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Foreword

Welcome to the fourth Military Justice Symposium, the annual criminal law year in review. This month's issue of *The Army Lawyer* contains Volume I of the symposium. It includes articles addressing recent developments in courts-martial jurisdiction, speedy trial and pretrial restraint, search and seizure, evidence, Sixth Amendment, and mental responsibility. Volume II of the symposium will appear in the May 1999 issue of *The Army Lawyer* and will contain articles reviewing trends in unlawful command influence, pretrial procedure, self-incrimination, substantive crimes and defenses, sentencing and post-trial.

As in recent years, we do not offer an exhaustive case digest. The symposium represents, instead, the best sense of the nine members of the Criminal Law Department, The Judge Advocate General's School, U.S. Army, about the most significant developments in military justice in the past year. We seek to provide some perspective on the most important opinions of the year by the Court of Appeals for the Armed Forces (CAAF) and the service courts. The following chart provides some indication of the dynamic on the court, including the inclinations or abilities of individual judges to forge consensus or to write independently. We hope you appreciate our efforts and we welcome comments from those practicing in the field.

Court of Appeals for the Army Forces

Author	**Total Opinons Written**	**Majority Opinions**	**Dissenting Opinions#**	**Concurring Opinions***
Chief Judge Cox	29	20	3	6
Judge Crawford	41	23	13	5
Judge Gierke	38	24	5	9
Judge Effron	35	22	7	6
Judge Sullivan	76	27	24	25
Totals for Court	219	116	52	31

Based on figures provided by the Office of the Clerk, United States Court of Appeals for the Armed Forces, for the October 1997 through September 1998 term.

Includes Dissent; Dissent in Part and Concur in Part; Dissent in Part and Concur in Result and in Part; Dissent in part and Concur in Result, and; Dissent in Part and Concur in Part and in Result.

* Includes Concur; Concur with Reservation; Concur in Result, and Concur in Part and in Result.

The Top Ten Jurisdiction Hits of the 1998 Term: New Developments in Jurisdiction

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Introduction

"Without music, life is a journey through a desert"
-Pat Conroy

I was sitting at my computer deep in thought, yet unable to put words on the screen. I had thoroughly digested this year's jurisdiction cases and could not discover a common thread that tied them all together. I seriously wanted to find a trend that I could promote to make this year's jurisdiction article flow seamlessly from beginning to end and still be intellectually stimulating. Then it dawned on me. As the disc jockey on the radio station I was listening to announced the week's number one pop-rock single, I realized that this year's jurisdiction cases were like the top ten hits—each case unique, yet varying in degree of prominence. So, I present the top ten jurisdiction "hits" of the 1998 term.[1] But first, a brief review of jurisdiction is in order.

Traditionally, this article only focused on courts-martial jurisdiction. This year, however, it addresses cases pertaining to both courts-martial jurisdiction and appellate jurisdiction. The cases relating to court-martial jurisdiction center primarily on the composition of the court-martial and on personal jurisdiction. The cases involving appellate jurisdiction deal with extraordinary writ authority. The article first addresses courts-martial jurisdiction, then briefly discusses extraordinary writ jurisdiction.

Rule for Courts-Martial (R.C.M.) 201(b) sets forth the five elements of court-martial jurisdiction. They are: (1) jurisdiction over the offense, (2) jurisdiction over the accused, (3) a properly composed court, (4) a properly convened court, and (5) properly referred charges.[2] The most litigious issues of courts-martial jurisdiction relate to either jurisdiction over the offense (subject matter jurisdiction) or jurisdiction over the accused (personal jurisdiction).[3] Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense.[4] If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a service member at the time the offense is committed, subject matter jurisdiction is complete.[5] To satisfy personal jurisdiction, the accused must be a service member at the time of trial.[6]

Appellate jurisdiction focuses on the military appellate court's authority to hear and resolve a legal issue. In 1948, Congress enacted the All Writs Act,[7] which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. In 1969, the Supreme Court held that the All Writs Act applied to the military appellate courts.[8] Consistent with other federal courts, the military appellate courts view writ relief as a drastic remedy that should only be invoked in truly extraordinary situations.[9] In addition to the actual jurisdiction granted military appellate courts under the UCMJ,[10] those courts have relied on the All Writs Act as a source of potential, ancillary, or supervisory jurisdiction.[11] The issue often becomes, as was the situa-

1. The 1998 term began 1 October 1997 and ended 30 September 1998.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (1998) [hereinafter MCM].

3. *See generally* EVA H. HANKS, ELEMENTS OF LAW 18 (1994).

4. MCM, *supra* note 2, R.C.M. 203; Solorio v. United States, 483 U.S. 435 (1987) (holding that subject matter jurisdiction is contingent upon the status of the accused (as a member of the armed service at the time of the offense charged) and not whether there was a service connection).

5. *Solorio*, 483 U.S. at 451.

6. MCM, *supra* note 2, R.C.M. 202 analysis, app. 21, at A21-9. Generally, court-martial jurisdiction over a person begins at enlistment and ends at discharge. To satisfy personal jurisdiction, the offense and the court-martial must occur between these two defining periods. Jurisdiction is lost if the accused is discharged after the offense, but before the court-martial.

7. 28 U.S.C.A. § 1651(a) (West 1999).

8. Noyd v. Bond, 395 U.S. 683 (1969). The military justice system commonly uses four writs: mandamus, prohibition, error coram nobis, and habeas corpus. A writ of mandamus is an order from a court of competent jurisdiction that requires the performance of a specified act by an inferior court or authority. BLACK'S LAW DICTIONARY 866 (5th ed. 1979). The writ of prohibition is used to prevent the commission of a specified act or issuance of a particular order. *Id.* at 1091. The writ of error, *coram nobis*, is used to bring an issue before the court that previously decided the same issue. It allows the court to review error of fact or a retroactive change in the law that which affects the validity of the prior proceeding. *Id.* at 487. The writ of *habeas corpus* is used to challenge either the legal basis for or the manner of confinement. *Id.* at 638. Rules 27 and 28 of the United States Court of Appeals for the Armed Forces Rules of Practice and Procedure set forth the requirements for the contents of a petition for extraordinary relief. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RULES OF PRACTICE AND PROCEDURES (27 Feb. 1996).

tion this year, under what circumstances can military appellate courts exercise relief under the All Writs Act.

With this overview as a backdrop, it is time to introduce the top ten jurisdiction cases from the 1998 term.

Hit #10: United States v. Cook[12]

The bottom of the chart contains cases that play a familiar tune from years past—the jurisdictional significance of a properly composed court.[13] Leading off the cases in this area is *United States v. Cook*.[14] *Cook* emphasizes the importance of having members properly detailed to the court. The jurisdictional issue before the Court of Appeals for the Armed Forces (CAAF) was whether Private First Class (PFC) Cook's court-martial "lacked jurisdiction because interlopers served as members of the court-martial panel."[15] Ultimately, the CAAF held that any error that occurred in excusing members was not a jurisdictional defect. Rather, it was an administrative error that was be tested for prejudice.[16]

At trial, before the court-martial members were empanelled, the convening authority's staff judge advocate (SJA) excused five of the nine panel members from the primary court-martial convening order. The SJA then substituted the excused members with five members from an alternate list.[17] Without objecting to this procedure, the defense voir dired the panel, and exercised both a challenge for cause and a preemptory challenge.[18]

On appeal, PFC Cook argued that the excusal and substitution of members violated R.C.M. 505(c)(1)(B)(ii).[19] This rule states that "no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial."[20] Since the SJA excused and substituted five of the nine members, he exceeded his authority under R.C.M. 505.[21] Under the rule, the SJA was only permitted to excuse and substitute three of the five court-martial members. On appeal, PFC Cook argued that the two extra substituted members were "interlopers."[22] According to PFC Cook, since the panel contained "interlopers," the court-martial was not properly detailed and, therefore, lacked jurisdiction.[23]

In overruling this argument, the CAAF declared that the one-third rule under R.C.M. 505(c) "does not involve a matter of such fundamental fairness that jurisdiction of the court-martial would be lost without an express waiver on the record."[24] Since PFC Cook did not object to the process at trial, the court viewed any violation of Rule 505(c) as administrative in nature, and tested it for prejudice.[25] The court also dismissed the

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9. Daniel J. Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act From the United States Court of Military Appeals*, 32 HARV. C.R.-C.L. L. REV. 33 (1975).

10. *See* UCMJ arts. 66, 67, 69 (West 1999).

11. *See* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976); Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998).

12. 48 M.J. 434 (1998).

13. *See* Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., May 1998, at 2 (discussing 1997 jurisdiction cases).

14. 48 M.J. 434 (1998).

15. *Id.* at 435.

16. *Id.* at 438.

17. *Id.* at 436.

18. *Id.*

19. *Id.*

20. MCM, *supra* note 2, R.C.M. 505(c)(1)(B)(ii).

21. *Id.*

22. *Cook*, 48 M.J. at 437. The term "interloper" refers to a member "who sat on a court-martial but who had not been appointed by the convening authority to do so." *Id.*

23. *Id.* at 436.

24. *Id.*

25. *Id.*

defense's "interloper" argument. The CAAF found that all members who were appointed to the court-martial, even the members who were substituted from the alternate list, were properly detailed by the convening authority and were not "interlopers."[26]

In holding that there was no jurisdictional error, the CAAF makes it clear that the jurisdictional challenge to members lies with the detailing of the members and the number of members that make up the panel.[27] In *Cook*, the convening authority properly detailed the members that were empaneled panel and the general court-martial panel consisted of the proper quorum of members—at least five members.[28] As such, there was no jurisdictional error.

Cook provides clear guidance for practitioners in the area of jurisdictional challenges to court-martial member composition. Counsel can raise two jurisdictional issues: (1) the court-martial does not consist of the requisite number of panel members, and (2) the members sitting on the panel are not properly detailed. Other errors that may arise, such as improperly excusing members, raise administrative, not jurisdictional, errors. The court will test these administrative errors for prejudice.

Hit # 9 United States v. Upshaw[29]

United States v. Upshaw[30] has a similar tune to that of *Cook*—the proper composition of a court-martial consisting of members. Air Force Staff Sergeant (E-5) Upshaw, requested to be tried by a court-martial composed of officer and enlisted members.[31] In fulfilling this request, the convening authority's SJA instructed his staff to compile a list of available enlisted personnel of the rank of E-7 and above.[32] The SJA gave this rank-limiting guidance under the mistaken belief that the accused was an E-6.[33] From this list, the convening authority detailed the enlisted members to the court-martial. The defense argued that this impermissible exclusion of E-6s deprived the court-martial of jurisdiction.[34]

In addressing this issue, the CAAF emphasized that "[w]hile it is permissible to look first at the senior grades for qualified court members, the lower eligible grades may not be systematically excluded."[35] The court also stated that it is improper for a convening authority to stack a court-martial panel by "inclusion or exclusion."[36] Looking at the facts of *Upshaw*, however, the CAAF determined that the exclusion of E-6s did not result from improper stacking, but rather from an administrative mistake.[37] Finding that the error was non-jurisdictional, the court tested for prejudice. Ultimately, the court found no prejudice and affirmed the conviction.[38]

In *Upshaw*, the CAAF makes two jurisdictional pronouncements: (1) "[c]ourt stacking does not deprive the court-martial

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26. *Id.* at 437. The convening authority used the criteria set forth under Article 25(d), UCMJ when selecting court-martial members to both the primary and alternate lists. *Id.* at 436 (citing UCMJ art. 25(d) (West 1999)).

