoid having to look at the  
hearsay documents regarding the charges. Lieutenant Loker, I'll  
hand you Appellate Exhibit III. Alright, Lieutenant Loker, take a  
look at Appellate Exhibit III and let me ask you: is it correct  
that you are not contesting the validity of that paragraph?

DC: Of the Appellate Exhibit, Your Honor?

MJ: That's right, that would be Commander Corr's determi-  
nation that there was probable cause to believe jurisdiction over  
the person of your client and also probable cause to believe that  
those listed charges were committed.

DC: That is correct, Your Honor.

MJ: Very well, then I see no need to have the supporting  
documents to the magistrate's package introduced into evidence.



Do both sides agree?

TC: Yes, sir.

DC: (Nods in the affirmative)

MJ: Very well, thank you. I would like to comment -- excuse me, invite your comments regarding the period of 14 May to 9 June 1981. My recollection of the evidence is that the accused was in the status of administrative segregation and not in a tile-cell or a strip cell for the entire period. What is the recollection of counsel on this point?

DC: That is correct according to our evidence, Your Honor; he was not in a tile cell or strip cell during that period of time. Although, the testimony did tend to indicate, while in administrative segregation, he did undergo, possibly underwent, certain hardships that might be analagous to those situations.

MJ: Very well, is that the recollection of the government?

TC: As stated by Your Honor, yes, sir.

MJ: Alright, does anyone recollect any evidence regarding who if anyone ordered the brig not to release the accused after the first hearing?

TC: Your Honor, I don't believe any evidence was presented on that question,

DC: I concur, Your Honor.

MJ: These is a discrepancy regarding which cell numbers are the tile-cells. Can we straighten this out and also can we straighten out the question of whether or not a strip-cell is the same as a tile-cell?

TC: Your Honor, I believe that the testimony at one point indicated that the tile cells were numbers 76 through 78 and that the strip cell is number 84 and that they are not the same. We will be willing to offer instruction on that point, if it's necessary.

MJ: Eighty-four is the strip cell?

TC: Yes, sir.

DC: Two part response, Your Honor. Our understanding is

that the tile-cells are numbers 79, 80, and 81. They are distinct from the strip-cell inasmuch as the strip cell does not contain a rack whereas the tile-cell does. However, in both cells -- I am sorry the tile-cell does not contain a rack. However, in both the tile-cell and strip-cell, the individual is devoid of all clothing except his underwear.

MJ: You think the tile cells are 79, 80, and 81?

DC: Yes, that's correct, Your Honor.

TC: Your Honor, my knowledge is based on talking to Chief Kesser at the brig and I'll...

DC: Would you repeat what...

TC: Seventy-six through seventy-eight.

DC: That is quite possible, Your Honor, I...

MJ: Alright, I don't think it makes any difference to my resolution but I think the reader of the record perhaps might want that question answered. So let's see if we can't agree the tile cells are cells number 76, 77, and 78 which is in accordance with Lieutenant Commander Taylor's testimony and that the strip cell is cell number 84. Would you agree to that, Lieutenant Loker?

DC: Yes, Your Honor.

MJ: Do you agree to that Destefano?

AC: Yes, Your Honor.

MJ: Very well. Alright, gentlemen I am going to announce my decision on the defense's motion and I have found it appropriate to issue special findings. And they are as follows: That, paragraph 6 (a) of SECNAV Instruction 1640.10, hereinafter 1640.10, was complied with when the military magistrate's package was received on 8 May 1981 by Mrs. Midge McGee who was acting for Commander Corr and when she called Commander Corr, either Friday afternoon or Monday morning, 11 May 1981. That, under the circumstances and considering the utility of using reservists as military magistrates, paragraph 6(b) of 1640.10 was complied with when Commander Corr convened the first hearing on 12 May 1981. I have relied on the case of U.S. v. Dorn, NCM 801620, decided on

25 February 1981. That, the evidence does not establish who made the decision not to release the accused following the first hearing. That, only the accused's Commanding Officer can make this decision. That, Commander Corr could properly review his earlier decision. Here I've relied on paragraph 8(c) of 1640.10 and U.S. v. Malia, <sup>65</sup> MJ (CMA 1978). That, the evidence regarding the accused's alleged offenses after his 6 May 1981 pre-trial confinement was not included in the magistrate's package because of administrative oversight. That, this oversight should've been obvious to Commander Corr. That, there was no command representative present at the first hearing. That, there should've been a command representative present, particularly in light of the fact that Commander Corr held his hearing past normal working hours. That, Commander Corr should not have conducted his first hearing without all of the supporting evidence. That, Lieutenant Commander Kelly acted properly in requesting and procuring a second hearing. That there was no ex parte communication between the command and Commander Corr. That no second alleged offense was considered at the second hearing and no evidence was considered that did not exist at the time of the first hearing. That, under the circumstances, the evidence considered was "new" or "other" within the meaning of paragraph 81, excuse me, paragraph 8(1)(C), 1640.10. That, counsel was not required at the second hearing. That, Lieutenant Commander Kelly acted prudently in appointing Lieutenant O'Neill but that he should've afforded Lieutenant O'Neill sufficient time to prepare for the hearing. That, the atmosphere present at the second magistrate's hearing was such as to make it difficult for Commander Corr to make an objective decision, and also to make it difficult for Seaman Recruit Destefano to perceive that he was receiving an objective and fair hearing. Notwithstanding the above, that, Commander Corr did not abuse his discretion in authorizing the accused's continued detention. That, administrative segregation does not constitute punishment. That, from 8 to 12 May 1981, the accused was in a tile-cell and that this was, under the circum-

stances, illegal and constitutes punishment. That, the accused was placed in the tile-cell because of his proported misconduct at the disciplinary hearing held on 8 May 1981. That, Specifications 1 and 2 of Charge IV are "minor", under the circumstances. That, the accused was in disciplinary segregation from 9 until 25 June 1981. That, under the circumstances, this period of disciplinary segregation was illegal. That, the accused was handcuffed to his ~~cell~~ at various times prior to 9 June 1981. That, the evidence does not pinpoint the dates or the duration of this handcuffing or shackling, <sup>That, under the circumstances, the handcuffing or shackling</sup> although technically unauthorized, was a reasonable measure for restraining the accused and does not constitute punishment. That, the accused, while recuperating in the hospital for his tragic and inexcusable burning, which occurred at the brig, had not been in pre-trial confinement from 25 June 1981 to the present. Although certainly, in my mind, matter to be considered relevant to sentencing, that, the remedy of administrative credit or dismissal of the charges is not available to me as a way to redress the pain and suffering that the accused has suffered since 25 June 1981. Based on the foregoing, Specifications 1 and 2 of Charge IV are dismissed based on prior punishment. The convening authority will afford the accused day for day credit for confinement from 8 to 14 May 1981 and from 9 to 25 June 1981, a period of 24 days. Are there any questions about my decision and my special findings?

TC: It is your determination, sir, that the period of 9 to 25 June was disciplinary segregation?

MJ: That's right.

DC: We have no questions, Your Honor.

MJ: Very well, anything further from the government.

TC: No, sir.

MJ: Does either side wish to vior dire me or propose a challenge based on the nature and extent of evidence I've examined in order to rule on the motion?

DC: The defense does not, Your Honor.

MJ: Trial counsel?

TC: No, sir.

MJ: Very well. Has my decision changed the prefatory provision of the pre-trial agreement?

TC: Sir, it's ours or it's my understanding that this will have no impact on the pre-trial agreement, that is, the dismissal of the two Specifications.

DC: Defense concurs, Your Honor.

MJ: Very well, was the accused obligated to plead guilty to either of those two Specifications under the pre-trial agreement?

DC: Yes, he was, Your Honor.

MJ: Alright, did you check with the convening authority to make sure he considers himself bound at this point?

TC: My understanding of the case was that he had no choice.

DC: The defense concurs, Your Honor.

MJ: Do you have the case?

TC: Not with me.

MJ: Well, I don't know the answer either, gentlemen, but what I'd like you to do is, when we get to that point, or, perhaps, better, right now, call him up and tell him what happened and see if the convening authority agrees to be bound irrespective of what the law might be regarding that pre-trial agreement in light of my ruling. The court will stand in recess.

The court recessed at 0855 hours, 30 July 1981.

The court was called to order at 0943 hours, 30 July 1981. All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Lieutenant Smith, what does the convening authority say about his obligation under the pre-trial agreement?

TC: The convening authority feels that he is bound by the pre-trial agreement in the absence of any definite authority indicating that he's not.

MJ: So he agrees to be bound by the pre-trial agreement?

TC: Yes, sir.

MJ: Very well. The accused and counsel may plead:

DC: Your Honor, before we plead can we get a clarification on the Specification under Charge three? Did you make a specific ruling as to <sup>that charge and</sup> the Specification thereunder?

