ON REVIEW BEFORE JUDGE ADVOCATE GENERAL, UNITED STATES NAVY

GENERAL COURT MARTIAL

CONVENED AT U. S. NAVAL TRAINING AND DISTRIBUTION

CENTER, SAN FRANCISCO, CALIFORNIA,

BY ORDER OF

THE COMMANDANT, TWELFTH NAVAL DISTRICT

AND COMMANDER, NAVAL OPERATING BASE,

SAN FRANCISCO, CALIFORNIA.

Case of:

Julius J. Allen,
Seaman second class,
U. S. Naval Reserve, et al.

MEMORANDUM BRIEF FOR ACCUSED

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PRELIMINARY STATEMENT

Although it is understood that the accused are bound by the record alone, we believe that the Board of Review and the Secretary of the Navy should examine the press releases and photographs issued when this trial began, emphasizing the points that (1) it was the largest court martial in the history of the Navy, and (2) it was the first mutiny trial in the United States Navy during World War II. The pictures of the court showing the accused gave the obvious impression that a large number of Negroes who had only recently been permitted to serve in the Navy as seamen were mutinous. On the other hand it is doubtful that such tremendous newspaper and magazine coverage could have been obtained by the public relations officer if these men had been tried individually.

Before considering the actual facts and surrounding circumstances in the case under review, it should first be pointed out that mass trials are always viewed with suspicion.

Mass prosecutions of this type, calculated to dispose of a large group of men with one swoop, militate against our whole traditional concept of personal guilt--in the hope that by proper administration of our procedure an innocent man shall never be convicted through a callous indifference as to the fairness and integrity of the trial to which he is subjected. For example, in the instant case

the evidence produced by the prosecution itself showed many varying degrees of responsibility. Berlin Kelly was on sick call during the time of the alleged mutiny (R. 81). Ollie Green had his arm in a sling after medical attention, yet he was ordered to load ammunition (R. 82). Julius Dixon had been ordered as mess cook and by doctors' orders was not to load ammunition (R. 78). He likewise was considered by his commanding officer as "a hazzard to anybody working on the dock" (R. 77). Lieutenant Delucchi explained "Just that I think that two of the men accused here in this court are not up to par, in my own opinion, with the rest of the men that stand accused, Bennon Dees and Julius Dixson. They were men that were in my division. Dees was one of the men, although a good worker, couldn't do much thinking for himself and would follow any suggestion or any order given to him faithfully. Dixson is a man that I myself hesitated to have on the dock because he was a liability rather than anything, so I had him assigned, through the doctor, as a permanent mess cook" (R. 89).

The dangers of joint trials and the inevitable prejudice engendered by mass trials has repeatedly been condemned by civil courts.

In the case of United States v. Haupt (C.C.A.--7th) 136 F (2d) 661, six defendants were jointly tried for treason. In reversing the decision in that case it was pointed out that while the matter of severance is for the trial court's discretion, it is subject, however, to review if abused, the court made it clear that even if, at the outset of the trial, the reasons may not seem clear, a severance must be granted even at the end of the trial, when the need appears.

Two types of testimony admitted in the Haupt case, (1) to show "background", and (2) incriminating statements offered only as against individual defendants, presented the same basis for objection that we have here. The Seventh Circuit held that both types of testimony were bound to prejudice the other defendants, and that not only a jury, but even a court could not be counted on to allocate the damaging testimony to the proper defendant, and to the exclusion of the others, stating as follows, at p. 672:

> "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt

that any jury, or for that matter any court, could perform such a herculean feat."

. . . . . .

"We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants."

at p. 673,

"Here again, this background testimony as to each defendant was offered only as to that particular defendant and the jury was instructed that it was to be only so considered. We seriously doubt, however, if it was possible for the jurjr to limit its damaging effect to the particular defendant against whom it was admitted."

The menace of mass prosecution was warned against by L. Hand, J., only a few years ago in Falcone v. U. S. (2nd Cir.) 109 F. (2) 579.