27. *Id.* at 437. *See* UCMJ arts. 16, 25 (West 1999).

28. UCMJ art. 16(1)(A). This provision states: "The three kinds of courts-martial in each of the armed forces are—(1) general courts-martial, consisting of—(A) a military judge and not less than five members . . . ." *Id.*

29. 49 M.J. 111 (1998).

30. *Id.*

31. *Id.* at 112.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 113 (citing United States v. Daigle, 1 M.J. 139 (C.M.A. 1975); United States v. Greene, 43 C.M.R. 72 (C.M.A. 1970); United States v. Crawford, 35 C.M.R. 3, 12 (C.M.A. 1964)).

36. *Id.* (citing United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991)).

37. *Id.*

38. *Id.* In a dissenting opinion, Judge Effron placed great weight on the fact that the defense raised the issue of improper exclusion during trial and the military judge denied any relief. He emphasized that the accused correctly raised the error, yet it was ignored. He opines that the CAAF must "scrutinize carefully any deviations from the protections designed to provide an accused servicemember with a properly constituted panel. . . . When a service member has done all he or she can do by putting the issue in the spotlight and asking for a timely correction, and the government declines to correct the error, we should not countenance such disrespect for the protections of the rights of members of the armed forces." *Id.* at 116 (Effron, J., dissenting).

of jurisdiction,"[39] and (2) administrative errors in detailing court-martial members are non-jurisdictional.[40]

Hit # 8: United States v. Seward[41]

Another court-composition melody that played this year was *United States v. Seward*.[42] Unlike *Cook* and *Upshaw*, the court-martial composition issue in *Seward* focused on the military judge rather than court-martial members. In particular, the accused argued that his court-martial lacked jurisdiction because he did not make an election to be tried by military judge alone, either orally or in writing, before the court was assembled.[43] The CAAF, however, held otherwise.[44]

The accused in *Seward* was charged with two specifications of larceny and tried by a general court-martial before officer and enlisted members.[45] The accused pleaded guilty to the lesser-included offenses of wrongful appropriation, and the government attempted to prove the greater offenses of larceny. By the end of the government's case, the military judge had seen enough error to grant the defense's request for a mistrial.[46] The government then re-referred the case to another general court-martial. In the interim, however, the government entered into a pretrial agreement with the accused in which he agreed to plead guilty to the lesser offenses of wrongful appropriation and elected to be tried by military judge alone. In exchange, the government agreed not to pursue the greater offenses of larceny.[47]

The same military judge that sat for the first court-martial presided over the second.[48] Unfortunately, the military judge considered the second trial a continuation of the first trial and did not ask the accused to make an election to be tried by military judge alone before assembly.[49] This is an important procedural step that is codified under Article 16, UCMJ.[50] It was not until the sentencing proceedings were completed that the accused finally submitted a request to be tried by military judge alone. On appeal, the accused challenged the legality of the process.

The first jurisdictional pronouncement made by the CAAF in *Seward* was that the granting of the mistrial had the same effect as the convening authority withdrawing the charges—it terminated jurisdiction of the first court-martial.[51] "A new referral was necessary to establish jurisdiction again and to convene a separate court-martial from the first."[52] The CAAF viewed the accused's second court-martial as separate and distinct. Accordingly, the second court-martial had to satisfy all jurisdictional prerequisites.[53] As such, the court found that "the military judge erred by not seeking [the accused's] request for trial by military judge alone on the record before assembly."[54] The court, however, did not find this error to be jurisdictional.[55]

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39. *Id.* at 113.

40. *Id.*

41. 49 M.J. 369 (1999).

42. *Id.*

43. UCMJ art. 16 (West 1998). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides that "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves." *Id.* art. 16(1)(B).

44. *Seward*, 49 M.J. at 373.

45. *Id.* at 370.

46. *Id.* at 371.

47. *Id.* at 373. There were no sentence limitations as part of the pretrial agreement. *Id.*

48. *Id.* at 371.

49. *Id.* at 370. The military judge also incorporated by reference into the second trial the accused's pleas to the wrongful appropriation made at the first trial. *Id.*

50. UCMJ art. 16(1)(B) (West 1999). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides: "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves." *Id.*

51. *Seward*, 49 M.J. at 372.

52. *Id.* at 373.

53. *Id. See* MCM, *supra* note 2, R.C.M. 201(b).

The court seemed to rely on a substantial compliance rationale to justify its holding. The CAAF stated that the "[accused's] desire to be tried by military judge alone was apparent from both the terms of the pretrial agreement and the entry of [the accused's] written request for a judge-alone trial, albeit after completion of the sentencing proceedings."[56] The CAAF reached a similar conclusion last year in *United States v. Turner.*[57] Interestingly, however, the court in *Seward* did not cite *Turner* to support its holding. Regardless, the music in *Seward* is clear—failing to follow the plain language of Article 16 does not create a jurisdictional error so long as the facts show there is substantial compliance with the statute.

Hit # 7: United States v. Keels[58]

With hit number seven, the chart unveils a different tune; a melody of personal jurisdiction. In *United States v. Keels*, the CAAF considered the question of when personal jurisdiction terminates. The specific issue was whether a convening authority's order to execute a punitive discharged served as a valid discharge that terminated personal jurisdiction.[59] The CAAF held that the order to execute the punitive discharge did not terminate court-martial jurisdiction.[60]

In 1994, Airman Basic Keels was convicted of drunken driving and involuntary manslaughter.[61] His sentence included fifteen months of confinement and a bad-conduct discharge.[62] He served the confinement, then remained in the service in an appellate leave status pending final appellate review of his case. His conviction was eventually approved, and a supplemental court-martial order was completed. The order directed Keels' punitive discharge to be executed.[63] One week later, Keels was accused of sodomizing and sexually assaulting his stepdaughter. At no time did Keels receive a valid discharge certificate[64] or undergo a final accounting of pay—two vital requirements that define a discharge from the service.[65]

On appeal, Keels challenged the jurisdiction of his second court-martial. He argued that the publication of the court-martial order executing the punitive discharge terminated personal jurisdiction over him. In denying Keels' challenge, the CAAF stated that the appellate review under Article 71(c), which is required before a punitive discharge can be executed, merely initiates "the administrative process of preparing the appropriate separation and pay documentation."[66] The court clearly holds that delivery of a valid discharge certificate, undergoing a clearing process, and receiving a finall accounting of pay defines a discharge, the mechanism that terminates personal jurisdiction over a servicemember.[67] This is a melody that has been played before, and will most certainly be played again.

Hit # 6: United States v. Underwood[68]

This next hit comes to us from the Air Force Court of Criminal Appeals and addresses the jurisdictional significance (or lack thereof) of an improper referral. In *United States v. Underwood*,[69] the Air Force Court considered at the effect of improper

54. *Seward*, 49 M.J. at 373.

55. *Id.* The court went on to find that the error did not unduly prejudice the accused, and affirmed the conviction. *Id.*

56. *Id.* at 373.

57. 47 M.J. 348 (1997) (holding that an accused's request for trial by military judge alone can be inferred from the record). *See* Sitler, *supra* note 13, at 3 (discussing *Turner* and other similar cases).

58. 48 M.J. 431 (1998).

59. *Id.*

60. *Id.* at 432.

61. *Id.*

62. *Id.*

63. *Id.* Once the allegations that the accused sexually abused his stepdaughter surfaced, the government issued another court-martial order. This revoked the previous order directing the execution of the accused's punitive discharge. *Id.*

64. *Id.* The court defines a valid discharge certificate as a Department of Defense Form 214.

65. *See* 10 U.S.C.A. § 1168(a) (West 1999).

66. *Keels*, 48 M.J. at 432.

67. *Id.* (citing United States v. King, 27 M.J. 327, 329 (C.M.A. 1989)).

68. 47 M.J. 805 (A.F. Ct. Crim. App. 1997).

command influence during the referral process on courts-martial jurisdiction.

In April 1996, the government referred rape charges against the accused.[70] Due to the victim's unavailability, the government requested a continuance, which the military judge denied. In response, the "convening authority withdrew all charges and, *de facto*, dismissed them" in June 1996.[71] Several months later, the convening authority referred the same charges to another general court-martial.[72] At trial, the defense moved to dismiss the charges for lack of jurisdiction, arguing that the withdrawal and re-referral to another court-martial was improper.[73] The judge denied the motion.

On appeal, the accused again raised the issue that the court-martial lacked jurisdiction.[74] The Air Force Court disagreed by declaring that "issues of an improper referral for trial are not jurisdictional in nature."[75] Even though the defense improperly titled its argument, the court recognized that challenges to the referral process touch upon "one of the more sensitive areas of the military justice process."[76] Applying a *de novo* standard of review, the Air Force Court held that there was not an improper withdrawal or re-referral.[77] Focusing on R.C.M. 604(a) and (b), which address withdrawal and re-referral of charges, the court determined that the convening authority's intent was proper, and the government did not unfairly delay the trial.[78] As such, the court affirmed the case.[79]

When viewed singularly, the jurisdictional significance of *Underwood* seems minimal. When compared to the other court-martial composition cases decided this year, however, *Underwood* adds support to the trend that errors with procedural rules (for example, the member selection process and the referral process) are non-jurisdictional errors. As such, the appellate courts will scrutinize these errors for prejudice.

Hit # 5: ABC, Inc. v. Powell[80]

The next several selections on the chart focus on the military appellate courts' procedure and exercise of authority under the All Writs Act.[81] As mentioned in the introduction, there is no question that military appellate courts can grant relief under the All Writs Act. The issue that is often raised, involves the extent of the court's writ authority. Before discussing this issue, a review of a case that focuses on extraordinary writ filing procedures is in order.

In *ABC, Inc. v. Powell*,[82] the CAAF established a clear procedure that practitioners should follow when filing a writ with a military appellate court. Specifically, the court announced that absent a showing of good cause, a practitioner should first file a writ with the respective service courts of criminal appeals.[83] If the service court denies the requested relief, the accused can then file a writ with the CAAF.