MJ: I was not required to make a specific ruling with regards to whether or not that allegation states an offense because you agreed to allow the trial counsel to amend that Specification as it appears in the original.

DC: That is correct, Your Honor, we were a little bit confused by prior discussion on the matter. We are prepared to plead at this time.

MJ: Very well.

DC: The accused pleads as follows:

To Charge I and Specification 1: Guilty.

To Specification 2: Not guilty.

To the Charge: Guilty.

To Charge II and the Specification thereunder: Guilty.

To Charge III and the Specification thereunder: Guilty.

To <sup>the</sup> Charge: Guilty.

To Charge IV and Specification 3: Guilty.

To Specification 4: Guilty.

To Specification 5: Guilty.

To Specification 6: Guilty.

To the Charge: Guilty.

Charge V and the Specification thereunder: Guilty.

MJ: Seaman Recruit Destefano, you and I are going to discuss your guilty pleas. I'll be asking you questions about the offenses you have plead guilty to but you do not have to answer. However,

if you choose not to answer my questions, I may not be able to except your guilty pleas. Do you understand this?

AC: Yes, Your Honor.

MJ: You, not Lieutenant Loker, must answer my questions but if you would like you may consult with him before you answer, for example if you're confused or don't understand the question. If you still don't understand something ask me. A guilty plea is a confession in court. Based on your pleas and our related discussion, I could find you guilty in accordance with your pleas. If you're not convinced of your guilt, you should not continue to plead guilty. It is the burden of the trial counsel to prove this case against you by legal and competent evidence beyond a reasonable doubt. Thus, it is your legal and moral right to plead not guilty even if you know that you are guilty. Do you understand this?

AC: Yes, sir.

MJ: If your still want to plead guilty, you must be willing to give up three constitutionally guaranteed rights. First, is the right against self-incrimination. Unless you give up this right I cannot question you about the offenses. Consequently, I cannot <sup>accept</sup> ~~except~~ your guilty plea. Second, is the right to a full trial in court. Unless you give up this right the trial counsel would have to call witnesses or introduce other evidence in court to prove the case against you and when the trial counsel is finished you can, if you like, call your witnesses and introduce other evidence. Then the court will decide your guilt or innocence based on all of the evidence presented. The third, is the right to be confronted by any witnesses against you. Unless you give up this right the trial counsel would have to bring any witnesses against you to court to testify and be subjected to questioning by the defense . Do you understand these rights?

AC: Yes, Your Honor.

MJ: You still want to plead guilty?

AC: Yes, Your Honor.

With respect only to the offenses that you have pled guilty to, you give up these three rights that I just explained to you?

AC: Yes, Your Honor.

MJ: Keep the charge sheet in front of you so that you can easily refer to it. Before we discuss the facts surrounding the offenses, I'll tell you the elements of the offenses. The elements of the offenses are the facts the trial counsel would have to prove beyond a reasonable doubt in order to convict you if you were to plead not guilty. Each element of each offense must accurately describe your conduct and you must admit to me that each element is true. Therefore I will ask you to listen carefully to the elements and ask yourself if each element is true and also if you want to admit the truth of the elements. The elements of Specification 1 of Charge I are: First, that on 7 May 1981 at the Naval Station brig you did certain overt acts. Second, that these acts were done with specific intent to commit the offense of escape from confinement. Third, that the acts amounted to more than mere preparation, that is, they were a direct movement toward the commission of the intended offense. And fourth, that the acts apparently tended to effect the commission of the intended offense, that is, the acts apparently would've resulted in that actual commission of the intended offense, except for a circumstance or circumstances which prevented the completion of the intended offense. You're advised that preparation consists of advising or arranging the means or measures necessary for the commission of the offense. The overt act requires steps beyond mere preparation and is direct movement toward the commission of the offense. With regard to the requirement that an overt act be done with the specific intent to commit the offense of escape from confinement it need not be proved that you actually completed that offense. However, it must be proved beyond a reasonable doubt that your intent embraced each and every element of the intended offense. With this requirement in mind here are the element of escape from



confinement. First, that you were duly placed in the brig. Second that you knew you were in confinement. And third, that you would have freed yourself from the brig before being released by competent authority. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are these elements accurate?

AC: Yes, Your Honor.

MJ: The elements of the Specification of Charge II are: First, on 6 May 1981, at Naval Station, San Diego, California, you were appointed a certain time and place of duty by competent authority, that is, 1130 restricted muster at the restricted barracks, Naval Station, San Diego, California. Second, that you had reasonable cause to know or knew that you were required to be present at this appointed time and place of duty. And third, that at 1130 on 6 May 1981 you failed to go to this appointed place of duty at the time prescribed. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are these element accurate?

AC: Yes, Your Honor.

MJ: The elements of Charge III and it's Specification are: First, that on 6 May 1981 at the Brig, Naval Station, San Diego, California, you used certain language, that is, "I don't know what you're doing in this fucking canoe club, you must be crazy. Second, that such behavior was directed toward Lieutenant Frank L. Tezak, JAGC, USNR. Third, that Lieutenant Tezak was your superior commissioned officer at that time. Fourth, at that time that you knew Lieutenant Tezak was your superior commissioned officer. And fifth, that under the circumstances your language was disrespectful to Lieutenant Tezak. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are they accurate?

AC: Yes, Your Honor.

MJ: Alright, the elements of Specification 3 of Charge IV are: First, that you received a certain lawful order from Signalman First Class Albert A. Fabianowicz, United States Navy, "to strip down to your scivies." Second, that at the time, this Petty Officer was your superior petty officer. Third, that at the time you knew that he was your superior petty officer. And fourth, that at the Navy brig, Naval Station, San Diego, California, on 7 May 1981, you willfully disobeyed his lawful order. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Do these element accurately describe what you did?

AC: Yes, Your Honor.

MJ: The elements of Specification 4 are: First, that you received a lawful order from Chief Master-at-Arms Russell D. Buchannan, United States Navy... excuse me, forget all of that. Let me start again on the elements of Specification 4, which is disrespect to a chief petty officer. The elements are, first, that on or about 6 May 1981, on board the Naval Station, San Diego, California, you said these words, "I don't want to talk to this fucking chief, not this fucking chief, you're fucking crazy, that fucking chief ain't shit," or words to that effect. Second, that such behavior was directed toward and within the sight of Chief Master-at-Arms Russell D. Buchannan, United States Navy. Third, that, under the circumstances, by such behavior you treated the Chief with disrespect. Fourth, that this chief was your superior petty officer at the time. And fifth, that you knew he was your superior petty officer at the time. And sixth, that the chief was in the execution of his office at the time. You understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are the elements accurate?

AC: Yes, Your Honor.

MJ: The elements of Specification 5 are very similiar and they are as follows: First, that on 6 May 1981, at the Naval

Station, San Diego, California, you said, "fuck you, James, fuck you, fuck you." Second, that such behavior was directed toward and within the sight of Boatswain Mate Second Class Leonard G. James, United States Navy. Third, that under the circumstances, by such behavior, you treated this petty officer with disrespect. And fourth, that this petty officer was your superior petty officer at the time. Fifth, that you knew that was the case. And sixth, that he was in the execution of his office at the time. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are they accurate?

AC: Yes, Your Honor.

MJ: The elements of Specification 6, assault upon a petty officer, are as follows: First, that on 7 May 1981, at the Navy Brig, Naval Station, San Diego, California, you did bodily harm to Signalman First Class Albert Fabianowicz, United States Navy. Second, that you did so, by kicking him in the calves with your feet. Third, that this bodily harm was done with unlawful force in violence. Fourth, that at the time this petty officer was your superior petty officer. And sixth, that he was in the execution of his office at the time. Do you understand the elements of that offense?

AC: Yes, Your Honor.

TC: Excuse me, Your Honor, I believe there are additional facts to the assault.

MJ: Let me see the original. Perhaps I neglected to note the additional facts, excuse me.

TC: I believe you retained the original charge sheet, sir.

MJ: Yes, I have it, thank you. Alright, in addition to committing bodily harm to him by kicking him in his calves with your feet, it's alleged that you also grabbed his left leg and tried to prevent him from leaving the cell. Now, is all of this accurate?

AC: Yes, Your Honor.

MJ: Of course, you understand the elements of the offense, do you not?

AC: Yes, Your Honor.

MJ: Now, the final offense, <sup>the</sup> Specification of Charge V. The elements are as follows: First, that at the Naval Station on 6 May 1981, you wrongfully used words, that is, "let me see you bull shitting with one "nigger" in ranks," toward Boatswain Mate Second Class Leonard G. James, United States Navy, a black petty officer. Second, that the words used were provoking. Third, that Petty Officer James was a person subject to the Uniform Code of Military Justice, that is, he was on active duty in the United States Navy. And fourth, that you knew that Petty Officer James was on active duty in the United States Navy. Do you understand the elements of this offense?