In U. S. v. Liss, 137 F. (2) 995, Jerome Frank, J., in his outspoken dissent, states, at p. 1004:

"But a trial even for £ single conspiracy is complicated. The complexity of such a trial should not be increased by needlessly injecting into it the trial of another conspiracy. More ought to be done, I think, to prevent prosecutors from employing the excuse of need for "expedition" to use, unnecessarily, conspiracy trials, in which" large numbers of defendants are herded into one suit, instead of bringing several actions. The trial dockets are not so congested as to compel such omnibus trials."

That justice for the accused in this case was impossible in the mass trial is apparent from even a cursory reading of the record. The entire case against the accused is built upon testimony as to statements allegedly made by other accused and by parties not accused and, even worse, by unnamed, unidentified individuals with no connection whatsoever to either the accused or the alleged crime. The substance of accusedTs contentions on this point have been expressed in Marcante v. United States, (C.C.A. 10th) 49 F (2d) 158:

" . . . It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to represent an impression that the defendants are guilty of something with little reference to the crimes with which they are charged."

Although the trial of this case involved fifty men, included the testimony of all fifty of the men, plus the testimony of the prosecution and defense, and although the record of the actual trial

of the case includes 1435 pages, single spaced and on legal size paper, the court arrived at its findings of guilty between 11:55 a.m. and 1:15 p.m. We assume that during this eighty minute period the court also had time for lunch. Even if we assume that the entire eighty minutes was spent in deliberation on this case, each individual accused received about a minute and a half of deliberation. This callous disregard of even perfunctory justice is amazing.

STATEMENT OF FACTS

Most of the essential facts necessary to establish the prosecution's case are in dispute. Much of the testimony introduced by the prosecution was inadmissible. Therefore this testimony will be dealt with as it comes up in the argument of the brief. However, there are certain facts which should be set out at the outset.

On duly 17, 1944, there was a violent explosion at the loading docks at Port Chicago. Several hundred seamen were killed in this explosion. There were many other seamen at Port Chicago who were not directly involved in the explosion and many of the accused were present at that time in their barracks and in the area immediately surrounding the barracks. Several were injured by flying glass and debris. Most of those who were injured were given hospital attention and others were immediately assigned the task of clearing up bodies, debris and other work incidental to clearing up after the explosion. The effect of this explosion on the men themselves is understandable. Lieutenant Richard H. Pembrook, an expert in neuro-psychiatry who testified for the defense, gave a clear picture of the normal mental and physical reaction of the accused as well as others who were present in Port Chicago at the time of the explosion. He also testified as to the normal reactions of such individuals subsequent to that tvpe of experience. Lieutenant Pembrook, for example, testified that "Such an experience would generate the emotion of fear" and also explained "that fear is a condition which prepares the body organism for impending or anticipated action protective in nature." (R. 1034); and that "along with fear there is a general body reaction, a physiological reaction which involves the entire body, which prepares the entire body for this impending or anticipated need for action, need for a defensive

action." (R. 1035)

On August 8 the U.S.S. San Gay arrived at the Mare Island naval ammunition depot to be loaded. Commander Joseph R. Tobin, commanding officer, naval barracks, naval ammunition depot, Mare Island, stated that "orders were issued by me through orders from Captain Gass, commanding officer of the naval ammunition depot, to have the enlisted personnel at the barracks who were assigned to that barracks for the purpose of ship loading report the next day, the ninth, to commence loading the San Gay with cargo ammunition", and that he "accordingly assigned a schedule of divisions in order, beginning with what was known as the fourth Port Chicago Division to report to the ammunition depot to commence work at 12:00 on the 9th of August." (R. 16)

According to the schedule prepared by Commander Tobin, the fourth division, under a Lieutenant Delucchi, the fifth division, under a Lieutenant Tobin, and the eighth division, under a Lieutenant Morehouse, were to load ammunition aboard the San Gay, in the order named, the work to commence at 12:00 on the ninth of August. The three division officers were ordered by Commander Tobin to have their men ready to load ammunition at the appointed time (R. 16, 39; 113, 123).

The officers testified that they ordered the men in their divisions to report for loading ammunition (Lieutenant Delucchi, fourth division: R. 40; Lieutenant Morehouse, eighth division: R. 113; Lieutenant Tobin, fifth division: R. 122).