The substantive issue raised in *Powell* was whether the convening authority erred in closing the Article 32 investigation to the public.[84] The issue came before the CAAF as a writ, which the defense filed directly with the court, bypassing the service

69. *Id.*

70. *Id.* at 807. The charges referred against the accused were "charges of rape, forcible sodomy, indecent assault, and providing alcohol to a minor." *Id.* There was later added another charge of rape involving a second victim. *Id.*

71. *Id.* at 808.

72. *Id.* The re-referral occurred in August 1996.

73. *Id.* at 806.

74. *Id.*

75. *Id.* at 807.

76. *Id.*

77. *Id.* at 811.

78. *See* MCM, *supra* note 2, R.C.M. 604(a), (b) discussion (providing examples of proper and improper reasons for a convening authority to withdraw and re-refer charges).

79. *Underwood*, 47 M.J. at 811.

80. 47 M.J. 363 (1997).

81. 28 U.S.C.A. § 1651(a) (West 1999).

82. 47 M.J. 363 (1997).

83. *Id.* at 365.

Court of Criminal Appeals.[85] In the end, the CAAF granted the requested relief and ordered that the Article 32 investigation be open to the public and the press.[86] In the process, however, the court made clear its intention that petitioners must first seek relief from the service courts.

Although not substantively significant to the issue of appellate jurisdiction, *ABC, Inc.*, provides procedural precedent that practitioners should heed.

Hit # 4: United States v. Dowty[87]

Although not a case centered on an extraordinary writ issue, the CAAF in *United States v. Dowty* displays its proclivity toward expansive authority under the All Writs Act. The issue before the court was the application of the Right to Financial Privacy Act (RFPA)[88] to the military. Similar to the All Writs Act, the RFPA is a federal statute that the military has embraced. The purpose of the RFPA is to regulate the government's ability to seize a person's bank records.[89] The issue in *Dowty* arose when the government attempted to acquire the accused's bank records and, in response, the accused filed a petition in federal court protesting release of the records.[90] The government eventually prevailed in the collateral attack, but the process delayed the court-martial past the five-year statute of limitations. At trial, the defense moved to dismiss the charges against Dowty, arguing that the statute of limitations expired.[91] In response, the government argued that the RFPA's tolling provision applied, and the time used to address the accused's collateral challenge in federal court should not count against the statute of limitations.[92] The military judge disagreed with the government and dismissed the charges.

In a government appeal, the prosecution argued that the RFPA and its tolling provision applied to the military. In holding that the RFPA does apply to the military, the CAAF looked to the military's exercise of another federal statute—the All Writs Act. In making the comparison, the CAAF stated that it fully embraced the jurisdiction afforded under the federal writ statute. It emphasized that the All Writs Act "has been exercised in a wide variety of circumstances, including instances where [the CAAF] would not have had direct review of the proceedings."[93] Although not a momentous appellate jurisdictional pronouncement, the message remains consistent—military appellate courts recognize supervisory jurisdiction under the All Writs Act to address issues arising in all facets of the military justice system. The next two cases provide recent examples of the exercise of this authority.

Hit # 3: Dew v. United States[94]

In *Dew v. United States*, the Army Court of Criminal Appeals (ACCA) granted relief under the All Writs Act. In so doing, it revealed its view of the Act's supervisory role over the military justice system.

Before addressing the specifics of *Dew*, a brief discussion of supervisory writ jurisdiction is warranted. The Supreme Court, along with the military appellate courts, unequivocally declared that the All Writs Act is not a separate source of appellate jurisdiction.[95] Rather, it provides a means by which a federal appellate court can address issues that will aid in the exercise of its actual jurisdiction. Without question, an appellate court may exercise extraordinary writ authority in aid of its actual or potential jurisdiction.[96] Another type of authority an appellate court may assert in aid of its jurisdiction under the All Writs Act is supervisory authority. The outer limits of supervisory jurisdiction are undefined and are viewed differently among the military appellate courts. In *Dew*, the ACCA presented its view of the scope of supervisory jurisdiction.

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84. *Id.* at 364.

85. *Id.*

86. *Id.* at 366. "Absent 'cause shown that outweighs the value of openness,' the military accused is likewise entitled to a public Article 32 investigative hearing." *Id.* at 365.

87. 48 M.J. 102 (1998).

88. *Id.* at 107.

89. *Id.*

90. *Id.* at 104.

91. *Id.* at 105.

92. *Id.*

93. *Id.* at 106.

94. 48 M.J. 639 (Army Ct. Crim. App. 1998).

95. Wacker, *supra* note 9, at 52.

The accused in *Dew* was convicted of making and uttering worthless checks by dishonorably failing to maintain funds.[97] Because she was sentenced only to a rank reduction, she did not qualify for an automatic review by the ACCA.[98] As required, however, the Office of The Judge Advocate General (OTJAG) reviewed her case. Upon review, the OTJAG upheld the conviction and sentence.[99] Staff Sergeant Dew then requested that her case be forwarded to the Army Court of Criminal Appeals for review.[100] The OTJAG denied her request. In response, the accused filed a writ for extraordinary relief with the ACCA.

The first issue addressed by the ACCA was whether it had jurisdiction to hear the writ. The court declared that it had "All-Writs-Act supervisory jurisdiction to consider, on the merits, a writ challenging the action taken [by OTJAG]."[101] In supporting its position, the ACCA looked to its role in the military justice process. The court professed that "[a]s the highest judicial tribunal in the Army's court-martial system, [it is] expected to fulfill an appropriate supervisory function over the administration of military justice."[102] Accordingly, the ACCA felt comfortable exercising jurisdiction over a challenge to action taken under Article 69.

What *Dew* does not answer, however, is what are the outer limits of the court's supervisory jurisdiction under the All Writs Act. The ACCA specifically stated that "[it] need not define the outer limits of [its] supervisory jurisdiction in order to dispose of the petition before [it]."[103] This statement by the court invites practitioners to not only challenge Article 69 actions, but to also seek extraordinary relief for novel issues that allow the court to exercise its supervisory role over the military justice process. As illustrated in the next case, the CAAF sings this same tune.

Hit #2: Goldsmith v. Clinton[104]

When considering the jurisdictional melody of extraordinary writs, the most noteworthy case decided during the 1998 term is *Goldsmith v. Clinton*.[105] In *Goldsmith*, the CAAF expands its supervisory review authority under the All Writs Act by stopping the Air Force from administratively separating an officer from the military.[106]

Major Goldsmith, the accused, was convicted of an HIV aggravated assault.[107] Although he was sentenced to a lengthy period of confinement, he was not given a punitive discharge.[108] While in confinement, the accused filed a writ before the Air Force Court of Criminal Appeals. The accused complained that the confinement facility was improperly administering and maintaining his HIV medication.[109] By the time the writ came before the Air Force Court, the accused had been released from confinement and the HIV issue was moot. Therefore, the writ was denied.[110]

Regardless, the accused filed a writ appeal to the CAAF. He did not argue that the denial of the initial writ was improper;

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96. UCMJ art. 66(b) (1999) (defining actual jurisdiction). Potential jurisdiction includes cases that could reach the actual jurisdiction of the appellate court depending upon the action taken by others who exercise authority in the military justice system. A case where the CAAF exercised writ authority in aid of its potential jurisdiction is *ABC, Inc. v. Powell*. *See* ABC, Inc. v. Powell, 47 M.J. 363 (1997). In *ABC, Inc*, the case was at the Article 32 investigation stage when the writ was filed. Therefore, there was the *potential* that the CAAF could have reviewed the case CAAF if it was referred to a general court-martial and resulted in a conviction.

97. *Dew*, 48 M.J. at 642.

98. *Id.* at 644.

99. *Id.* at 643.

100. *Id.* The accused's legal challenge was that her plea was improvident because her bad checks were written to pay for a gambling debt. The OTJAG reviewed the accused court-martial pursuant to Article 69(a), and upheld the conviction. Under Article 69(a), the OTJAG shall review a general court-martial that resulted in a conviction that is not otherwise reviewed by the Court of Criminal Appeals. *See* UCMJ art. 69(a). The accused then requested that the OTJAG recommend further appellate review under Article 69(d). The OTJAG denied this request. Article 69(d) permits the OTJAG to send a court-martial to the military appellate courts in situations where the case does not qualify for automatic review by the courts. *See id*. art. 69(d).

101. *Dew*, 48 M.J. at 647.

102. *Id.* at 645 (citing Noyd v. Bond, 395 U.S. 683 (1969); McPhail v. United States, 1 M.J. 457 (C.M.A. 1976)).

103. *Id.* at 647.

104. 48 M.J. 84 (1998).

105. *Id.*

106. *Id.* at 89. The type of administrative separation Major Goldsmith was facing was a dropping from the roles. *See* 10 U.S.C.A. §§ 1161, 1167 (West 1999).

107. *Goldsmith*, 48 M.J. at 85.

108. *Id.*

109. *Id.* at 86.

instead, the accused raised a new issue before the court.[111] He claimed that the government was unlawfully dropping him from the roles of the Air Force.[112] Since the accused was not adjudged a punitive discharge in his court-martial, the government sought to discharge the accused by dropping him from the rolls of the Air Force. The government took this action pursuant to a federal statute. The law in effect at the time of the accused's conviction, however, did not permit the government to drop an officer from the rolls based solely on a court-martial conviction. According to the defense, the government's action was additional punishment that violated the *ex post facto* clause of the Constitution.[113] Before addressing this issue, however, the CAAF had to determine if it possessed the jurisdiction to grant the relief. Specifically, the CAAF considered whether it could grant relief over an issue that it did not address, nor could address, under its statutory appellate authority.

The government insisted that "dropping [the accused] from the rolls [was] only an 'administrative' matter and [did] not concern punishment."[114] According to the government, since the challenge did not amount to a military justice matter, the CAAF lacked supervisory authority under the All Writs Act to grant relief. In rejecting the government's argument, the majority declared that the government's action (dropping the accused from the rolls) amounted to additional punishment.[115] Since the action equated to punishment, the issue was a military justice matter. As such, CAAF reasoned that it could exercise its inherent supervisory power under the All Writs Act to grant relief, if necessary.[116] Under the facts of *Goldsmith*, the CAAF believed it was necessary to grant relief, and ordered the Air Force not to drop Goldsmith from the rolls.[117]

The interesting aspect of *Goldsmith* is the display of differing opinions the judges of the court have about the scope of the court's supervisory authority under the All Writs Act. In a concurring opinion, Chief Judge Cox cautions that the court's exercise of jurisdiction in *Goldsmith* is limited to the facts of the case.[118] He does not purport to adopt a precedent that allows the CAAF to exercise writ jurisdiction over all administrative actions that touch the military justice system. Judge Sullivan, however, applauds the court's action, and emphasizes that the CAAF "should use [its] broad jurisdiction under the Uniform Code of Military Justice to correct injustices like this and [should] not wait for another court to perhaps act."[119] Judges Gierke and Crawford strongly disagree. In a dissenting opinion authored by Judge Gierke, both judges proclaim that dropping the accused from the rolls "pertains to a collateral administrative consequence . . . that may or may not occur," and that the CAAF "has no jurisdiction over administrative personnel actions."[120] On 4 November 1998, the Supreme Court agreed to review *Goldsmith*, and address the issue of the scope of the CAAF's supervisory authority under the All Writs Act—a song soon to be composed.[121]

Hit #1: Willenbring v. Neurauter[122]

The number one hit this term involves the music of court-martial jurisdiction. Topping the jurisdiction chart this year is *Willenbring v. Neurauter*.[123] In this case, the CAAF put to rest the interpretation of a long debated issue: can the military assert courts-martial jurisdiction over a reservist who committed misconduct while a member of the regular component?