AC: Yes, Your Honor.

MJ: Are the elements accurate?

AC: Yes, Your Honor.

MJ: When did you enlist in the United States Naval Reserve?

AC: July 12th, 1978, sir.

MJ: For how many years?

AC: Three years, Your Honor.

MJ: When was your first day of active duty in the United States Naval Reserve?

AC: July 12th, 1978, Your Honor.

MJ: Have you been continuously on active duty from 12 July 1978 until today?

AC: Yes, Your Honor.

MJ: Are you satisfied that you have been lawfully extended on active duty?

AC: Yes, Your Honor.

MJ: Now, of course, you're presently at the hospital, that is the Balboa Naval Hospital here in San Diego?

AC: Yes, Your Honor.

MJ: But are you still assigned to the Naval Station?

AC: Yes, Your Honor.

MJ: No, how long have you been assigned to the Naval Station, San Diego, California?

AC: Approximately four months, Your Honor.

MJ: Continuously?

AC: Yes, Your Honor.

MJ: Four months ago, approximately, was certainly before 6 May 1981, is that correct?

AC: Say again, Your Honor.

MJ: You were on active duty and assigned to the Naval Station sometime before 6 May 1981, is that correct?

AC: Yes, Your Honor.

MJ: Alright, let's talk first about Charge I, Specification 1. On 7 May 1981 were you in the brig, Naval Station, San Diego, California?

AC: Yes, Your Honor.

MJ: Sometime at or about 0830 on 7 May 1981, did you intend to commit the offense of escape from the brig?

AC: Yes, Your Honor.

MJ: Alright, do you believe and admit that you were properly placed in the brig on 6 May 1981?

AC: Yes, Your Honor.

MJ: Of course, you knew you were in the brig, obviously, is that correct?

AC: Yes, Your Honor.

MJ: Alright, now, did you specifically intend to free yourself from the confines of the brig when you attempted to escape at about 0830?

AC: Yes, Your Honor.

MJ: Now of course you were not released by anyone prior to that, were you?

AC: No, Your Honor.

MJ: Now at the time you wanted to get out of the brig, did you do any certain act or acts which amounted to more than mere preparation and which amounted to a direct movement toward the commission of the offense of escape from the brig.

AC: No, Your Honor.

MJ: Alright, listen to the question again, I am asking you what did you do to try to escape?

AC: ~~Exc~~use me, sir.

MJ: What did you do to try to escape?

AC: What I did was I climbed the back gate fence and climb up the fence and I tried to go over it but I got caught on the barbed wire.

MJ: Would you agree with me that the act tended to effect the commission of the intended offense?

AC: Yes, Your Honor.

MJ: Now of course your attempt to escape from the brig was interrupted by getting caught on the barbed wire, is that correct?

AC: Yes, Your Honor.

MJ: If that would ~~ve~~<sup>not have</sup> happened, would you have escaped from the brig.

AC: Yes, Your Honor.

MJ: Alright, now, let's look at the Specification of Charge II. Were you required in the course of your duty to be at the 1130 restricted muster at the restricted barracks, Naval Station, San Diego, California on 6 May 1981?

AC: Yes, Your Honor.

MJ: Why were you required to be there?

AC: Because that's the 1130 restricted men's muster and I was restricted at the time.

MJ: Were you there at this time?

AC: No, Your Honor.

MJ: Did anyone give you permission not to be there?

AC: No, Your Honor.

MJ: Did you have any justification or excuse for not going to the restricted muster?

AC: No, Your Honor.

MJ: Alright, with regards to the offense involving Lieutenant Tezak, Specification and Charge III. On 6 May 1981, at the Navy Brig, Naval Station, San Diego, California, did you say these words to Lieutenant Tezak, "I don't know what you're doing in this fucking canoe club, you must be crazy?"

AC: Yes, Your Honor.

MJ: Was this behavior directed towards Lieutenant Tezak?

AC: Yes, Your Honor.

MJ: Was this behavior within the hearing of Lieutenant?

AC: Yes, Your Honor.

MJ: At the time, Lieutenant Tezak was, of course, your superior commissioned officer, is that correct?

AC: Yes, Your Honor.

MJ: Now, did you know that?

AC: Yes, Your Honor.

MJ: How did you know that?

AC: By his uniform and bars on his collar, sir.

MJ: Do you believe and admit that such behavior was disrespectful to Lieutenant Tezak because it detracts from the respect due his person and authority?

AC: Yes, Your Honor.

MJ: Was there anything about Lieutenant Tezak's behavior that made you to believe that at the time he was not deserving of your respect?

AC: No, Your Honor.

MJ: Why did you say this to Lieutenant Tezak?

AC: I was in -- just like the whole day I was -- I just lost it, sir, and I couldn't control myself.

MJ: Alright, now let me ask you something. Are you satisfied that on 6 May 1981, that you knew that conduct such as disrespect was wrongful?

AC: Yes, Your Honor.

MJ: Alright now if you had wanted to could you have kept from being disrespectful?

AC: Yes, sir.

MJ: Did you think you were suffering from any kind of mental disease or defect that prevented you from knowing right <sup>from</sup> wrong and conforming your conduct to the requirements of military discipline?

AC: No, Your Honor.

MJ: Did Lieutenant Tezak do anything to provoke you?

AC: No, Your Honor.

MJ: Now with regard to Specification 3 of Charge IV, on 7 May 1981, inside the brig, did Signalmen First Class Albert A. Fabianowicz, United States Navy, order you to strip down to your scivies?

AC: Yes, Your Honor.

MJ: Did you hear and understand this order?

AC: Yes, Your Honor.

MJ: Was he your superior petty officer at the time?

AC: Yes, Your Honor.

MJ: At the time did you know that he was your superior petty officer?

AC: Yes, Your Honor.

MJ: <sup>Do</sup> You beleive and admit that this order related to a specific military duty and was one that was -- this petty officer was authorized to give under the circumstances?

AC: Yes, Your Honor.

MJ: Did you disobey this order by failing to strip down to youscivies?

AC: Yes, Your Honor.

MJ: At the time action was required on your part to comply with this order, did you purposely fail to take whatever steps were necessary to comply with this order?

AC: Yes, Your Honor.



MJ: Did you any excuse or justification for your willful disobedience?

AC: No, Your Honor.

MJ: Turn your attention to Specification 4. On 6 May 1981, on board the Naval Station, San Diego, California, did you say these words, "I don't want to talk to this fucking chief, not this fucking chief, you're fucking crazy, that fucking chief ain't shit"?

AC: Yes, Your Honor.

MJ: Was this behavior directed toward Chief Master-at-Arms Russell D. Buchannan, United States Navy?

AC: Yes, Your Honor.

MJ: Was this behavior within the hearing of Chief Buchannan?

AC: Yes, Your Honor.

MJ: At the time was Chief Buchannan your superior petty officer?

AC: Yes, Your Honor.

MJ: At the time did you know that he was?

AC: Yes, Your Honor.

MJ: <sup>Do</sup> you believe and admit that such behavior was disrespectful to Chief Buchannan because it detracted from the respect due his person and authority?

AC: Yes, Your Honor.

MJ: Was there anything about this Chief's behavior to lead you to believe that at the time he was not deserving of respect?

AC: No, Your Honor.

MJ: What duties was he performing at the time of the disrespect?

AC: He was setting at his desk during some paperwork, Your Honor.

MJ: During working hours?

AC: Yes, Your Honor.

MJ: In uniform?

AC: Yes, Your Honor.

MJ: With regard to Specification 5, on 6 May 1981, on board the Naval Station, did you say these words, "fuck you James, fuck you, fuck you"?

AC: Yes, Your Honor.

MJ: Was this behavior directed toward Boatswain's Mate Second Class Leonard G. James, United States Navy?

AC: Yes, Your Honor.

MJ: Was this behavior within his hearing?

AC: Yes, Your Honor.

MJ: At the time was he your superior petty officer?

AC: Yes, Your Honor.

MJ: At the time did you know that?

AC: Yes, Your Honor.

MJ: Do you believe and admit that such behavior was disrespectful to Petty Officer James?

AC: Yes, Your Honor.

MJ: Was there anything about his behavior that led you to believe that at the time he was not deserving of respect?

AC: No, Your Honor.

MJ: What duties was he performing at the time of the disrespect?

AC: It was during working and he was just setting at his desk watching me pack my seabag to go to the brig, sir.

MJ: What was his job at the time?

AC: His job is -- he's in charge of the DR barracks during working hours.

MJ: And that's what he was doing at the time?

AC: Yes, Your Honor.