After receiving a report from Commander Bridges, Commander Tobin drove around to the naval barracks with his executive officer and received an official report from Lieutenant Delucchi. He ordered Lieutenant Delucchi to order his men to go to work at the ammunition depot (R. 18). Then Commander Tobin had the men of Lieutenant Delucchi's division to report to him individually in alphabetical order and ordered them individually to load ammunition (R. 18). Of the fifty accused, Commander Tobin only gave the direct order to load ammunition to "6 or 7" of them (R. 30). Commander Tobin then ordered Lieutenants Tobin and Morehouse to order the members of their divisions individually to go to work at the ammunition depot. Out of a total of 328 men in three divisions who were ordered to load ammunition only about 70 signified their intention

to obey the order (R. 21).

Lieutenant Tobin testified that he ordered his men (R. 123), and Lieutenant Morehouse, his men (R. 113). Out of a total of 328 men in the three divisions who were ordered to load ammunition, only seventy signified their intention to obey the order (R. 21). The 258 who did not were quartered on a "lighter" moored beside the depot (R. 22), where they remained from the afternoon of the ninth until 4:30, of the afternoon of the eleventh, when they were all assembled on the ball field in divisional formation to be addressed by the Commandant of the District (R. 22). Following the Commandantfs talk, Lieutenant Delucchi, Lieutenant Morehouse and Lieutenant Tobin were again ordered by Commander Tobin to order their men to work at the ammunition depot (R. 24). Lieutenants Tobin and Delucchi testified that fifty men refused to obey their orders.

All of the officers who testified for the prosecution made it quite clear that none of the accused at any time acted in a riotous manner. They also testified that during the time of the alleged mutiny all of the accused obeyed all orders and all directives without hesitation with the exception of the alleged orders to load ammunition.

The accused testified that they were never given a direct order and that they were "afraid to load ammunition". Several testified that even though they were afraid to load ammunition as a result of their experience at Port Chicago, they nevertheless would have loaded ammunition if they had been given a direct order to do so.

ARGUMENT

THE CHARGE AND SPECIFICATION SHOULD HAVE BEEN WITHDRAWN

Prior to the trial of the instant case counsel for the accused presented their "objection of accused to charge and specification" D (1-3) and respectfully requested the ruling of the court. The court sustained the charge and specification. It is not deemed advisable to repeat the substance of the objection filed by counsel for the accused, but you are respectfully requested to consider the same as if set out herein in full.

We also wish to call attention to N.C.B. (Sec. 27) which provides that " . . . each specification must be complete and in itself

state an offense, but should allege only one offense*. It is not sufficient that several specifications taken together may do so". It also should be pointed out that N.C.B*. 112 explains the crime of conspiracy as a separate and distinct crime under both the A.G.N. and the United States Code#. The failure of the court to sustain the objection to the charge and specifications brought about the many instances of admission of inadmissible testimony*. This is evident from the statements of the Trial Judge Advocate, such as the one on page 58, in which he deliberately confuses the law as to conspiracy and mutiny*. This failure of the court to sustain the objection to the charge and specifications also brought about the apparent confusion in the minds of the members of the court as exemplified by the several instances of change in prior rulings concerning admissibility of evidence all of which will be developed in later portions of this brief.

THE EVIDENCE FAILED TO SUPPORT THE CHARGE OR SPECIFICATION

Counsel for the accused repeatedly attempted to have the court make a clear ruling which would limit the testimony to be introduced by the prosecution*. The court, however, permitted the prosecution to introduce testimony under the broad general rules of evidence as to conspiracy*. It must be pointed out that the charge is making a mutiny and is not "conspiracy to make a mutiny". The only direct testimony, all of which is disputed by accused, as to the actions of accused, is the testimony that they refused to obey an order.

Mere refusal to obey an order and repeated refusals to obey an order is not in and of itself mutiny. In N.C.B., Section 17, in discussing the question of joinder, it is pointed out that "The more fact that several persons happen to have committed the same offense at the same time docs not authorize their being joined in the charge. Thus, where two or more persons take occasion to desert or absent themselves without leave, in company but not in pursuance of a common unlawful design and concert, the case is not one of a single joined offense, but of several separate offenses of tho same character, which are no less several in law though committed at tho same moment . . . ."