110. *Id.*

111. By allowing the petitioner to first raise the issue before the CAAF, the court made clear that its previous holding in *ABC, Inc.* (declaring that a writ for extraordinary relief must first be brought before the Court of Criminal Appeals absent good cause) was not an ironclad rule. *Id.* at 88.

112. *Id.* at 86.

113. *Id.* at 89.

114. *Id.* at 90.

115. *Id.*

116. *Id.* at 87.

117. *Id.* at 90. The CAAF held that the government's action in dropping the accused from the roles of the Air Force violated the *Ex Post Facto* clause of the Constitution. *Id.*

118. *Id.*

119. *Id.* at 91.

120. *Id.*

121. Goldsmith v. Clinton, 119 S. Ct. 402 (1998).

122. 48 M.J. 152 (1998).

123. *Id.*

Through means of an extraordinary writ, the court answers the question in the affirmative.[124]

On 31 March 1992, after serving over ten years in the Army, the accused was discharged from the regular component, and on 1 April 1992 he enlisted with the U.S. Army Reserve.[125] In 1997, while the accused was a member of the reserve component, charges were preferred against him for rape. The charges related to misconduct the accused allegedly committed in 1987 and 1988 while he was a member of the regular component.[126] Pursuant to Article 2(d), UCMJ, the government involuntarily recalled the accused to active duty.[127] Once the government referred the case to a general court-martial, the accused challenged the jurisdiction of the court, arguing that the court-martial lacked jurisdiction because he had been discharged from the regular component before joining the reserve component. The accused alleged that the intervening discharge precluded the military from prosecuting him for any misconduct he may have committed while a member of the regular component.[128]

In support of his position, the accused relied on Articles 3(a) and 2(d), UCMJ. The version of Article 3(a) that applied to the case did not permit the military to assert court-martial jurisdiction over an offense committed prior to an intervening discharge when the offense was punishable by confinement for less than five years and could be prosecuted in a civilian criminal court.[129] Under this statute, the accused argued that he was discharged, and the crime that the military sought to prosecute him for was rape—an offense that could easily be prosecuted in the civilian criminal justice system. As such, under Article 3(a), the military could not assert court-martial jurisdiction.[130]

Alternatively, the defense opined that even if the government could satisfy Article 3(a), Article 2(d) did not provide the statutory authority to involuntarily recall the accused to active duty to face a court-martial.[131] Article 2(d) permits the military to involuntarily recall a reservist to active duty for purposes of a court-martial when he allegedly committed misconduct while on active duty.[132] The defense argued that the term "active duty" only pertains to periods of active duty served while a member of the reserve component.[133] Since the accused's offenses occurred while he was an active duty member of the regular component, Article 2(d) did not apply. Therefore, the government had no means to place the accused in the proper status to court-martial him.

In a well-written and reasoned opinion by Judge Effron, the CAAF synthesized the two statutory provisions at issue and declared that they should be "read in harmony."[134] First, the court determined that the accused's intervening discharge did not necessarily divest the military of court-martial jurisdiction over the accused.[135] In analyzing the then-existing Article 3(a), the CAAF addressed three scenarios. According to the CAAF:

> If there was a complete termination of military status with no subsequent military service, then the former service member would not be subject to court-martial jurisdiction for prior-service offenses as a matter of constitutional law . . . . If, however, there was a complete termination of military status followed by reentry into reserve service, then the reservist would be subject to court-mar-

124. *Id.* at 175.

125. *Id.* at 154. The accused was fulfilling a six year enlistment when he requested an early discharge. As part of his request, the accused agreed to serve the remaining portion of his enlistment in the reserves. The accused remained in the reserves until his court-martial.

126. *Id.* at 155.

127. UCMJ art. 2(d)(2) (West 1999). This provision states that "[a] member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was (A) on active duty . . . ." *Id.*

128. *Willenbring*, 48 M.J. at 157. The accused argued that the "court-martial may not exercise jurisdiction over a former service member whose relation ship with the armed forces has been severed completely as a result of a valid discharge . . . ." *Id.* (citing United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955)).

129. *Id.* at 158. "When Congress enacted the present version of Article 3(a), the statue was given prospective effect, applying only to offenses occurring on or after October 23, 1992." *Id.*

130. *Id.* at 157.

131. *Id.* at 171.

132. UCMJ art. 2(d)(2) (West 1999).

133. *Willenbring*, 48 M.J. at 171.

134. *Id.* at 175.

135. *Id.*

> tial jurisdiction for prior service offenses, subject to the major offense and nontriability conditions of Article 3(a). Finally, if there was a change in status between regular and reserve service, or within various forms of reserve service, unaccompanied by a complete termination of military status, then the reservist would be subject to court-martial jurisdiction for all prior-service offenses to the same extent as a regular whose military status had changed in form without a complete termination of military status.[136]

The CAAF declared that the latter scenario applied, and urged the military judge to solicit facts that would definitively answer the question of whether the accused's military status was completely terminated.[137] Second, the CAAF declared that Article 2(d) is not limited to misconduct committed while serving on active duty as a member of the reserve component. Rather, the term "active duty" refers to both regular component and reserve component active duty service.[138]

In addition to answering the issues before the court, the CAAF also foreshadowed its interpretation of the current version of Article 3(a) when faced with a similar situation. Throughout its opinion, the court confirmed several times that "under current law, if a person is subject to military jurisdiction at the time of trial and was subject to military jurisdiction at the time of the offense, that person may be tried for offenses occurring during a prior period of military service . . . regardless of the intervening discharge."[139] The court makes it clear that the statute of limitations of the criminal misconduct alleged is the determinative factor that may preclude prosecution in the military, not an intervening break in service.[140]

The *Willenbring* case solidifies the CAAF's interpretation of Articles 3(a) and 2(d). The case clearly opens the door for the military to prosecute reservists who commit misconduct while members of the regular component. Although stated in dicta, the court firmly believes that under the current Article 3(a) any intervening discharge or break in service is irrelevant. The relevant jurisdictional inquiry is—was the accused in the proper status at the time of the crime and at the time of trial? What happens in between is immaterial. The defense can nevertheless take issue. There still remains a viable constitutional challenge to Article 3(a)—can the military assert court-martial jurisdiction over a person who became a civilian, yet for whatever reason, decided to re-join the military?[141] The Supreme Court will most likely have to answer this challenge.

Conclusion

Although there is no overall trend, there are several messages that can be gleaned from this year's cases. First, challenging court-martial jurisdiction is always ripe when the government fails to follow the rules, especially when it comes to court-martial composition or referral. The success of the challenge may not hinge on the strict application of the rule, but rather the particular facts in the case that indicate a substantial compliance with the rule. Second, the military appellate courts are liberal in asserting a supervisory role over the military justice system under the All Writs Act. This trend may change, however, depending on the Supreme Court's decision in *Goldsmith v. Clinton*. Finally, although it is contained in dicta, the message in *Willenbring* is clear—under Article 3(a), UCMJ, a break in service does not automatically divest the military of court-martial jurisdiction.

The cases mentioned in this article represent the most significant or controversial jurisdiction cases of the 1998 term. Each one played a unique tune that influenced the law of military jurisdiction.

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136. *Id.* at 170.

137. *Id.* at 175.

138. *Id. But see* Murphy v. Dalton, 81 F.3d 343 (3d. Cir. 1996) (holding that the term "active duty" in Article 2(d) only pertains to (active duty service performed while a member of the reserve component).

139. *Id.* at 158.

140. *Id.* at 176.

141. *See* United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1966) (declaring that it is unconstitutional to assert court-martial jurisdiction over a former service member who has become a civilian); United States *ex rel*. Hirshberg v. Cooke, 336 U.S. 210 (1949) (holding that discharged servicemembers are not subject to court-martial jurisdiction for prior service offenses).

Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead

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Introduction

The past year saw both regulatory and judicial changes to the law of pretrial restraint and speedy trial. The 1998 changes to the Rules for Courts-Martial (R.C.M.)[1] governing pretrial confinement and speedy trial were, for the most part, housekeeping changes to make the R.C.M. conform to existing judicial decisions. The judicial decisions during the last year, by contrast, raised—but did not answer—some significant issues in both speedy trial and pretrial restraint that impact military justice practice.

Pretrial Restraint

The Rules for Courts-Martial (R.C.M.)

Rule for Courts-Martial 305[2] underwent two important changes in 1998. The first change to R.C.M. 305 was the addition of a forty-eight hour review to the previous seven-day review.[3] This change to R.C.M. 305 incorporated prior case law, which imposed this forty-eight hour review of pretrial confinement requirement on the Army.[4] The second change also incorporated prior case law[5] into the text of R.C.M. 305(k),[6] allowing the military judge to grant additional discretionary pretrial confinement credit for pretrial confinement under "unusually harsh circumstances."[7]

In its 1975 decision in *Gerstein v. Pugh*,[8] the United States Supreme Court read the Fourth Amendment to guarantee a "prompt" probable cause review by a magistrate for persons arrested without a warrant. In 1976, the Army Court of Military Review applied *Gerstein* to the Army in *Courtney v. Williams*.[9] By 1991, the United States Supreme Court decided *County of Riverside v. McLaughlin*,[10] which interpreted the *Gerstein* promptness requirement to mean forty-eight hours, in normal circumstances. By 1993, the Court of Military Appeals, in *United States v. Rexroat*,[11] applied the *McLaughlin* forty-eight hour review standard to the Army. The 1998 change adding R.C.M. 305(i)(1)[12] formalizes the *McLaughlin / Rexroat* requirement in the *Manual for Courts-Martial*.

Practitioners need to note that this forty-eight hour review is *in addition to* the seven-day review, not in place of it.[13] Although both the forty-eight hour review and the seven-day review consider the probable cause for pretrial confinement, they are procedurally different.[14] The forty-eight hour review

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. (1998) [hereinafter MCM].

2. *Id.* R.C.M. 305.

3. *See id.* R.C.M. 305(i)(1) (requiring a 48 hour review); *see also id.* R.C.M. 305(i)(2) (requiring a 7 day review). The seven-day review is commonly referred to as the "magistrate's review."

4. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991); United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

5. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

6. MCM, *supra* note 1, R.C.M 305(k).

7. *Id.*

8. 420 U.S. 103 (1975).

9. 1 M.J. 267 (C.M.A. 1976).

10. 500 U.S. 44 (1991).

11. 38 M.J. 292 (C.M.A. 1993).

12. MCM, *supra* note 1, R.C.M. 305(i)(1).

13. *See* United States v. Williams, No. 9601314 (Army Ct. Crim. App. June 12, 1998). As a practical matter, military justice practitioners can "kill two birds with one stone" by continuing the common practice from some installations of conducting the magistrate's review within 48 hours. *See* MCM, *supra* note 1, R.C.M. 305(i).

14. *See* MCM, *supra* note 1, R.C.M. 305(i)(1), (i)(2).

need only be conducted by a "neutral and detached officer," not necessarily the military magistrate.[15] Unlike the seven-day review, the forty-eight hour review is done "on the record,"[16] and neither the soldier nor his counsel must be present.[17]

Prior to the 1998 change to R.C.M. 305(k), if the command placed a soldier in pretrial confinement under "unusually harsh circumstances," the military judge could order additional pretrial confinement credit at trial under *United States v. Suzuki*.[18] Now, the military judge's authority for such credit is included directly in R.C.M. 305(k). This change clarifies application of credit for unusually harsh circumstances of confinement as well; such credit is to be applied to the accused's approved sentence, not his adjudged sentence.[19]

Case Law

Sentence Credit for Pretrial Restraint

This area has been the subject of much confusion for military justice practitioners. In 1998, the courts both expanded the reach of regulatory sentence credit provisions and implied support for a major change to sentence credit.[20]

In *United States v. Williams*,[21] the Army Court of Criminal Appeals (ACCA) addressed the remedy for a violation of R.C.M. 305(l).[22] Private First Class Williams was charged with, *inter alia*, two specifications of aggravated assault.[23] His command placed him in pretrial confinement on 2 September 1995. The military magistrate released him from pretrial confinement on 4 September 1995.[24] Uncomfortable with the magistrate's decision, the government "appealed" the magistrate's decision to the supervising military judge, who reconfined Williams on 8 September 1995.[25]

On appeal, the ACCA considered this case in light of *Keaton v. Marsh*,[26] and found that the accused's reconfinement violated R.C.M. 305(l).[27] The court was, however, faced with a problem; what is the remedy for this violation, as R.C.M. 305(k) by its terms applies only to violations of R.C.M. 305(f), (h), (i), or (j)? The ACCA looked at the purpose behind pretrial confinement credit under R.C.M. 305(k) and found that it was intended

15. *Id.* While both the 48-hour and the seven-day review require review by a "neutral and detached officer," R.C.M. 305(i)(2) includes an additional requirement that the neutral and detached officer be "appointed in accordance with the regulations prescribed by the Secretary concerned . . . ." The R.C.M. 305(i)(2) reviewing officer is the military magistrate appointed under chapter 9 of *Army Regulation 27-10. See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 9 (24 June 1996) [hereinafter AR 27-10].

16. Unlike the seven day review, no hearing-type procedure exists for the 48-hour review. *See* MCM, *supra* note 1, R.C.M. 305(i)(2)(A).

17. *Compare* MCM, *supra* note 1, R.C.M. 305(i)(1) (requiring a 48-hour review), *with* R.C.M. 305(i)(2)(A) (requiring a seven-day review and discussing the procedures for this review). Rule for Courts-Martial 305(i) provides many more rights for the confined soldier at the seven-day review than at the 48-hour review.

18. 14 M.J. 491 (C.M.A. 1983). *Suzuki* draws its authority from Article 13, UCMJ, which prohibits pretrial confinement "any more rigorous than the circumstances require . . . to insure his presence . . . ." Although it is questionable whether *Suzuki* is an Article 13 case or an independent judicially-created basis for sentence credit, *Suzuki*'s reliance on *United States v. Larner*, supports the better argument that *Suzuki* is an Article 13 case. *Id.* at 492 (citing United States v. Larner, 1 M.J. 371 (C.M.A. 1976)).

19. Notwithstanding the seemingly clear language that R.C.M 305(k) credit is to be applied to the adjudged sentence, *United States v. Gregory* made clear that "adjudged" really meant "approved," where R.C.M. 305(k) credit was concerned. *See* United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986). *See also* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997) (supporting this interpretation by saying that *Suzuki* credit for unduly rigorous pretrial confinement is applied against the approved sentence, not the adjudged sentence). Applying pretrial confinement credit is the subject of much debate within the bench and bar. Additional executive or judicial intervention may be necessary to completely clarify this area.

20. *United States v. Martin* dangled the prospect of a tantalizing credit in front of the defense bar—credit for time spent in civilian confinement. *See* United States v. Martin, No. 9700900 (Army Ct. Crim. App. June 18, 1998). This would not be a new credit, but merely an updated and expanded *Allen* credit. *Id.* (citing United States v. Allen, 17 M.J. 126 (C.M.A. 1984)). In *Allen*, the Court of Military Appeals interpreted a Department of Defense (DOD) Instruction and federal statute to find that soldiers were entitled to day-for-day credit for time spent in military pretrial confinement. *Allen*, 17 M.J. at 126. Revisiting *Allen*, in light of the current DOD Directive and applicable federal statute, may very well result in credit for time spent in civilian pretrial confinement, in certain circumstances.

21. 47 M.J. 621 (Army Ct. Crim. App. 1998).

22. Rule for Courts-Martial 305(l) prohibits placing a soldier back into pretrial confinement if he has once been released, absent "the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement." MCM, *supra* note 1, R.C.M. 305(l).

23. *Williams*, 47 M.J. at 622.

24. *Id.* at 623.

25. *Id. See* AR 27-10, *supra* note 15, para. 9-5b.

26. 43 M.J. 757 (Army Ct. Crim. App.1996). In *Keaton*, the Army Court found paragraph 9-5b of *AR 27-10* to be invalid in light of R.C.M. 305(l). Neither the government nor the military judge in *Williams* can be faulted, as their actions predated the Army Court of Criminal Appeal's decision in *Keaton v. Marsh.*

27. *Williams*, 47 M.J. at 623.

to "grant relief appropriate to cure the prejudice suffered."[28] The ACCA also considered several cases involving credit under Article 13, UCMJ.[29] These cases reminded the ACCA that remedies for illegal pretrial confinement must be "effective."[30] Finding that the violation of R.C.M. 305(l) prejudiced Williams, the ACCA held that R.C.M. 305(k) credit also applies to R.C.M. 305(l) violations and awarded Williams an additional forty-five days of credit.[31] Practitioners should add a margin note to their *Manual for Courts-Martial* next to R.C.M. 305(k), citing *Williams* as authority for pretrial confinement credit resulting from violations of R.C.M. 305(l).

Another judicial development with potentially far-reaching implications is *United States v. Martin*.[32] In *Martin*, the ACCA examined whether the Army should award expanded pretrial confinement credit for soldiers in civilian pretrial confinement.

Private Perry Martin went absent without leave from his unit at Fort Hood, Texas on 20 December 1996.[33] On 7 April 1997, civilian police in Pearl, Mississippi arrested him for an unrelated offense.[34] Civilian authorities notified the Army on 8 April 1997, and the Army officially requested Martin's detainer late on 10 April 1997.[35] Civilian authorities turned Private Martin over to the Army on 14 April 1997.[36] At trial, the military judge authorized pretrial confinement credit from 11 April 1997 until the date of trial.[37]

Private Martin claimed that he was entitled to full credit from the time he was initially incarcerated by civilian authorities (7April to trial).[38] On appeal, he maintained that *Department of Defense Directive (DOD Dir.) 1325.4*[39] and 18 U.S.C.A. § 3585(b)[40] mandate such credit. *DOD Dir. 1325.4* mandates that the DOD follow the procedures established by the Department of Justice (DOJ)[41] for sentence computation. Section 3585(b) of 18 U.S.C.A., which governs how the DOJ computes sentences, provides:

> **Credit for prior custody**. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.[42]

Private Martin argued that he had not been credited in Mississippi with the time he spent in civilian confinement for the Mississippi arrest.[43] Because the Mississippi offense, for which he was confined, happened after the offense for which he was

28. *Id.* (citing R.C.M. 305(k) analysis, at 20-21).

29. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (citing United States v. Larner, 1 M.J. 371 (C.M.A. 1976)).

30. *Id.* at 493.

31. *Williams*, 47 M.J. at 623-4.

32. No. 9700900 (Army Ct. Crim. App. June 18, 1998).

33. *Id.* at 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988) [hereinafter DOD DIR. 1325.4].

40. 18 U.S.C.A. § 3585(b) (West 1999).

41. The "[p]rocedures employed in the computation of sentences [within the DOD] shall conform to those established by the Department of Justice for Federal prisoners unless they conflict with this Directive." DOD DIR. 1325.4, *supra* note 39, para. H.5.

42. 18 U.S.C. § 3585(b) (1994).

43. *Martin*, No. 9700900 at *2.

sentenced at his court-martial, he contended he was entitled to credit at his court-martial for the time he spent in civilian confinement.[44]

Acknowledging the apparent validity of Private Martin's legal argument, but avoiding a decision on that issue, the ACCA said "however appealing [his argument] might be legally, [it] fails for lack of a factual basis."[45] Instead, the ACCA said that Private Martin had the burden to demonstrate that he had *not* been given credit for the time he spent in civilian confinement against another sentence.[46] Because Private Martin failed to prove at trial that he had not been given such credit, the ACCA denied him credit.

In 1996, the Air Force Court of Criminal Appeals (AFCCA) addressed the same issue in *United States v. Murray*,[47] but decided that *DOD Dir. 1325.4* and 18 U.S.C.A. § 3585(b) do require that a military accused be given credit at his court-martial for time spent in civilian confinement.[48] The Court of Appeals for the Armed Forces (CAAF) has not recently addressed or decided this issue directly.[49] Until then, defense counsel must continue to request the additional credit for civilian pretrial confinement. In so doing, defense counsel should cite these decisions, *DOD Dir. 1325.4*, and 18 U.S.C.A. § 3585(b). In light of *Martin*, the defense must also be prepared to establish that the client is factually entitled to the credit by showing he previously has not received credit for that confinement.[50]

Applying Sentence Credit

How to apply pretrial confinement credit—against the adjudged sentence or against the approved sentence—is frequently confusing to practitioners. Last year, in *Coyle v. Commander, 21st Theater Army Area Command*,[51] the ACCA attempted to clarify this area.[52] In *Coyle*, the court distinguished between credit awarded for pretrial confinement and credit awarded for pretrial punishment. In the ACCA's view, pretrial confinement credit is applied against the approved sentence. Pretrial punishment credit, however, is applied against the adjudged sentence, and, in some cases, the approved sentence.[53]

While this issue remains ripe for the CAAF to consider, in a concurring opinion in *United States v. Ruppel*,[54] Judge Effron provided some insight into what may be his view on the subject. Master Sergeant Ruppel was convicted of sodomy and indecent

44. *Id.*

45. *Id.* at 3.