MJ: With regard to Specification 6, did you on 7 May 1981, inside the brig, commit the following acts to Signalman First Class Albert A. Fabianowicz, United States Navy: Kick him in the calves with your feet,, grab his left leg, and try to prevent him from leaving the cell?

AC: Yes, Your Honor.

MJ: Bobily harm means any physical injury to or offensive touching of the person of another, however slight. Do you believe and admit that you did bobily harm to Petty Officer Fabianowicz?

AC: Yes, Your Honor.

MJ: Did he consent to your action?

AC: No, Your Honor.

MJ: Did you have any excuse or justification for your action?

AC: No, Your Honor.

MJ: Why did you do this to him?

AC: I was angry, Your Honor.

MJ: Once again, were you mentally capable of controlling your actions at the time?

AC: Yes, Your Honor.

MJ: Was he your superior petty officer at the time?

AC: Yes, Your Honor.

MJ: Did you know that he was your superior petty officer at the time?

AC: Yes, Your Honor.

MJ: Was he performing duties as a corrections petty officer in the brig?

AC: Yes, Your Honor.

MJ: Did you on 6 May 1981, and here we're referring to the last offense, at the Naval Station... Let me start again, And we're talking about the Specification in Charge V, on 6 May 1981, at the Naval Station, did you say these words: "let me see you bull-shitting with one 'nigger' in ranks?"

AC: Yes, Your Honor.

MJ: Did you say these words to Boatswain's Mate Second Class Leonard G. James, United States Navy, a black petty officer?

AC: Yes, Your Honor.

MJ: You're advised that provoking words are those words which are used in the presence of a person to whom they are directed and tend to induce breaches of the peace. Breach of the peace

means acts or conduct which <sup>is turb</sup> ~~deserve~~ public tranquility or infringe upon the peace or good order to which the community is entitled.

Do you believe and admit that your words were provoking?

AC: Yes, Your Honor.

MJ: What was going on around you and Petty Officer James when you said these provoking words?

AC: He was, like I said again, on Charge V -- Charge IV Specification 5 that he was just setting there watching me pack my seabag, Your Honor.

MJ: Now this was in building #56 or #57?

AC: Building #57 DR.

MJ: So people were working all around you, is that correct?

AC: There was no one in the barracks, Your Honor.

MJ: No one else?

AC: No, Your Honor.

MJ: In the whole barracks?

AC: Yes, Your Honor.

MJ: What time of day was this?

AC: It was approximately 1230, Your Honor. It was lunch time no one was there.

MJ: Alright, of course Petty Officer James was on active duty at the time, was he not?

AC: Yes, Your Honor.

MJ: And you knew he was on active duty?

AC: Yes, Your Honor.

MJ: Alright, as a member of the community, are you satisfied that Petty Officer James is entitled to peace and good order and that he might had been provoked into started a fight with you?

AC: Yes, Your Honor.

MJ: It's true that he might've since you called him a "nigger," isn't it correct?

AC: Yes, Your Honor.

MJ: You would understand that he would not -- he probably didn't take kindly to you calling him a "nigger," isn't that correct?

AC: Yes, Your Honor.

MJ: Or calling someone else a "nigger?"

AC: Yes, Your Honor.

MJ: Alright, trial counsel, are you satisfied with the providency inquiry?

TC: Yes, sir.

~~MJ: Why don't you stop and take care of that?~~

MJ: Seaman Recruit Destefano, based on your pleas alone the court could sentence you to the maximum punishment authorized; confinement at hard labor for six months, forfeiture of two-thirds pay per month for six months, and a bad conduct discharge from the naval service. Has Lieutenant Loker advised you that this was the maximum punishment authorized?

AC: Yes, Your Honor.

MJ: I have in my possession what has already been marked Appellate Exhibit VII, the first three pages of your pre-trial agreement. Is this your signature that appears on page two?

AC: Yes, Your Honor.

MJ: Did you sign the document on 10 July 1981? Excuse me trial counsel hand it to him ...

DC: He's got one right here.

MJ: You have one.

DC: He has a copy there.

MJ: Excuse me.

AC: Yes, Your Honor, I do.

MJ: Were you represented by Lieutenant Loker when you signed it?

AC: Yes, Your Honor.

MJ: Is this agreement the idea of you and your counsel?

AC: Yes, Your Honor.

MJ: Did anyone force or coerce you in signing this agreement?

AC: No, Your Honor.

MJ: Did you read it and understand it before you signed it?

AC: Yes, Your Honor.

MJ: In order to be sure that your understanding is the same as mine, we'll discuss this agreement. Basically, if you plead guilty to the offense listed on page 2(b), minus Specifications 1 and 2 regarding what you do not have to plead guilty, the convening authority will limit the sentence you can receive to that specified elsewhere in the agreement, do you agree?

AC: That's Charge 1 and 2 of which -- Specifications 1 and 2 of which Charge, sir?

MJ: That's Charge IV.

AC: That's right, Your Honor. Yes, Your Honor.

MJ: I do not intend to examine the sentence limiting portion of your agreement until after the sentence is announced. Nevertheless, we will discuss in general terms that portion of your agreement. It is divided into three categories. One pertaining to a punitive discharge, one pertaining to confinement or restraint, and one pertaining to a loss or detention of pay, do you agree?

AC: Yes, Your Honor.

MJ: Do you understand that the convening authority has agreed to place a limit on one or more of these categories as specified in your agreement?

AC: Yes, Your Honor.

MJ: Do you understand that in each category you will have the benefit of whichever is less, either the sentence of the court or the limit of your agreement?

AC: Yes, Your Honor.

MJ: Administrative processing is separate from this court-martial, consequently, even if your agreement should provide for suspending or disapproving a bad conduct discharge, if awarded, the Navy can still process you for an administrative discharge and such a discharge could be other than honorable. Do you agree?

AC: Yes, Your Honor.

MJ: Even though you have plead guilty as required, the convening authority would no longer have to limit the sentence as specified in your agreement if I do not except your pleas of guilty or if, after acceptance, and plea is changed to not guilty, either because you want it or the court directs it. Do you understand this?

AC: Yes, Your Honor.

MJ: Do you understand that your agreement and it's offers to plead guilty cannot be used against you in the determination of your guilt should any plead by changed to not guilty?

AC: Yes, Your Honor.

MJ: Your agreement allows you plead not guilty to one alleged offense. Is it your understanding that the trial counsel may present evidence and attempt to prove the remaining alleged offense?

AC: Yes, Your Honor.

MJ: Is it your understanding or, rather, <sup>a</sup>as your understanding of the agreement the same now as it was when you signed it?

AC: Yes, Your Honor.

MJ: And of course today after you understood that you don't have to plead guilty to Specifications 1 and 2 of Charge IV?

AC: Yes, Your Honor.

MJ: Do both sides concur in our understanding of the agreement?

TC: Yes, sir.

DC: The defense concurs, Your Honor.

MJ: Does the written agreement contain all of the conditions and understanding between you and the government relating to your case?

AC: As related to me?

MJ: Yes.

AC: Yes, Your Honor.

MJ: You understand what I am asking you about is simply this, are all the conditions and understandings contained in

either this portion of the pre-trial agreement or the portion that remains on your desk?

AC: Yes, Your Honor.

MJ: Do both sides concur?

TC: Yes, sir.

DC: The defense concurs.

MJ: Realizing that you can cancel this agreement at this time and enter a plea or pleas of not guilty, do you still want to plead guilty?

AC: Yes, Your Honor.

MJ" I find these provisions of the pre-trial agreement are in accordance with appellate case Law, not against public policy, and not contrary to my own concepts of fundamental fairness. Certainly, Lieutenant Loker has advised you regarding the meaning and effect of your guilty pleas, is this true?

AC: Yes, Your Honor.

MJ: Has he informed you that if you were to plead not guilty to any offense you have plead guilty to you would have the right to have your guilt or innocence determined by a military jury?

AC: Yes, Your Honor.

MJ: Did anyone force or coerce you into pleading guilty?

AC: No, Your Honor.

MJ: Are you confident that you understand the meaning and the effect of your guilty pleas?

AC: Yes, Your Honor.

MJ: Do you have any questions?

AC: No, Your Honor.

MJ: Do you still want to plead guilty?

AC: Yes, Your Honor.

MJ: I find that your guilty pleas are voluntary, that you realize their meaning and their effect, that you have knowingly intelligently, and consciously waived your right against self-incrimination, your right to a trial of the facts, and your right of confrontation, and that your guilty pleas are provident.



Accordingly, I accept your pleas. However, if you should change your mind about pleading guilty before the sentence is announced you may request that any plea be changed to not guilty. Can you remember this?

AC: Yes, Your Honor.