In Winthrop, Military Law and Precedents", second edition, pp, 578-580, there is a full discussion of the law of mutiny. It is

pointed out that:

> "[Mutiny has boon variously described, but in general not in such terms as to fully distinguish it from some other military crime, the characterizing intent not boing sufficiently recognized. It may, it is believed, properly be defined as consisting in unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office,"

In the discussion Winthrop points out further that is the intent which distinguishes mutiny from other offenses with which it has often been confused. Thus, disrespect towards a commanding officer has sometimes been wrongfully charged as mutiny. More frequently the doing or offering of violence to a superior officer and disobedience of orders, offenses specifically made punishable by "Article 21" have been so charged or so considered. Still more frequently has the designation of mutiny been erroneously attached to disorders of the class known as "mutinous conduct", such as defiant behavior, or threatening language towards superiors, muttering or murmuring against restraints of military discipline, combinations of soldiers with a view to acts of violence or lawlessness, which however are not committed; intemperate and exciting discussions at meetings held for the purpose of protesting against orders. Where such disorders stop short of resistance or are not characterized by deliberate intent to overthrow military authority, do not constitute in general the legal offense of mutiny.

In the case under consideration there is no direct testimony of the intent of the accused to "usurp, subvert or override" superior military authority. Every officer who testified for the prosecution admitted that the discipline of the men was excellent with the exception of the alleged refusal to load ammunition and that the mon had never at any time refused to obey any other orders and as a matter of fact did obey all orders during the time of the alleged conspiracy with the exception of the order to load ammunition.

The prosecution in an effort to establish the requisite intent necessary to sustain the charge of mutiny was permitted over objection of accused to introduce testimony as to certain statements made by unidentified individuals. It should be pointed out that although in some instances statements by co-conspirators are admissible, these statements are admissible only as recognized exceptions to the hearsay rule*. In order for these statements to be admissible

under any circumstances it is necessary that the fact ho first established that the person making the statement is a member of the conspiracjr whether on trial or not. The prosecution never at any time identified all of the members of the alleged conspiracy. The alleged conspiracy was established by the prosecution only by the use of inadmissible testimony concerning certain statements and certain meetings.

What Must Be Proved to Support The Charge

In order for mutiny to occur there must be a defiance of or resistance to superior military authority, with a deliberate purpose to usurp, subvert or override the same, or to eject with authority from office,[1] "Simple violence without proof of purpose to usurp, subvert or override authority is not mutiny. Specific intent is an essential element. To complete the offense an overt act of mutinjr must occur," (N.C.B., Sec. 46) The record shows only the refusal of the men to obey the order to load ammunition, because they were afraid. There is no evidence of any attempt to usurp superior authority. There is no evidence of an attempt to override superior - authority. The men were respectful in their attitude toward their superiors. They wore afraid to handle ammunition, and told the officers they were afraid as the result of the explosion.

The fact that the men, according to the prosecution, refused to obey the order to load ammunition on three separate occasions does not make this a mutiny without proof of the necessary intent. In those cases in which a distinct and specific intent, independent of the mere act is essential to constitute the offense as in mutiny, this intent must be affirmatively established as a separate fact (N.C.B,, Sec. 151). No matter in what light the evidence produced at the trial is read, there cannot be spelled out of the evidence adduced any intent to usurp or override superior military authority. In failing to prove this specific intent the prosecution failed to prove that a mutiny took place. In failing to prove this the prosecution failed to prove the charge.

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1 Winthrop, "Military Law and Precedents", second edition, pp. 578-580; "The Digest of Opinions from the Judge Advocate General of the Army", 1912--1930, Section 1550, and Section 46, N.C.B.

The Errors in The Conduct of The Trial Wore so Prejudicial to The Rights of The Accused That They Alone Necessitate a Reversal of This Verdict.

Because of the tremendous size of the record in this case and because of the confusion in the minds of the members of the court brought about by the attempt to combine the law as to conspiracy and mutiny, there are a tremendous number of objections many of which are clearly erroneous. However, we will only point out the more important errors as to the admission of evidence, limiting ourselves to those which are sufficient in themselves to require a reversal.