46. *Id.*

47. 43 M.J. 507 (A.F. Ct. Crim. App. 1996), *pet. denied* 43 M.J. 232 (1995). The Air Force Court of Criminal Appeals followed *Murray* in a later, unreported case. United States v. Taylor, No. ACM 31574, 996 WL 354883 (A.F. Ct. Crim. App. 1996).

48. Although the facts in *Murray* differ from those in *Martin* (Airman Murray was ultimately court-martialed for the offense for which he was in civilian confinement), the DOD Directive and the statute are identical. The DOD Directive and the statute do not require that the offense generating civilian confinement be the same as the one for which the servicemember is ultimately court-martialed.

49. The Court of Appeals for the Armed Forces denied a petition for review in *Murray.* The CAAF—then the CMA—did address the interplay between DOD Instructions, statutes, and pretrial confinement credit in the familiar case of *United States v. Allen*. Should the court revisit *Allen*, it might very well agree with the service courts in *Martin* and *Murray.*

50. *See* United States v. Lamb, 47 M.J. 384 (1998). In *Lamb*, the CAAF reiterated prior case law, stating that soldiers are not entitled to pretrial confinement credit for civilian confinement unless that civilian confinement is: (1) for a military offense, and (2) with the notice and approval of military authorities. *Id.* at 385. The CAAF, however, did not even address, let alone decide the case on the basis of the DOD Directive and the statute discussed in *Martin* and *Murray.* The CAAF decided *Lamb* on the basis of R.C.M. 305(k) credit. *Lamb* held that absent the two factors above, R.C.M. 305 did not apply, and a violation of R.C.M. 305 (such as a late review) could not give rise to credit. *Id.* The CAAF has yet to squarely address the legal arguments raised by Private Martin and Airman Murray.

51. 47 M.J. 626 (Army Ct. Crim. App. 1997).

52. *See* Lieutenant Colonel James Kevin Lovejoy, *Re-interpreting the Rules: Recent Developments in Speedy Trial and Pretrial Restraint*, ARMY LAW., Apr. 1998, at 19 (containing a good discussion of this case).

53. *Coyle*, 47 M.J. at 630. Unfortunately, the court did not discuss the specific circumstances under which pretrial punishment credit would be applied against the approved sentence. *Coyle* also does not answer all the questions posed by applying sentence credits as it suggests. If the sentence credits are applied against the adjudged sentence, does this mean that the terms and duration of pretrial restraint or confinement are no longer matters in extenuation and mitigation under R.C.M. 1001(c)(1)? *See infra* note 65 and accompanying text. If they are matters to be considered on sentencing, does the defense thereby get a "double benefit from the same period of pretrial confinement" (a result that Judge Cook described as "absurd")? *See* United States v. Allen, 17 M.J. 126, 130 (C.M.A. 1984) (Cook, J., dissenting). On the other hand, if the credit is credited by the sentencing authority, how can practitioners be sure that this credit will not effectively increase the time the accused spends in confinement, when "good time" is factored in? *See* United States v. Larner, 1 M.J. 371, 372-3 (C.M.A. 1976). In such a situation, the remedy is certainly not an "effective" one. *See generally* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983). Although intriguing, these questions are beyond the scope of this article and await judicial and executive action.

54. 49 M.J. 247 (1998).

acts involving his stepdaughter and his natural daughter.[55] At the trial, the military judge ordered eighteen days of credit for conditions that he found to be tantamount to confinement.[56] As a result of allegations of government misconduct, the convening authority ordered a rehearing on certain findings and on the sentence.[57] At the rehearing, the second military judge refused the defense request for the eighteen days of sentence credit.[58] On appeal, the defense argued that the first military judge's decision was the law of the case and must be followed by the second military judge.[59] The CAAF disagreed and refused to grant the eighteen days of sentence credit to Master Sergeant Ruppel.[60]

In his concurring opinion,[61] Judge Effron discussed that the military judge's power to grant sentence credit is judicially created to implement Article 13, UCMJ[62] and DOD guidance.[63] Judge Effrron wrote:

> Even though a credit is related to the sentence and may be addressed during the sentencing proceeding, the sentence-credit determination is not part of the adjudged findings or sentence that Congress has determined should be final. . . . The basis for the credit is not a consideration in the sentencing process, and the credit itself is not a reduction of the sentence.[64]

One interpretation of Judge Effron's comments is that all sentence credits—resulting from pretrial punishment or pretrial confinement—are applied against the approved sentence, not the adjudged sentence.[65] Even though Judge Effron's comments relate directly to whether a sentence credit determination is a "final" determination (to which the law of the case doctrine would apply), they also provide some insight into how one judge on the CAAF might treat the application of sentence credits, if directly faced with that issue.[66] Practitioners need to ensure that any sentence credit awarded by the military judge, if not expressly considered on sentencing as in *Coyle*,[67] is reflected in the convening authority's action and the promulgating order.[68]

The Navy-Marine Court of Criminal Appeals (NMCCA) recently found that one confinement facility's administrative decisions to place pretrial confinees in maximum custody violated of Article 13, UCMJ.[69] In *United States v. Anderson*,[70] the NMCCA reviewed the pretrial confinement of Corporal Jonathan Anderson. At his general-court martial, Corporal Anderson was ultimately convicted of several marijuana-related offenses.[71] On appeal, Corporal Anderson argued that he had been subjected to pretrial punishment in violation of Article 13,[72] by spending seventy-seven days in "maximum custody status."[73] The policy at the brig where he was held was that any pretrial confinee facing more than five years of confinement served his pretrial confinement in that maximum status.[74] Comparing that "single blanket criterion"[75] with the provisions of Article 13—that the circumstances of confinement be no more rigorous than required to ensure the accused's presence at trial—the court found that the brig procedure was arbitrary and constituted "unreasonable punishment."[76] Accordingly, the court awarded Corporal Anderson seventy-seven days credit.[77]

In addition to awarding Article 13 credit on the basis of the brig's procedure, the NMCCA advised practitioners of several important matters. First, the court explained that it based its decision in *Anderson* on the particular facts of that case.[78] Second, the court stated that defense counsel must diligently investigate and raise such issues at the trial level.[79] Although courts will not presume waiver of Article 13 issues under current decisions,[80] defense counsel should be mindful of a possible ineffective assistance claim. Third, the NMCCA advised staff

55. *Id.* at 248.

56. *Id.* at 251.

57. *Id.* at 248.

58. *Id.* at 251.

59. *Id.* at 253.

60. *Id.*

61. *Id.* at 254 (Effron, J., concurring).

62. *Id.* (citing United States v. Larner, 1 M.J. 371 (C.M.A. 1976)).

63. *Id.* (citing United States v. Allen, 17 M.J. 126 (C.M.A. 1984)).

64. *Id.* at 254.

65. This interpretation is consistent with the *Military Judge's Benchbook*. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK 94 (30 Sept. 1996) [hereinafter BENCHBOOK]. The *Benchbook* instruction tells panel members to "consider" that the accused has been in pretrial confinement. The same instruction, however, advises the members that the accused will be credited with the time spent in pretrial confinement against any adjudged confinement by "authorities at the correctional facility . . . ." *Id.*

judge advocates to watch for allegations that even hint at pretrial punishment, and take appropriate action.[81] Finally, the NMCCA advised confinement authorities to consider "all relevant factors" in deciding confinement limitations.[82]

Speedy Trial

The R.C.M.

Among the other changes to the *Manual for Courts-Martial*, the 1998 changes added a new clause to R.C.M. 707(c):

> (c) Excludable delay. All periods of time during which the appellate courts have issued stays in the proceedings, *or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney Gen-*

66. Applying sentence credit remains confusing and is an area ripe for regulatory reform, such as consolidating all sentence credit provisions into R.C.M. 305(k) and applying all sentence credits—whether from pretrial confinement or from pretrial punishment—against the approved sentence. Only by applying the sentence credits against the approved sentence can the accused be guaranteed that he will actually get the benefit of the credit. *See* United States v. Larner, 1 M.J. 371 (C.M.A. 1976) (holding that applying sentence credit administratively against the approved sentence provides a complete remedy, whereas applying it against the adjudged sentence may not). An in-depth analysis of that issue, however, is beyond the scope if this article. Such changes are the province of the courts and the President. Confusion in the area of sentence credit is not limited to pretrial confinement or pretrial punishment situations. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (requiring that a soldier who is court-martialed for an offense for which he has already be punished under Article 15, UCMJ, be given complete credit against his court-martial sentence for the prior punishment). Because of the automatic forfeiture provisions of Article 58b, UCMJ, crafting effective forfeiture credit has been difficult. In *United States v. Ridgeway*, the Army Court discussed the effect of Article 58b, UCMJ, on the Private Ridgeway's court-martial sentence. *See* United States v. Ridgeway, 48 M.J. 905 (Army Ct. Crim. App. 1998). At his court-martial, the military judge sentenced Private Ridgeway to forfeit $200 per month for four months (along with confinement and a punitive discharge). *Id.* at 906. Trying to comply with *Pierce*, the convening authority ordered that Private Ridgeway be credited with $300 against his adjudged forfeitures. *Id.* Unfortunately for Private Ridgeway, Article 58b automatically took two-thirds of his pay while he was confined, regardless of what forfeitures the convening authority ultimately approved. *Id.* The Army Court gave practitioners a number of options for dealing with these situations. First, the court said to avoid this situation entirely; the government should court-martial soldiers for offenses previously disposed of by Article 15 only in "rare cases." *Id.* at 907 (citing *Pierce*, 27 M.J. at 369). Second, if requested by the soldier, the convening authority could defer the appropriate amount of adjudged and automatic forfeitures. *Id. See* United States v. Self, No. 9800614 (Army Ct. Crim. App. Feb. 26, 1999) (commenting that such cases have become "all too common"). Third, the convening authority could waive the appropriate amount of automatic forfeitures, sending the money to the accused's dependents. *Id.* Finally, the convening authority could convert the forfeitures to additional confinement credit. *Id.* The court also advised defense counsel to assist the government by requesting "specific, meaningful relief based on their clients' monetary situation, family circumstances, and personal desires." *Id.* Although Articles 57(a) and 58b are confusing to many in the field, if a defense counsel can craft a workable plan to get his client realistic *Pierce* credit, the client has the best chance of getting relief at the installation level, rather than having to wait for appellate action.

67. 47 M.J. 626 (Army Ct. Crim. App. 1997).