MJ: Trial counsel, do you intend to go forward doing the findings stage of this trial?

TC: No, sir.

MJ: Seaman Recruit Destefano, I find you as follows:

Of Specification 1 of Charge I:	Guilty.
Of Specification 2 of Charge I:	Not Guilty.
Of Charge I:	Guilty.
Of the Specification and Charge II:	Guilty.
Of the Specification and Charge III:	Guilty.
Specifications 1 and 2 of Charge IV have been dismissed.	
Of Specification 3 of Charge IV:	Guilty.
Of Specification 4:	Guilty.
Of Specification 5:	Guilty.
Of Specification 6:	Guilty.
And of Charge IV:	Guilty.
Of the Specification and Charge V:	Guilty.

You may be seated. I have what appears to be your request for trial before military judge alone, did you sign this request on 29 July 1981?

AC: Yes, Your Honor.

MJ: When you signed it was the name, Lieutenant Commander Turner filled in at the top?

AC: Yes, Your Honor.

MJ: So I take it that you knew that I would be the military judge in your case?

AC: Yes, Your Honor.

MJ: Certainly, you discussed this request with Lieutenant Loker, is this true?

AC: Yes, Your Honor.

MJ: Nevertheless, I must explain to you your right to be tried by a jury and your right to request trial by judge alone. You have the right to be tried by a jury consisting of not less than three officers. If you want and your request is in writing at one-third of the members of the jury would be enlisted persons from a unit other than your own. With regard to determining both findings of guilty and a sentence, the jury votes by secret written ballot. Since I have found you guilty, the jury would vote to determine a sentence and two-thirds must concur. If you still want to be tried by a judge alone than I will sentence you, do you understand this?

AC: Yes, Your Honor.

MJ: Has anyone forced or coerced you into requesting trial by judge alone?

AC: No, Your Honor.

MJ: <sup>Do</sup> you realize that if you choose to be tried by a jury they would not be presented with the information that you've obtained a pre-trial agreement?

AC: Yes, Your Honor.

MJ: <sup>Do</sup> you still want to be tried by me?

AC: Yes, Your Honor.

MJ: Your request is approved and the court<sup>is</sup> assembled. Now we'll commence the pre-sentencing stage of the trial.

DC: Excuse me, Your Honor, the defense would like to request a five minute recess.

MJ: Very well, the court will stand in recess for five minutes.

The court recessed at 1034 hours, 30 July 1981.

The court was called to order at 1043 hours, 30 July 1981.

All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. After the trial counsel has presented matters in aggravation, if he does, you can present

information which you believe will explain or lessen the severity of the offenses you've been convicted of. You can present such matters with a sworn statement, an unsworn statement or both and also if you would like for me to consider matters brought out during the inquiry regarding your pleas and also if you would like me to consider some or all of the Appellate Exhibits, I will do that also. A sworn statement is made under and you can be cross-examined or questioned on it. An unsworn statement is not made under oath and you cannot be cross-examined on it. However, the trial counsel may offer independent evidence to rebut anything contained in your unsworn statement. An unsworn statement can be present orally, in writing or both. You can make an unsworn statement, Lieutenant Loker can make one for, or you can both make one. You may if you choose make no statement at all in which case the court will not draw any adverse inference from your silence. In addition, you can call witnesses and you can introduce other evidence including documents or statements. You understand your rights during the pre-sentencing stage of the trial?

AC: Yes, Your Honor.

MJ: Very well, trial counsel.

TC: Your Honor, the government would offer Prosecution Exhibits 1 through 12.

DC: At this time, Your Honor, we have several objections we would like to voice to those Prosecution Exhibits.

MJ: Very well, just a moment please. First of all, Lieutenant Loker, without stating the basis for your objection which Exhibits do you object to?

DC: Your Honor, we object to the following Exhibits: Prosecution Exhibits 1, 3, 5, 8, 9, 10, and 11.

MJ: Surely you must object to 2, if you object to 1, because 2 is the SA's action on the sentence.

DC: Yes, Your Honor, those are labeled as separate Exhibits Your Honor?

MJ: They are.

DC: Yes, Your Honor, that's correct.

MJ: The same thing would hold true with regard to 6 because it's the SA's action for ...

DC: That's correct, Your Honor.

MJ: ...the special. Alright, you may state the grounds for you objections, taking them one at a time please.

DC: Our objections are as follows, Your Honor. Prosecution Exhibit 1 <sup>is</sup> reports to <sup>be</sup> the -- rather a record of a summary court-martial. On it's face we feel that it is stale, dated 27 March 1979, if I am not mistaken, and it's incompetent.

MJ: What's your basis for that assertion?

DC: It's over two years old, Your Honor.

MJ: Any other objection to this summary?

DC: Shall I continue?

MJ: Please.

DC: Prosecution Exhibit 3.

MJ: Alright, just a second. I want to take them in order. I asked you, do you have any other objections to 1 and 2?

DC: May I retrieve Prosecution Exhibit 1, Your Honor?

MJ: Certainly, here's 1 and 2.

DC: As to 1 and 2, Your Honor, we had two objections, I am sorry, I overlooked one of them. As to its staleness and also there's an absence of any indications that the accused was afforded his rights under U.S. v. Booker or the record thereof.

MJ: Response from the government?

TC: First of all, Your Honor, the two-year rule doesn't apply to summary courts-martial and, second of all, we ask the court to consider that there should be a presumption of regularity in the SA's action. Such actions do not ... (unitelligible)... the Booker rights was afforded to the accused.

MJ: The defense's objection to 1 and 2 is sustained based on the second part, no Booker papers.

DC: As to the third prosecution exhibit, Your Honor, I beg

your pardon we have no objection to the third, Your Honor. I miss-numbered my objections, in fact, because of my faulty pagination of these exhibits. I have several corrections to make.

MJ: Very well, why don't you start once again.

DC: Okay, our objections were as follows and are as follows: to Prosecution Exhibits 1 and 2, Prosecution Exhibits 8, 9, 10, and 11. We have no objections to 5 and 6, as previously stated at that point. With your permission, I'll continue.

MJ: Very well.

DC: To Prosecution Exhibit 8, Your Honor, the accused objects because no date of offense is listed on that entry on the page before you and it's difficult to ascertain whether for the purpose of two-year limitation whether this offense is stale.

MJ: Response from the government? That's 8, counsel?

DC: Yes, sir, that's a NJP dated 20 December 1979, Your Honor.

MJ: No it's not.

MJ: Alright, the court will stand in recess.

The court recessed at 1055 hours, 30 July 1981.

The court was called to order at 1058 hours, 30 July 1981.

All parties to the trial who were present when the court recessed are again present.

MJ: The court will come to order. Lieutenant Loker.

DC: We would like to voice an objection to Prosecution Exhibit 9, that which we had erroneously tagged as Prosecution Exhibit 8. May I retrieve Prosecution Exhibit 9, Your Honor?

MJ: You may.

DC: Our objection to Prosecution Exhibit 9, Your Honor, is as follows: that entry contains primarily non-judicial punishments received while Seaman Recruit Destefano was attached to Naval Station. It's the accused's contention in regard to Prosecution Exhibit 9 that they should've been prepared while under the

jurisdiction of Naval Station while he was attached to it and therefore he should've been afforded his rights under U.S. v. Booker and U.S. v. Matthews and there should be in evidence thereof.

MJ: Response from the government?

TC: Do I understand the objection is made that the NJP's were administered while the accused was attached?

M: Some of them apparently are.

DC: Our argument is that as to those offenses he should have been afforded the right to consult with counsel and the other concomitant rights and there should be some record thereof. In regard to those offenses.

TC: The accused was transferred to the GOMPERS and the GOMPERS may appropriately administered non-judicial punishment for offenses regardless of where they arise. Such a transfer was proper. There's no indication that the transfer was not proper.

MJ: Lieutenant Loker?

DC: Your Honor, we feel that the place of the offense should be controlling and where he was truly attached to Naval Station, as it appears from the non-judicial punishment, he does have a right... it our feeling that on the face of it it looks as if he is not attached to or embarked upon a vessel during that period of time in which he incurred those violations. And that absent the government showing that he was, beyond the page six, then he should... the Booker form and the Booker rights should have been afforded the accused.

MJ: Defense's objection to Prosecution Exhibit 9 for identification is overruled.

DC: To continue, Your Honor, the accused would like to voice and objection to Prosecution Exhibit 10. Prosecution Exhibit 10 is a non-judicial punishment. Our objection is based on the following argument. According to Prosecution Exhibit 10 the following punishment was awarded, forfeiture of \$150.00 time one and suspended forfeitures of a \$150.00 for three months, the accused contends that this was illegal punishment in as much the

Manuals for Courts-Martial 131 b(2) provides for a maximum potential liability of one half months pay for two months. The total liability under this punishment would've been \$600.00. We feel that it a illegal punishment and therefore it should not be considered by the court.