1. The court excluded evidence which was a material element of the crime charged.

The accused asked (R. 33) "Q. Did they interfere with the prerogatives of your office in any way?" The court sustained the objection of the judge advocate to this question. To have sustained this objection was material and reversible error because, as the defense counsel pointed out, the answer to this question was material to determine actually whether a mutiny had occurred. If there is no interference with the prerogatives of superior authority there can be no mutiny. The accused had a right to ask this question of Commander Tobin and to have an answer entered into the record. The exclusion of this testimony in and of itself is sufficient to warrant a reversal# If an erroneous exclusion of evidence injuriously affects a substantial right of the accused, there is reversible error. It is generally held to affect a substantial right if it relates to a material point (3 Am. Jur. 589). Certainly the question asked related to the most vital element of the crime charged.

2. Evidence which was most prejudicial and which was the rankest type of hearsay was erroneously admitted.

A. Commander Tobin testified that he called the men of Lieutenant Delucchi's division before him individually in alphabetical order and gave each of the men he talked to a direct order to load ammunition. Without identifying the persons talked to he testified as to conversation with unidentified members of the division such as "A number of men took the attitude that they would obey any order except to handle ammunition" and "In answer to a statement on the

part of certain individuals that they were afraid of ammunition, I stated that anyone working around ammunition might be afraid of ammunition, but they still had to obey an order to handle ammunition if such order was assigned to them" (R. 19). The prosecution never at any time made any effort to identify the men alleged to have made the above statements. The defense objected to this testimony and moved that it be stricken on the ground that Commander Tobin only talked to six or seven of the accused and that he failed to identify the others as being implicated or involved in the alleged mutiny (R. £6). This objection was overruled (R. £7). The motion was renewed and denied (R. £9). In this instance there were in the group not only men who had refused but men who expressed their willingness to load ammunition.

B. At page 144 the judge advocate in interrogating seaman second class K. C. Carter, asked this question: "Carter, on your way from chow hall back to the barge . . . did you hear any of those men say anything?

"A. Yes, sir, I did.

Q. What?"

The court overruled an objection.

"Q. State what you heard.

A. Well, Well, I heard two of the men say 'when we get back there we are going to have a meeting to see that we all stick together' because one of the fellows wanted to come off the barge and go back to work and they had to punch him out, I imagine beat him.'"

C. At page 148 in interrogating William James Smith, seaman second class the judge advocate asked: "You heard something said at that time?

"A. . . . There was some talk about they had the officers by the balls. I couldn't definitely say who said it because I don't know.

q. When you heard the statement 'We have the officers by the balls' did you hear anything else said at that same time?

A. No, sir, I didn't."

Then the judge advocate gave the witness a statement which he had previously made for him to read and then asked him this question: "Now, will you state what else, if anything, you heard the men in

that group say in addition to 'We havo tho officers by tho balls'?"

"A. 'We have the officers by tho balls, and if we stay like we are we don't believe they could do anything to us for not going to work.'"

D. Again in questioning Benjamin Johnson, Gunner's mate third class, the judge advocate asked these questions: (R. 153, 154) "At that time did you hear any of those men . . . . say anything?"

"A. Yes, sir. I heard some man complaining and kicking about the other men not sticking with them and left them 'holding the bag' . . ."

Q. State whether or not you heard them say anything besides kicking about the other men not sticking with them.

A. I can say I heard this: I heard the man say that the other men "didn't stick with them". I heard that.

Q. What else?

A. "They were fools for not sticking.'

Q. What else?

A. That is about all.

Q* You mentioned something about leaders not sticking to the end. What did they say about that?

A. I said it seems as though they were talking about some leaders that were not there.

Q. What did they say about that—about the leaders?"

An objection was interposed and overruled.

"Q. What did they say about these leaders, if anything?

A. That they were fools for not sticking with them"

An objection was made by the accused on the ground that the question was leading. To this the judge advocate responded "It is slightly leading, but I am directing his attention to something".

These are but a few of the many instances of the admission of prejudicial statements made by unidentified men. The theory upon which the admission of this evidence was attempted to bo justified by the judge advocate was on the ground that his evidence showed a conspiracy and that the statements of co-conspirators were admissible against each other. The persons making tho statements were never identified as being connected with the alleged conspiracy. No

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one knows who they were# No one can point them out# Evidence of this sort was brought into the record primarily to prejudice the cause of the accused.