68. *See* MCM, *supra* note 1, R.C.M. 1107(f)(4)(F), 1114(c)(1).

69. United States v. Anderson, 49 M.J. 575 (N.M. Ct. Crim. App. 1998). *See also* United States v. Avila, No. NMCM 9700776, 1998 WL 918614 (N.M. Ct. Crim. App. Dec 23, 1998).

70. 49 M.J. 575 (N.M. Ct. Crim. App. 1998).

71. *Id.* at 575.

72. *Id.* at 576. Corporal Anderson did not raise this issue at trial, nor in his post-trial submissions before the convening authority's initial action.

73. *Id.*

74. *Id.*

75. *Id.* at 577.

76. *Id.*

77. *Id.*

78. *Id.* at 577 n.4. This comment is probably based on the government's failure to submit anything to rebut the defense assertion of a "facing five years = maximum custody status" policy. In future cases, should the government be able to produce evidence that the confinement authorities consider other factors—possible punishment being only one—the result may be different.

79. *Id.*

80. *Id.* Judge Crawford advocates applying waiver in Article 13 cases. *See* United States v. Huffman, 40 M.J. 225, 228 (C.M.A. 1994) (Crawford. J., dissenting).

81. *Anderson*, 49 M.J. 577 n.4. Such action could be relief at initial action or a post-trial hearing ordered by the convening authority.

82. *Id.*

> *eral***,** shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.[83]

The new provision continued a trend, started by the appellate courts,[84] toward a return to the "laundry list" of exclusions from speedy trial calculations. This trend deviates from the avowed purpose of the wholesale 1991 amendment of R.C.M. 707, which sought to simplify the speedy trial system and to avoid speedy trial motions that too frequently degenerated into "pathetic side-shows."[85]

An accused's incompetence to stand trial also generated a change to the restart provisions of R.C.M. 707(b)(3)(E).[86] The new R.C.M. 707(b)(3)(E) provides a fifth restart provision, applicable when the accused returns to the custody of the general court-martial convening authority from the custody of the attorney general (as a result of the accused's incompetence to stand trial).[87]

Case Law

Restarting the Clock: From the Frying Pan, Into the Fire

In *United States v. Ruffin*,[88] the CAAF also dealt with speedy trial restart provisions and determined what does and does not constitute a "significant period" of release from pretrial restraint under R.C.M. 707(b)(3)(B).[89] In late 1993, Aviation Electronics Technician Airman Ruffin was suspected of attempted murder, conspiracy to commit murder, aggravated assault and wrongful discharge of a firearm.[90] On 10 December 1993, Ruffin's command placed him on pretrial restriction.[91] On 15 February 1994, Ruffin's command released him from that restriction, but preferred charges against him on 16 February 1994.[92] The command never placed Ruffin under any further pretrial restriction before his trial on 30 August 1994.[93]

In response to Ruffin's speedy trial motion at trial, the military judge concluded that the start date for Ruffin's 120-day clock[94] was 16 February 1994—the date of preferral.[95] Subtracting authorized delays, the military judge found that the government had arraigned Ruffin within 120 days.[96] Ruffin argued that his release from restriction did not reset his speedy trial clock to zero under R.C.M. 707(b)(3)(B), because there had not been a "significant period" between his release from restraint and preferral of charges (only one day).[97] Therefore, Ruffin contended that his start date was the date the command placed him in pretrial restraint (10 December 1993).[98] Accord-

83. MCM, *supra* note 1, R.C.M. 707(c).

84. *See* United States v. Dies, 45 M.J. 376 (1996) (holding that periods during which the accused is absent without leave are automatically excluded from the R.C.M. 707 speedy trial clock).

85. *Id.* at 377. Whether the courts or the President continue this trend is an open question. As a 1997 new developments article on this subject pointed out, the field is potentially wide open for government and defense advocates to convince trial and appellate judges that specific equitable circumstances mandate another exception to the seemingly monolithic rule. Major Amy Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 14.

86. MCM, *supra* note 1, R.C.M. 707(b)(3)(E).

87. *Id.* R.C.M. 909(f). This fifth restart joins the other four restart provisions. *See id.* R.C.M. 707(b)(3)(A) (discussing dismissal or mistrial), 707(b)(3)(B) (discussing release from pretrial restraint for a significant period), 707(b)(3)(C) (discussing government appeals), 707(b)(3)(D) (discussing rehearings ordered or authorized by the appellate courts).

88. 48 M.J. 211 (1998).

89. Rule for Courts-Martial 707(b)(3)(B) restarts the speedy trial clock to zero when "the accused is released from pretrial restraint for a significant period . . . ." The clock then starts to tick again when a new triggering event occurs. MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

90. *Ruffin*, 48 M.J. at 211.

91. *Id.* at 212.

92. *Id.*

93. *Id.*

94. *See* MCM, *supra* note 1, R.C.M. 707.

95. *Id.*

96. *Id.*

97. *Id.*

ing to Ruffin, even excluding the authorized delays, the government arraigned him beyond 120 days.[99]

On appeal, the CAAF considered the purpose behind R.C.M. 707(b)(3)(B) and rejected Ruffin's argument.[100] The CAAF found that the harm R.C.M. 707 sought to prevent was continuous pretrial confinement (and sham releases for the sole purpose of restarting the clock). Relying on the drafter's analysis, the CAAF determined that the government should treat a service member who is released from pretrial restraint for a significant period of time as one who had not been restrained.[101] Since Ruffin's command never again placed him in pretrial restraint, his release was for a significant period.[102] Because the next speedy trial trigger was preferral on 16 February 1994, his speedy trial clock started then.[103]

Dismissal Without Prejudice: With Friends Like This, Who Needs Enemies?

Rule for Courts-Martial 707 allows the military judge to dismiss charges without prejudice,[104] upon a finding that the government violated the speedy trial provisions in R.C.M. 707. *United States v. Flarity*[105] continues a trend by the NMCCA to treat dismissal without prejudice as unreviewable, under Article 59, UCMJ.[106]

In his minority opinions in *United States v. Anderson*[107] and *United States v. Robinson*,[108] Judge Wynne expressed his view that the remedy of dismissal without prejudice under R.C.M. 707 was not reviewable by the service courts under Article 59(a), UCMJ. Under Judge Wynne's analysis, dismissal without prejudice is not a substantial right of the accused, since it does nothing for the accused beyond giving the government a second "bite at the apple" and—when granted on appeal—subjecting the accused to a second trial.[109] In *United States v. Flarity*,[110] Judge Wynne's view carried the day. Under this view, unless an accused can argue that the government's legal error has deprived him of a dismissal with prejudice, the NMCCA will not alter the findings or the sentence.[111] Whether other panels on the NMCCA—or other service courts—will adopt this rationale remains to be seen.[112] Defense counsel must vigorously make their case for dismissal with prejudice at the trial level by establishing that the government's violation of R.C.M. 707 has irreparably harmed their cases.[113]

98. *Id.* at 213. The 120-day clock starts (notwithstanding restarts) at the earlier of the imposition of pretrial restraint (but not conditions on liberty), entry on active duty, or preferral. MCM, *supra* note 1, R.C.M. 707(a).

99. *Ruffin*, 48 M.J. at 213.

100. *Id.*

101. *Id.* at 212.

102. *Id.* at 213.

103. *Id.*

104. The dismissal without prejudice provision is based on the Federal Speedy Trial Act, 18 U.S.C. § 3162. Rule for Courts-Martial 707(d) provides:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

MCM, *supra* note 1, R.C.M. 707(d).

105. 48 M.J. 545 (N.M. Ct. Crim. App. 1998).

106. Article 59(a) provides that the appellate courts cannot hold a finding or sentence "incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (1999). Given the NMCCA's interpretation of reviewability, unless the court found dismissal with prejudice appropriate, the court would affirm, notwithstanding a technical violation of R.C.M. 707 (also called "harmless error").

107. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

108. 47 M.J. 770 (N.M. Ct. Crim. App. 1997).

109. Many accused might argue that this is a benefit itself—a second shot at acquittal. Although many speedy trial motions are handled at the trial level, if the issue is resolved on appeal, the accused may find himself without further prosecution. The government may find further prosecution is not feasible, after such a delay, since evidence becomes lost, witnesses scatter, and memories fade.

110. 48 M.J. 545 (N.M. Ct. Crim. App. 1998).

111. Judge Wynne would impose a threshold requirement that the defense show substantial or presumptive prejudice before the court would consider the alleged violation of the appellant's speedy trial rights. Such a showing would establish a *prima facie* entitlement to dismissal with prejudice, which is a substantial right of the accused under Article 59(a), UCMJ. Quoting *United States v. Kossman*, Judge Wynne states that "[w]here the circumstances of delay [in trial] are not excusable . . . it is no remedy at all to compound the delay by starting all over." *Id.* at 546 (quoting United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1995)).

Article 10 v. R.C.M. 707: But Boss, We Were Within 120 Days . . . .

The right to a speedy trial in the military has multiple sources.[114] Each source has different rules, and compliance with one source does not necessarily guarantee compliance with another.[115]

In *United States v. Hatfield*, the CAAF held that complying with the R.C.M. 707 120-day clock does not necessarily ensure compliance with the standard of "reasonable diligence" under Article 10, UCMJ.[116] In *United States v. Calloway*, the NMCCA reaffirmed its commitment to this concept.

Private First Class David Calloway reported to the provost marshal that a noncommissioned officer had assaulted him. The next day, he found himself in pretrial confinement; eventually, the government charged him with disobeying and using disrespectful language toward noncommissioned officers.[117] The NMCCA characterized what next happened in his case as follows:

> After his confinement on 21 July 1995, the first action on his case was receipt of the Request for Legal Services, on 10 August 1995. Second, a week passed before any further action was taken on the case, when the Military Justice Officer reviewed it. Third, more than a month—34 days—passed before the next action on the case, which was preferral of the charge. Fourth, although a "brief" period of only 5 days passed between preferring the charge and delivering the charge to the defense section, there is no reasonable explanation as to why the appellant spent more than 2 months—66 days—in pretrial confinement before a defense counsel was assigned to him.
>
> Two days after the appellant was assigned a defense counsel, his case was docketed to go to trial on 30 October 1995—33 days later. Fifth, after the case was docketed, a week passed before the summary court-martial officer received the charge. The very next day, the charge was referred and the appellant was informed of the charge against him. Sixth, although the delay between receipt of the charge by the summary court-martial officer and the appellant being informed of the charge against him was brief, we find it significant that the appellant was informed of the charge 76 days after being placed in pretrial confinement. Seventh, although the military judge redocketed the case three times before the prosecution took any further action, the next action toward prosecution of the case was service of the referred charge upon the accused, which occurred 22 days after the charge was referred. Eighth, the next action toward prosecution of the case occurred 18 days after the appellant was

112. Dismissal without prejudice is new to military practice as of 1991. The CAAF has characterized the benefit the defense gets from such dismissal as "ephemeral." *See* United States v. Thompson, 46 M.J. 472, 476 (1997). Although it was finally included in the legislation, the American Bar Association (ABA) opposed dismissal without prejudice. The ABA's position was:

> the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right of speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

Act of January 3, 1975, Pub. L. No. 93-619, 88 Stat. 2076.