TC: Your Honor, it's clear from the face of the document that \$100.00 was suspended for three months, not imposed for three months. That would leave him \$50.00 ~~to~~ pay as the actual punishment. The remaining \$100.00 was suspended for a period of three months. It's clear that that's the punishment from the face of the document.

DC: Your Honor, a suspension exposes the individual to that liability and subsequent misbehavior could have nonetheless exposed him for the liability of a punishment in excess of that amount by the Manuals for Courts-Martial.

MJ: Well, the authorized forfeiture at a Captain's Mast is one half pay per month for two months, is it not?

DC: That's correct, Your Honor. For an E-1 at that time it would've approximately--a total liability of approximately \$500.00 before taxes.

TC: Perhaps counsel misreads the document, Your Honor, it's the government interpretation, which we feel is clear, that \$100.00 was suspended out of the total forfeiture of \$150.00.

MJ: That appears to be correct, counsel, because block 17 shows a forfeiture of \$50.00.

DC: Are you ruling on the motion, <sup>(sic)</sup> Your Honor?

MJ: I am prepared to unless you have further argument.

DC: May I retrieve the document again, Your Honor? We have no further argument on that document, Your Honor.

MJ: The defense's objection to Prosecution Exhibit 10 for identification is overruled.

DC: To continue, Your Honor, the accused interposes an objection to Prosecution Exhibit 11 as follows. Prosecution Exhibit 11 ~~pre~~ports to be a record of summary court-martial in which once, again there is no form reciting the right to be afforded

the accused under U.S. v. Booker and therefore it should not be admitted.

TC: The government would make the same response as to prosecution Exhibits 1 and 2.

MJ: The defense's objection to 11 is sustained. Eleven and twelve will not be received. Prosecution Exhibit 3 through and including 10 will be received into evidence.

TC: The government has no other matters in aggravation.

MJ: Very well. Lieutenant Loker, are you ready to proceed?

DC: At this time, Your Honor, we would like to introduce that which has been marked Defense Exhibit A, previously shown to trial counsel for possible objection.

TC: No objection.

MJ: A will be received into evidence.

DC: Your Honor, at this time we would ask that the accused be allowed to give an unsworn statement through counsel in the form of question and answer. Your Honor, because the accused is not in ideal health and has trouble speaking up we would ask permission that he take the stand and he'll be much closer to the microphone and his voice would be much more audible.

MJ: Very well. Before we start, Seaman Recruit Destefano, as counsel has noted on the record, you're not in the best of health, at least physically, your outward appearance, but once again, you feel perfectly capable, mentally, do you not?

AC: Yes, Your Honor.

MJ: Very well.

DC: Would you be seated please, Seaman Recruit Destefano? Seaman Recruit Destefano, U.S. Naval Reserve, the accused, made the following unsworn statement through counsel in question and answer form:

DC: Seaman Recruit Destefano how old are you?

AC: Twenty-one, sir.

DC: How old were you when you came into the Navy?

AC: Seventeen, sir.



DC: Will you tell the court a little bit about your training record and that which you are qualified to do in the Navy?

AC: Yes, sir, when I first came in I was on the USS TUSCALOOSA. I was PQS qualified, I was trained on the OBA, I was number one OBA man on the USS TUSCALOOSA and on the USS GRIDLEY I was qualified on numerous weapons: 12-gauge shotgun, the M-16 and the .45, I was PRP qualified at one time and my clearance was taken away.

DC: I see. I'd like to discuss for a moment a little bit about your family and your background. Will you tell the court how old you were at the time your mother and father were divorced.

AC: I think I was around three years old.

DC: You were raised primarily by your mother and later by a step-father?

AC: Yes, sir.

DC: What kind of man was your step-father?

AC: He's an alcoholic.

MJ: I am sorry I didn't hear that.

AC: He's an alcoholic. You have different types of alcoholics. In his case he would get violent when he started to drink. Other than that, he was fine when he wasn't drinking.

DC: What sort of violence were you growing up... Let me rephrase the question, what sort of atmosphere did that engender while you were growing up as a youth. Were there violent fights between he and your mother?

AC: Yes, sir, just mainly between him and my mother and just property damage.

DC: Did you and your little brother, at times, find it necessary to intervene in these family disputes?

AC: Yes, sir, there were three specific times we had to that I can recall.

DC: Seaman Recruit Destefano, what is it that you want from the court today?

AC: As far as my military status?

DC: That's correct.

AC: These past few months I've been through a lot. I don't know exactly how to put this, mostly I want to be retained by the service. I don't want to get kicked out mainly because I know it's "far out" but I'd like to just get into a field where I could talk to my peers. As the other people that are coming in and that are in have from my experience have a bad attitude towards the Navy and it's mainly because they feel there's some injustice and there's been a couple of things from first hand experience that has been done in my case, and from the JAG Manual, and I can see that if you go about it the right way and not get violent and aggressive, like I have done in the pass, and just let the military take care of it, there is some justice that's done.

DC: Do you feel that if you were returned to the fleet you could adapt to the Navy regimen?

AC: Honestly, yes, sir.

DC: We have nothing further. Thank you, Seaman Recruit Destefano.

MJ: Please step down and resume your seat next to counsel.

DC: Your Honor, we ask that you consider, in determining your sentence, all the Appellate Exhibits introduced in the course of this trial including on the preliminary motion.

MJ: Insofar<sup>s</sup>as, of course, they're favorable to your...

DC: That's correct, Your Honor.

MJ: Very well.

DC: The defense rests, Your Honor.

MJ: Very well, rebuttal?

TC: One moment, Your Honor.

DC: Trial counsel is this intended to introduced?

TC: Yes.

MJ: The record should reflect the trial counsel handed to the defense counsel a document. Obviously, he intends to offer this in rebuttal. It's being marked Prosecution Exhibit 13 by the reporter.

DC: Your Honor, we would like to voice an objection to this document. This document purports to be a document taken in the course of pursuing an administrative discharge. We feel that the military rules of evidence specifically prohibit such a thing that could in all likelihood be excluded under Rule 403 because it's probative value is quite prejudicial -- I mean it's probative value is minimal and its potential for prejudice is great. But we do think that, more specifically, this document is prohibited by military rules of evidence, 410.

MJ: Trial counsel, does it pertain to an administrative action, more specifically, an attempt to obtain an administrative determination in lieu of trial by courts-martial?

TC: Yes, sir.

MJ: Alright, just a moment.

TC: However, we would like it noted that this is a sworn and signed statement by the accused.

MJ: Alright, just a moment, please. It appears to me that Rule 410, as well as the proposed amendment to Rule 410 prohibits receiving such evidence into... it would prohibit the receipt into evidence of such a statement. Trial counsel?

TC: Your Honor, we believe that there are portions in this statement which should be considered by the court in rebuttal or as rebuttal of the accused's statement but it may be difficult, if not impossible, to mask those portions in order to make this exhibit conform to the requirement of Rule 410. So, rather than, perhaps, proceeding with this matter by offering it, we'll just withdraw the exhibit.

MJ: Very well. I think you better give it to the reporter for inclusion in the record. Prosecution Exhibit 13 for identification which was withdraw will be remarked as Appellate Exhibit XIII.

TC: The government has no other matters in aggravation, rebuttal, I am sorry.

MJ: No other matters in rebuttal. Very well.

MJ: Are both sides prepared to argue?

TC: Yes, sir.

DC: Defense is, Your Honor.

MJ: Trial counsel.

TC: Your Honor, despite the accused's unsworn statement, his past record of non-judicial punishments, special court-martial convictions, his actions which brought him here to court today clearly indicate that there's no place for this person in the United States Navy. He's proven that over and over and over by his conduct. One thing that the government would urge this court to impose as punishment would be a bad conduct discharge. There's no other way to characterize the past performance and conduct of Seaman Recruit Destefano but bad conduct. His non-judicial punishments and his special court-martial conviction include numerous disrespects, assaults, offenses under Articles 91 and 92, an unauthorized absence. These offenses go to the very marrow of what the Navy relies on in accomplishing its objectives. That is, people who will do what they're told, when they're told to do it, and will act in a respectful manner to those who have authority over them. In the same light, confinement at hard labor is clearly merited, appropriate. In fact, a lengthy term of confinement at hard labor is merited by Seaman Recruit Destefano's behavior. We're aware that Seaman Recruit Destefano has some 49 days of pre-trial confinement, some of which you previously ruled on as having been imposed illegally or rather should be considered in giving administrative credit, when the final review of the sentence is made. We feel that that should not mitigate the circumstances enough to lessen confinement under three months. We feel that at least that much confinement is appropriate based upon prior conduct and performance in the offenses here today. Escape from confinement or attempted escape from confinement, disrespect to a commissioned officer, orders violations, provoking words and perhaps, worse of all, an assault. These are serious offenses and rate a serious punishment. A concomitant period of forfeitures is also appropriate and perhaps would even be necessary in order

to demonstrate to Seaman Recruit Destefano the Navy's displeasure with his past conduct and performance; specifically your displeasure. The prosecution has introduced two exhibits, one dated July 1979, and the another dated June 1981, where Seaman Recruit Destefano was told, he was warned, that if he didn't stay out of trouble that he had a chance of being discharged. He didn't heed those warning then, he had his chance to "straighten up his act" all along. He knew that this was a eventual possibility. Seaman Recruit Destefano is a slow learner. We'd ask that a bad conduct discharge be awarded as well as a lengthy period of confinement.