A reading of the record in this case makes it clear that the judge advocate had certain hearsay testimony which he was determined to get before the court# He knew that such testimony was inadmissible. He invoked the rule as to admissibility of statements of alleged co-conspirators# He then extended the rule to unidentified co-conspirators# Finally he extended the rule to unidentified persons who were not even alleged to be co-conspirators. In other words whenever he sought to place in the record hearsay testimony he took the position that the unidentified person was a co-conspirator (1) without identifying the person (2) without showing that the person was a co-conspirator (3) without showing that there was a conspiracy, and (4) without showing any concert of action between the person making the statements and the accused. This type of evidence was admitted over the objection of the accused.

3. <u>Inadmissible Testimony In An Appeal to Racial Prejudice</u>

At page 42 the judge advocate asked Lieutenant Delucchi "When you had your Fourth Division mustered the first time . . . state whether or not you heard any remarks from either your division or from the Eighth Division, who were standing around, about refusing to work or not going to work--anything of that nature.

"A. Yes, sir.

Q. Will you state what the remarks were and under what circumstances?

A. Well, I was standing on the sidewalk in front of Division Eight; the men were behind me, and on the ladder around the end of my division and on the lawn of the mess hall and I heard at least three times the statement 'Don't go to work for the white m . . . f . . . .'."

Objection to this line of testimony was overruled. Again, at pages 61 and 62:

"Q. As you approached the division from the rear, state whether or not you heard any remarks from the ranks of the men of the division.

"A. Yes, sir, I did.

Q. What did you hear?

A. "Let's all stick together".

Q. Now, by the way, while the commandant was on the field and before he had left, state whether or not you heard any remarks from any of the men of your division of any kind or character.

A. Yes.

Q. State what they were.

A. The first remark I heard was "the m--- f-----s won't even send us to sea".

Q. Did you hear any other remark?

A. Yes, sir.

Q. What was it?

A. "Let's run over the m---- f---"."

In order to make certain that this inadmissible hearsay got across to the court, the judge advocate quoted this obscenity at page 1362 in his opening argument. In referring to remarks he states that Lieutenant Dolucchi heard "Don't go to work for the white m---- f----s" and he heard this three times.

The Lieutenant is unable to identify the makers of these remarks and when asked to look at the accused and identify one of them as the one who made the remark, the Lieutenant states, at page 69 "I can't sir, because I had my back to them. I was standing facing the Admiral." In all the array of witnesses presented by the prosecution and by the defense no one but Lieutenant Dolucchi heard these profane statements. Further, not all of the members of the group had refused to load ammuntion. Even members of the Eighth Division, all of whom went back to work, were present.

The judge advocate should have known that those remarks were inadmissible because they were hearsay. Sven on the theory that an actual conspiracy occurred before remarks such as these can be admitted into the record the persons, who make them must be identified as conspirators. Because of the persistence of the judge advocate in pursuing this line of inquiry it must have been his intention to use these hearsay statements in order to prejudice the rights of the accused. This is an appeal to race prejudice and is most reprehensible. The men's guilt does not rest upon their racial

identity. It rests upon proof of the commission of the crime alleged. In any trial under our system of justice such appeals by counsel to racial prejudice are grounds for a new trial or reversal. Court martial tribunals are supposed to be composed of officers of the highest integrity, with a sense of justice and devotion to duty. Yet, no one can truthfully say on reading the record that the officers who composed the court martial tribunal were not adversely influenced by the prejudicial statements which the Lieutenant quotes unidentified and unknown men as having made. The judge advocate's questioning of Lieutenant Delucchi about those obscene hearsay remarks and his repetition of them in his opening argument could' have been only for the purpose of prejudicing the court against the accused because of their race.

Further, in this instance, Lieutenant Tobin testified (R. 124) that one* of his division leaders (Murray) at the time he ordered the men to load ammunition told him that he had not ordered all of the men and nodded his head towards the four first class carpenter's mates who were white "So I turned and ordered each of them, telling them that if they would obey that order, they should fall over with those 26 colored men who had obeyed the order. They immediately walked over . . ."