DC: Your Honor, the evidence is all in in this case and we've heard a great deal of it. It tends to indicate that, following an unauthorized absence, a failure to go, in which the accused has plead guilty, he was committed to pre-trial confinement and then in the following 72 hours, in a fit of rage, he committed a number of offenses to which he has plead guilty before the court. A number of considerations are operative in this case. We ask you to consider the fact that Seaman Recruit Destefano is quite a young man with a long future before him and that he came into the Navy at the age of 17, an age of which it is arguably difficult to understand the responsibility that is required of one in the Navy. We ask that you consider the background of Seaman Recruit Destefano, that he grew up in a tumultuous and violent familial situation. He was not given any access to motivation and reenforcement that most of us <sup>were</sup> ~~was~~ given in our early family life. Without belaboring the evidence, Appellate Exhibit IV, the <sup>findings</sup> ~~finds~~ of facts in the JAGMAN Investigation, indicated that, among other things, while in confinement, Seaman Recruit Destefano was committed to a cell in which the ambient air tempature was approximately 130 degrees. And, according to the same JAGMAN Investigation, he was placed there on the 25th by Chief Kiesner as a disciplinary measure in violation of the Corrections Manual. It's not simply that Seaman Recruit Destefano has spent approximately 50 days in confinement at hard labor and it's not simply that he was in a quasi-restricted status subsequently while in the hospital and it's not simply the

pain and deprivation that the JAGMAN investigation findings that the JAGMAN Investigation findings of facts indicate. It's not simply the scarring or permanent disfigurement that he will have to bear for the rest of his life. But there's another larger issue. I'd like to leave you with an epigram that's been debated since the days of the earliest Greeks and they have debated this all through history when talking about the legitimate rule of government in the affairs of men. And the epigram is this, "who will guard the guards?" We hope that the sentence today in an expression both of Seaman Recruit Destefano's penitence, of the travails he's undergone and perhaps also an expression to the government that where misdeeds are done, the accused will not be made to pay repeatedly, where he has, in fact, suffered before. We ask that above all else, you not recommit Seaman Recruit Destefano to confinement. We ask that you consider his desire to return to the fleet. Considering the pain and deprivation that he's already undergone in the hands of the government. My feeling is that he's not medically fit, that he's undergone sufficient confinement to a total for those offenses to which he has plead guilty and ask that he not be recommitted to confinement at hard labor. Thank you, Your Honor.

MJ: Thank you, counsel.

TC: Your Honor, the prosecution has presented his case in aggravation <sup>that</sup> only goes back to June of last year. Counsel makes an argument that somehow the youthfulness of Seaman Recruit Destefano should mitigate his actions. Seaman Recruit Destefano was only a year younger than he is now, ~~when~~ when he began, or when he committed the offenses for which, are before the court in aggravation. He's had his chance to grow up, Your Honor. He's had his chance. The two years prior to the beginning of the offenses which are before the court, he had his chance. And he's proven himself unworthy over and over. The burn, Your Honor, which Seaman Recruit Destefano suffered, was an unfortunate experience; however, that burn has nothing to do with the offenses which are

before the court today, for which this court must impose punishment for. Counsel refers to a saying of the question, perhaps, of "who will guard the guards." The Guard of Honor written by James H. Cousins dealt with this same question. The alternate resolution of that question is, "we must do the best we can." We submit to you that in the same light as the question was put to you by the defense, that this court must do the best it can. The court did the best it can in dealing with that situation of the motion raised earlier. That it is now time to deal with the issues which are here before the court now. In doing the best you can, the government urges that that would be the imposition of a bad conduct discharge and a lengthy confinement and appropriate forfeitures.

MJ: Seaman Recruit Destefano, it not often that I make comments before sentencing an individual ... accused, but I want to say this. I want the convening authority to know that it has been most difficult for me to arrive at a sentence that fits your convictions as well as one that takes into account your particular situation, obviously, the pain and suffering that you have incurred during -- due to being burned in the brig. However, I must recognize the interests of the victims in this <sup>case</sup> and, in my view, the sentence must serve to satisfy theirs as well as your need for justice. Unfortunately, I cannot award a suspended sentence and I cannot look at your pre-trial agreement. Consequently by these words, I am respectfully requesting the most strong consideration

to the recommendation that I will give in this case as it relates to my award of confinement at hard labor. You are sentenced to be confined at hard labor for three months, to forfeit \$300.00 pay per month for three months, and to be discharged from the naval service with a bad conduct discharge. It is most strongly recommended that all confinement at hard labor be suspended for an appropriate period of time and that, if Seaman Recruit Destefano is physically capable of being confined, then a request for deferment by himself or counsel be honored. May I see the sentence limitation?

DC: Yes, Your Honor.

MJ: Alright, now, first of all, Seaman Recruit Destefano, you understand that the convening authority does not have to follow my recommendation?

AC: Yes, sir.

MJ: You understand that even though I strongly recommended that your period of confinement be deferred and then suspended for an appropriate period of time, he doesn't have to do that. What he has to do is simply comply with Appellate Exhibit VIII, the sentence limiting portion of your pre-trial agreement. Do you understand that?

AC: Yes, sir.

MJ: Alright now, did you sign this on 10 July 1981?

AC: Yes, sir.

MJ: Alright, first of all, is the accused capable of being confined in the brig?

DC: Your Honor, it's the defense's contention that he is not. The matter isn't finally settled by his doctors. There seems to be some disagreement between them.

MJ: Alright, let me explain to you that service to confinement starts to run today, so maybe you want be able to go to the brig. If you are ready to go to the brig, do you understand that you and your counsel can request deferment as, in accordance with my recommendation?

AC: Yes, sir.

MJ: You understand that?

AC: Yes, sir.

MJ: Should you not be fit to go into confinement, then when you are determined to be fit you can request that deferment. Alright, now, if you'll take a look at category two and also take a look at the clause in the first part of the pre-trial agreement that is found on page two just above where it says "charges preferred" and "pleas by the accused." I am going to explain to you my understanding of that clause, coupled with the convening



authority's obligation to suspend all confinement of hard labor in excess of 60 days for six months from the date of trial, that is today, excuse me, yesterday. I am going to read to you my understanding of these two provisions. It is agreed between the convening authority and you that action may properly be taken to vacate the suspended portion of the sentence based on your misconduct during the period of probation, that is, six months from yesterday, whether such misconduct occurs before or after the convening authority's action on the record of trial. Should such misconduct occur prior to the convening authority's action be established, it is understood that, should any misconduct on your part be alleged, you will be given timely notice that you are suspected of violating the terms of your probation and the basis of that suspicion. Thereafter, your Commanding Officer, with authority to convene a special court-martial, will convene a hearing in which you can contest the allegations and/or the necessity of vacating all, or a portion of, the approximate 30 days that has to be suspended, which in the absence of misconduct and this agreement, the convening authority will be obligated to suspend. It's understood that at such a hearing your rights include but not be necessary limited to, the following: to be represented by counsel; to question all witnesses against you; to present matters in defense or mitigation; to have the commanding officer examine and question witnesses; and to present a personal statement in any form. It is understood that misconduct means conduct on your part which constitutes a violation of the Uniform Code of Military Justice, regardless of where the conduct occurs, that is, either on or off base. Now, is my understanding the same as yours with regard to the convening authority's obligation and rights?

AC: Yes, Your Honor.

MJ: Let me try to make it simple for you. My understanding of the convening authority's obligation to you, pursuant to your agreement, is that, if he wants to, he may approve the sentence I awarded you in it's entirety but if you refrain from misconduct

during the probationary period you will not have to serve more than 60 days confinement at hard labor crediting to your benefit whatever good time you've earned, is that also your understanding?

AC: Yes, Your Honor.

MJ: Do you have any questions about the pre-trial agreement?

AC: No, Your Honor.

MJ: Do both sides concur in our understanding of the sentence limitations?

DC: Yes, Your Honor.

TC: Yes, Your Honor.

MJ: I reaffirm my previous determination that the pre-trial agreement is legal and proper and that the pleas of guilty are provident. Is there anything else for me at this time?

DC: Your Honor, shouldn't we restate for the record the nature of the administrative credit to be directed?

MJ: Very well, that might be appropriate. The convening authority is obligated to award administrative credit for at least 24 days illegal pre-trial confinement. Anything further?

DC: No, Your Honor.

TC: No, Your Honor.

MJ: Alright, just a minute. I believe we're wrong. I believe he has to take that administrative credit off the 60 days.

DC: That's correct, Your Honor.

MJ: Alright, so he doesn't have to ... everything I've told you is correct except for the fact that you won't have to spend more than 36 days in the brig, or approximately that amount. I am not sure about how exactly he has to compute it but his obligation is to suspend all in excess of 60 days minus the administrative credit and not the 60 days that I've earlier spoke of. Now, do you have any questions about that?

AC: No, Your Honor.

MJ: Everything else remains the same except for the time that you would spend in the brig under the pre-trial agreement. Now, also let me explain that the administrative credit means

that -- does not increase the amount hanging over your head. It's still approximately one month. Do you understand that?

AC: Yes, Your Honor.

MJ: Alright, do you have any questions at all and I apologize for not putting two and two together?

AC: No questions, sir. I just ask for mercy and not to be placed in the same brig.

MJ: Alright, now, this is a matter between you and counsel and the convening authority. You've heard my recommendations and you understand the difficulties I've gone through in my mind that have led me to come to such a sentence and such a recommendation. This matter is well known to your counsel and for now on it's between you, he, and the convening authority. Alright any other questions at all.

AC: No, Your Honor.

MJ: Now, do both sides concur in our understanding of the pre-trial agreement?

DC: The defense does, Your Honor.

TC: Yes, sir.

MJ: Alright, are there any other inquiries that would be appropriate?

DC: We have nothing, Your Honor.

TC: No, sir.

MJ: Alright, gentlemen, the court is adjourned.  
The court adjourned at 1150 hours, 30 July 1981.

AUTHENTICATION OF RECORD OF TRIAL

29 September, 1981

Thomas G. Turner  
THOMAS G. TURNER  
LCDR, JAGC, USN  
MILITARY JUDGE

I have this date examined the above record of trial:

1 OCTOBER, 1981

Michael W. Loker  
MICHAEL W. LOKER  
LT, JAGC, USN  
DEFENSE COUNSEL

**COURT MEMORANDUM**

1. DATE SUBMITTED 79MAR27		2. SHIP OR STATION AND LOCATION USS TUSCALOOSA (LST-1187)			
3. DATE OF REFERRAL		4. TYPE OF COURT SCM	5. DATE OF COURT/ MAR 16	6. UCMJ ARTICLE(S) 86, 91	
7. DATE OF ACTION 79MAR19		8. TYPE OF ACTION TYPE OF ACTION <input checked="" type="checkbox"/> REPORT OF ACTION	9. MODIFICATION OF ACTION <input type="checkbox"/>	10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>	11. DATE OF SUBMISSION ON 1070/607 MOD. OR CORRECTED
<input checked="" type="checkbox"/> 12. RATE ADJUSTMENT	13. FROM SA	14. TO SR	15. TIR 79MAR19		
<input checked="" type="checkbox"/> 16. FORFEITURE	17. MONTHLY AMT. \$ 280.00	18. NO. MONTHS 1			
<input type="checkbox"/> 19. FINE	20. AMOUNT \$	<input type="checkbox"/> 21. CONSENT TO CHECKAGE	<input type="checkbox"/> 22. DOES NOT CONSENT TO CHECKAGE	23. MO. AMT. OF CHECKAGE \$	24. NO. MOS.
<input type="checkbox"/> 25. DETENTION	26. MONTHLY AMT. \$	27. NO. MONTHS	28. DETENTION RE-FUND DATE		
<input type="checkbox"/> 29. DESERTION MARK REMOVED	<input type="checkbox"/> 30. ADJUDGED	<input type="checkbox"/> 31. ADJUDGED AND DIS-APPROVED			
PRE-TRIAL CONFINEMENT 32. FROM 79MAR19	33. TO 79APR12	34. DAYS LOST TIME (30 DAY BASIS)	35. DAYS LOST TIME (DAY FOR DAY)		
CONFINEMENT ORDERED AND COMPLETED 36. FROM 79MAR19	37. TO 79APR12	38. DAYS LOST TIME (30 DAY BASIS) 24 23	39. DAYS LOST TIME (DAY FOR DAY) 27		
40. CHANGE EAOS TO: 84AUG06	41. CHANGE EXP. ENL. TO: 84AUG06				

79

42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE)  
 79MAR16: SCM: VIO OF UCMJ ART 86, UA FM 1930, 79FEB17, TO 0947, 79FEB18, ART 86, FAILING TO GO TO OR LEAVING APPOINTED PLACE OF DUTY {3 SPECS}, ART 91, WILLFUL DISOBEDIENCE OF A PETTY OFFICER {2 SPECS}, ART 91, DISRESPECT TO A PETTY OFFICER.  
 SENTENCE AS ADJUDGED: TO BE CONFINED AT HARD LABOR FOR 30 DAYS.  
 TO FORF \$280.00 PAY PER MONTH FOR 01 MONTH  
 TO BE REDUCED TO PAYGRADE E3.

DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)

43. 1070/607 DTD 79MAR27	44. AUTHORITY TYPE CONVENING
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65. USS TUSCALOOSA (LST-1187), SCMO NO. 3-79 DTD 79MAR09. RECORD OF TRIAL FUD TO COMNAVSURFPAC FOR ACTION UNDER ART 65C UCMJ

CA'S ACTION: THE SENTENCE IS APPROVED AND WILL BE DULY EXECUTED. NAVSTA, SDIEGO, CA., IS THE DESIGNATED PLACE OF CONFINEMENT FORFEITURE AND REDUCTION IN RATE SHALL APPLY AND BECOME DUE ON AND AFTER THE DATE OF THIS ACTION.

(MAY BE CONTINUED ON REVERSE)

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46. (SIGNATURE) BY DIRECTION F. H. TRYON, JR., LCDR, USN, BY DIR OF CO		GRADE
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47. UNIT I.D. CODE 20026	48. RATE SR
49. NAME (LAST, FIRST, MIDDLE) DESTEFANO, LAWRENCE MICHAEL	50. SSN 586-64-4489
	51. BRANCH/CLASS USN

COURT MEMORANDUM NAVPERS 1070/607 (REV 10-71) 5/N 0106-LF-018-6071

RETAIN IN SERVICE RECORD

11 PE 1 100 FO

CERTIFIED TO BE A TRUE COPY:

A.R. Matthews  
 ANTONIO R. MATTHEWS  
 LN2, USN, COURT REPORTER  
 FOR THE TRIAL COUNSEL

PROSECUTION EXHIBIT /

57-103

ACTION OF THE SUPERVISORY AUTHORITY

COMMANDER NAVAL SURFACE FORCE  
United States Pacific Fleet  
San Diego, California 92155

SC-103  
FF4-5/163:hd  
5800  
Ser 16- 2350  
586-64-4489

APR 05 1979

In the foregoing summary court-martial case of Seaman Apprentice Lawrence M. Destefano, U.S. Naval Reserve on active duty, tried by order of Commanding Officer, USS TUSCALOOSA (LST 1187) on 19 March 1979, the accused was awarded confinement at hard labor for 30 days, reduction to pay grade E-1 and forfeiture of two-thirds pay for one month. Paragraph 126h, MCM, 1969 (Rev.) states that forfeitures must be stated in whole dollar amounts. Further, when confinement is awarded, sea pay may not be used in any computation. Additionally, in the case of a reduction in grade, forfeitures are computed using the reduced rate.

ENCE

Accordingly, the sentence, as approved and ordered executed by the convening authority, is amended to read confinement at hard labor for 30 days, reduction to pay grade E-1 and forfeiture of \$279.00 pay per month for one month and is hereby approved as amended. Correctional Center, Naval Station, San Diego, California is hereby designated as the place of confinement.

The record of trial has been reviewed by a Judge Advocate in accordance with Article 65(c), UCML.



T. I. KOLSTAD  
Captain, U.S. Navy  
Chief of Staff  
Commander Naval Surface Force  
United States Pacific Fleet

Copy to:  
CO USS TUSCALOOSA (LST 1187)  
CO NAVSTA SDIEGO (Code 04D)  
Accused's Service Record  
Accused

A true copy. Attest:



L.A. WELTER  
LNC USN  
Force Judge Advocate  
Commander Naval Surface Force  
U.S. Pacific Fleet

2  
PK 9 (10-51)