Murray appeared later as a witness for the defense. The judge advocate began questioning him on page 1134 about these carpenter's mates--"Q. Lieutenant Tobin ordered (the carpenter's mates) to work didn't he?--Q. Did you order them to work or not?" (objection was made and sustained) Then the judge advocate continued, "There have been many objections that I could have made, but I have been very careful not to interpose many objections and I think in all fairness, I should be allowed to cross examine this witness." Again the court sustained the objection. "Q. Did Lieutenant Tobin order these carpenter's mates to work?" The court for a third time sustained the objection by the defense.

"Q. Did Lieutenant Tobin say anything to the carpenter's mates?

A. They joined the men that were carrying on the orders.

Q. They joined the men who had agreed to work, making 30 or 31 altogether?

A. 30 or 31.

"Q. They didn't hesitate a bit, did they?"

In answer to objection the judge advocate said, "I withdraw the question".

"Q. When Lieutenant Tobin talked to the carpenter's mates did those carpenter's mates hesitate one second, or did they go right over and join the 26 men that were there?

A. Yes, sir, they did.

Q. And they went right over promptly."

The only purpose the judge advocate could have had in persisting in this line of inquiry was to again appeal to racial prejudice by showing that Negro seamen had refused to work whereas white carpenter's mates had promptly indicated their willingness to obey an order to load ammunition.

4. Additional Acts of The Judge Advocate Deliberately Intended to Illegally Prejudice the Cause of the Accused.

A. Comment on The Failure of the Accused To Make a Prior Statement

In the cross examination of seaman first class Ernest Dobson Brown the judge advocate made prejudicial inferences because this man had refused to make any statement prior to the trial to a Lieutenant Cordiner, who apparently was investigating the case. The judge advocate used this failure as a means to impeach the testimony of the accused. Ho deliberately ignored the fact that it is one of the constitutional rights of the accused to remain silent if he sees fit. Sven if he had refused to testify at the trial no unfavorable inferences could have been drawn by this failure in view of the fact that ho was standing on a constitutional right. (N.C.B., Section 422) This conduct is certainly not in keeping with the duties of the judge advocate as envisaged in Section 351 of N.G.B.

B. Activities of the Judge Advocate Prior to the Trial

The duties of the judge advocate in reference to the accused prior to the trial as set out in Section 351, N.G.B., are to confer with the accused, to advise him of his right to counsel and of his right to have witnesses summoned for the defense."If, in discussing the case of the accused, it develops that he might have any good defense whatever, or the accused believes he has, discussion of the merits of the case should bo terminated at once and the accused advised to plead not guilty and secure counsel. The judge advocate

should endeavor to ascertain what statement, if any, the accused contemplates making at the trial, as this will enable the judge advocate to determine whether the accused has or believes he has any defense to offer."

The judge advocate in this instance interviewed the accused and attempted to get from them statements concerning the alleged offense. When he had the accused on the stand statements were made inconsistent with those which they had previously made to him, he attempted to impeach the accused by calling to their attention and to the attention of the court these prior inconsistent statements. This is clearly taking unfair advantage of the accused in that any discussion of the merits of the case as set forth in Section 151, supra, is to enable the accused to take advantage of whatever defense he might have. He deliberately interviewed those men while they were not represented by counsel, obtained statements from them and then attempted to turn these statements to his advantage.

C. Improper Impeachment.

At pages 439-440 in cross examining one of the accused, seaman first class Ollie Green, the judge advocate asked the accused what his occupation was prior to coming into the Navy. When the answer was given that he worked in the post office, the judge advocate asked how long. The answer was a little more than a month. Then came this series of questions:

"Q. All right, for one month, what was your occupation before that?

A. I didn't have a job, sir.

Q. You didn't have any occupation?

A. No, sir.

Q. Before working one month in the post office . . . you never had any occupation of any kind?"

Proper objection was interposed and was overruled by the court.

"A. I didn't have no occupation at the time.

Q. I am not just limiting it to any short period of time, getting back for a year, two years, three years before you--a period of time like that before you worked in the post office, what did you do for a living?

A. Made a living on the game of chance.

Q. Made a living on the game of chance?

"A. Yes, sir.

Q. Green, you were one of the leaders in this thing, weren't you?"

Objection.

"Q. You were one of the leaders in this refusal of the men of the Fourth Division to work, weren't you?

A. No, sir."

In N.C.E. on the question of impeachment of witnesses it is pointed out that in order to impeach a witness on the ground of crime it must be shown that the crime involved moral turpitude and that there had been a conviction by a court. Evidence of mere accusation and indictment is inadmissible (N.C.E. 301). In this particular case the only basis for such a line of questioning would be to seek to prejudice the court against the particular accused on the ground that he is alleged to have been a professional gambler without having any evidence whatsoever as to any trial or conviction for this charge.

D. Appeal of the Judge Advocate to Sectional Prejudice.

Throughout the cross examination of the accused the judge advocate deliberately asked all accused who were from northern and borderline states, with one exception, to give their place of residence. Yet, at the same time he did not ask any of the accused from southern states where they were from. Following is a list of the accused questioned as to their residence:

Seamen First Class

Joseph R. Small	New Brunswick, New Jersey
Harry E. Grimes	Detroit, Michigan
Charles Hazzard	Philadelphia, Pennsylvania
Cyril Sheppard	New York, New York
Mentor Burns	Cincinnati, Ohio
Ernest Dobson Brown	New York, New York
Perry L. Knox	Nashville, Tennessee

Seamen Second Class

Augustus Mayo	Brooklyn, New York
Edward Sandus	Detroit, Michigan
Fleetwood H. Postell	Philadelphia, Pennsylvania
Morris Berry	Baltimore, Maryland
Theodore King	Chicago, Illinois
Charles L. Davis, Jr.	Chicago, Illinois
Willie E. Banks	New York, New York
Lack Credle	New York, New York
Melvin Ellis	Chicago, Illinois
Robert LeBurage	Chicago, Illinois
Charles C. Gray	Chicago, Illinois
Charles S. Wedemon	Baltimore, Maryland
Kenneth Dixon	New York, New York

Further evidence that the judge advocate was attempting to appeal to sectional prejudice is the fact that when questioning the accused, Fredie Meeks, who replied that he was from Memphis, Tennessee, asked the additional question: "Before you came in'the Navy weren't you in Los Angelos?" (R. 716) In examining accused, Julian J. Allen, when asked where his home was and the reply being North Carolina, the judge advocate then asked whether the accused did not come from Baltimore (R. 758). If the judge advocate had merely been trying to give the court the full picture as to the background of the accused, the simplest rules of fairness would have required him to ask each of the accused the same question. Only one inference can be drawn from his practice of asking only certain accused where they were from.

THE CONVICTION AND SENTENCE OF THE ACCUSED SHOULD HAVE BEEN REVERSED

In the first place, the charge and specification must fail if there be no direct order. The testimony as to the direct order and the relaying of this order by subordinate officers stands contradicted by all of the defense witnesses.

On the question of the mutiny itself there is no showing of the requisite intent to usurp, subvert or override authority. Even if we consider the inadmissible evidence we still do not have any evidence of intent to usurp, subvert or override military authority. The answers of the prosecution's witnesses that none of the accused at any time refused to obey any orders other than the alleged order to load ammunition is conclusive proof of the absence of the requisite intent to warrant a conviction of mutiny.

CONCLUSION

An examination of the record in this case leads to the inescapable conclusion that the accused were made the scape goats in a situation brought about by a combination of circumstances. In the first place, there was the Port Chicago explosion and its inevitable effect on the accused as explained by the Navy medical officer. Then there is the failure of the naval authorities to take any steps to counteract this condition. This is followed by the obvious inefficiency of Lieutenants Tobin and Delucchi in being unable to properly order their men to work. Thus the trial of these fifty accused Negroes for the most serious crime possible would explain away the above conditions.

We are certain that this is the most important case so far as the*morale of the Navy is concerned and especially the morale of Negro seamen. When we realize that it was not until the present war w/as in its advanced stages that Negroes were permitted to enlist as seamen and this is followed by such a mass trial for the crime* of mutiny, it is expected that all citizens and servicemen whether they he white or Negro are tremendously interested in the outcome. Justice can only ho done in this case by a complete reversal of findings. Morale in the United States Navy is not aided hy injustice hy means of courts martials. Morale is only aided hy justice. We regret that much evidence pertaining to this case could not he introduced at the court martial and for that reason at the time of the filing of this brief we respectfully request that an opportunity he given to present facts which can ho established hy an independent investigation through the office of the Secretary of the Navy.

Respectfully submitted

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