Testifying before Congress on this bill, Judge Alfonse J. Zirpoli said "I would be disposed to accept the view of the American Bar." *Id.* Dismissal without prejudice appears to be, as Judge Wynne says, an oxymoron. Presumably the President did not intend to provide speedy trial protection in R.C.M. 707 without a remedy. If the government was dilatory to the point that it violated the accused's rights under R.C.M. 707, what remedy is it to the accused to allow the government to begin anew under a freshly-restarted speedy trial clock? In his dissent in *United States v. Robinson*, Judge Wynne stated that "[t]he order of this court [dismissing findings and authorizing a rehearing for violation of speedy trial rights] . . . essentially prescribes that the accused may be tried again in exactly the same manner. The President could not have intended to create such a remedy . . . ." *Robinson*, 47 M.J. at 770 (Wynne, J., dissenting). Addressing this issue directly remains the province of the President, as the "proponent" of the Rules for Courts-Martial.

113. Defense counsel must also examine basing speedy trial motions on Article 10 or the Sixth Amendment. Dismissal with prejudice is the only remedy for a violation of these speedy trial provisions.

114. *See* U.S. CONST. amends. 5, 6; MCM, *supra* note 1, R.C.M. 707; UCMJ art. 10 (West 1999). *See also United States v. Ruffin*, 48 M.J. 211, 212 (1998); Colonel Thomas G. Becker, *Games Lawyers Play: Pre-Preferral Delay, Due Process and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1 (1998).

115. *See* United States v. Hatfield, 44 M.J. 22 (1996); United States v. Calloway, 47 M.J. 782 (N.M. Ct. Crim. App. 1998).

116. *Id.* at 262. *See Kossman*, 38 M.J. at 261. "Merely satisfying lesser presidential standards [in R.C.M. 707] does not insulate the [g]overnment from the sanction of Article 10." *Id.*

117. However unfair and one-sided the facts may have appeared, the NMCCA said they were not a factor in the government's loss. *Calloway*, 47 M.J. at 786.

served, when he was arraigned—115 days after being place in pretrial confinement.[118]

Faced with a speedy trial motion at trial, the military judge, although noting Article 10's supremacy over R.C.M. 707, found that the government did not violate Article 10. In addition, the military judge found that the government had complied with R.C.M. 707.

On appeal, the NMCCA disagreed that the government had prosecuted the case with reasonable diligence and found the judge abused his discretion in denying the motion. Importantly, the Court faulted the military judge for focusing on an R.C.M. 707-type analysis in denying the motion to dismiss for lack of speedy trial. Pointing out that there are no exceptions to the government's responsibility to prosecute the case with reasonable diligence, the court chided the military judge for "reliev[ing] the government of the burden of proof of reasonable diligence . . . by findings which said, in effect, 'I approved [the delay], so it's all right.'"[119] Accordingly, government counsel should beware; delays that toll the R.C.M. 707 speedy trial clock do not satisfy the government's obligation of reasonable diligence under Article 10.

Speedy Trial and the Status of Forces Agreement (SOFA)

In *United States v. Thomas*,[120] a case with increasing relevance given the growing frequency of deployments outside the United States, the CAAF examined how the military's speedy trial provisions apply in conjunction with an applicable SOFA.

Air Force Technical Sergeant Thomas was stationed at Rhein-Main Air Base in Germany.[121] Although married, Sergeant Thomas began a relationship with another woman, whom he met through a mutual friend.[122] Eventually, Sergeant Thomas tried to end the relationship, but his paramour did not want that to happen, phoning Sergeant Thomas several times a day.[123] Sergeant Thomas' girlfriend also told her friend that she was in love with Sergeant Thomas and wanted to marry him.[124] Frustrated with his former girlfriend's actions and concerned that his wife would divorce him, Sergeant Thomas told his roommate that he was going to try to get his former girlfriend deported from Germany;[125] failing that, he would have to do "something else."[126] That "something else" (as the government proved beyond a reasonable doubt at trial) was murder his former girlfriend, chop up her body, and then set fire to the pieces.[127]

On 21 September 1991, the German police arrested Sergeant Thomas for murdering his former girlfriend.[128] That same day, the Air Force took custody of Sergeant Thomas and held him in a military confinement facility on behalf of German authorities.[129] Under the North Atlantic Treaty Organization SOFA and its supplementary agreements, both the United States and Germany had jurisdiction to try Sergeant Thomas. German authorities, however, had the primary right to exercise jurisdiction over the case, unless the victim was "a member of the force or civilian component of [the sending state] or . . . a dependent. . . ."[130] Even if the Germans had the primary right of jurisdiction, the United States could ask the Germans to waive their primary right of jurisdiction.[131] If the Germans choose to waive

118. *Id.* at 784.

119. *Id.* at 787.

120. 49 M.J. 200 (1998).

121. *See* United States v. Thomas, 43 M.J. 626 (A.F. Ct. Crim. App. 1995) (explaining the facts more fully).

122. *Id.* at 628.

123. *Id.*

124. *Id.*

125. *Id.* His girlfriend was not a U.S. service member, a member of the civilian component, or a dependent. She was also Filipino, not German. These facts would became pivotal when the United States and Germany tried to determine which nation had primary jurisdiction over the case.

126. *Id.*

127. The head and hands were never found, and the body showed signs of having been subjected to repeated cuts with a knife, ax, or machete. Some bones had marks consistent with having been cut by a saw. *Id.* at 629-30.

128. United States v. Thomas, 49 M.J. 200, 206 (1998).

129. Had the Air Force not asked for custody, the military judge found that the appellant would have remained in a German jail until trial. *Id.* at 205.

130. North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. VII, para. 3, 4 U.S.T. 1792.

131. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 19, para. 1, 14 U.S.T. 531.

their primary right of jurisdiction, however, they could recall that waiver within twenty-one days if "major interests of German administration of justice make imperative the exercise of German jurisdiction."[132]

Because of the condition of the remains, determining the victim's identity became a major challenge. Pending identification, German authorities notified the Air Force that they intended to prosecute the appellant.[133] On 28 April 1992, scientific test results showed that the victim was not a member of the force, civilian component or a dependent; therefore, Germany had primary jurisdiction.[134] On 12 May 1992, however, the United States asked Germany to waive its jurisdiction, which Germany did on 29 May 1992.[135] The Air Force preferred charges against Sergeant Thomas the same day. Although the government arraigned Sergeant Thomas 195 days after preferral, 140 days were approved delays that were requested by the defense.[136]

On appeal, Sergeant Thomas argued that because the United States requested that Germany waive its primary right to jurisdiction, and could have done so earlier, the United States had primary jurisdiction. Accordingly, Sergeant Thomas claimed that this time counted for speedy trial purposes.[137] The military judge found that although the SOFA allowed the United States to request a waiver of jurisdiction, it did not indicate when the United States had to do so. The military judge found that Sergeant Thomas was not available to be tried by the United States until Germany waived jurisdiction, which they would not have done earlier under the circumstances.[138] Agreeing with the Air Force Court of Criminal Appeals, the CAAF held that the military judge's decision denying the defense motion was not an abuse of discretion.[139]

From this decision, overseas practitioners can gain some degree of comfort that the United States need not request jurisdiction at the first available moment. Nevertheless, *Thomas* stops short of saying that SOFA provisions completely insulate the government from speedy trial challenges. Government counsel should not consider this case as authority for delaying requests for jurisdiction solely for speedy trial purposes; under less compelling facts, the court may decide differently.

How Far Can the Government Twist That Arm?

In *United States v. Benitez*,[140] the NMCCA reminded all practitioners to beware of pretrial agreements (PTAs) that require a waiver of speedy trial motions.

Prior to his general court-martial, Airman Recruit Benitez entered into a PTA with the government, which, among other provisions, required him to waive "all non-constitutional or non-jurisdictional motions."[141] At trial, the military judge determined that the defense could have made a valid speedy-trial motion, but for the PTA. The judge further found that the PTA term had originated with the government.[142] Citing R.C.M. 705(c)(1)(B)[143] and *United States v. Cummings*,[144] the NMCCA held that the provision violated public policy because it was initiated by the government to prevent the accused from raising his speedy trial motion.[145]

The NMCCA's decision in *Benitez* is sound and one that the clear language of R.C.M. 705 supports. Speedy trial is a partic-

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132. *Id*. para. 3. "Major interests" include "offenses causing the death of a human being . . . ." The Protocol of Germany to the Supplemental Agreement to the NATO SOFA, para. 2(a)(ii).

133. United States v. Thomas, 43 M.J. 626, 637 (A.F. Ct. Crim. App. 1995).

134. *Id.*

135. Germany told the United States that it would not recall its waiver of jurisdiction under the Protocol of Germany. *Thomas*, 49 M.J. at 207.

136. *Thomas*, 43 M.J. at 638.

137. *Thomas*, 49 M.J. at 207.

138. *Thomas*, 43 M.J. at 638. The military judge apparently relied on several factors. First, the victim's identity determined who had primary jurisdiction. Identity, however, was not finally determined until 29 April 1992 by dioxyribonucleic acid test results (although investigators determined in March 1992 that the victim's identity was such as to give Germany primary jurisdiction). Second, Germany consistently indicated its desire to prosecute the case. Finally, because the death penalty was possible in the military, but not under German law, Germany would have retained jurisdiction if it thought the imposition of the death penalty was a possibility.

139. *Id.*

140. 49 M.J. 539 (N.M. Ct. Crim. App. 1998).

141. *Id.* at 540.

142. *Id.*

143. MCM, *supra* note 1, R.C.M. 705.

144. 38 C.M.R. 174 (C.M.A. 1968).

ularly important right for soldiers in pretrial confinement, given the absence of bail in the military. Free market trends from the appellate courts in other areas notwithstanding,[146] practitioners should not cheapen the fundamental rights that speedy trial provisions protect, in the name of time off of a prospective sentence.[147]

Conclusion

Last year saw the R.C.M. catch up with case law in some areas. Case law has also jumped ahead of the R.C.M. in other areas, leaving the R.C.M. ripe for future amendments. Finally, 1998 has seen the service courts raise issues that can only be resolved by the CAAF or by presidential action. Until then, advocates on both sides of the courtroom have fodder for creative representation in both the pretrial restraint and speedy trial areas.

145. *Benitez*, 49 M.J. at 541. Contrast this with provisions that require the defense to waive requests for sentence credit, which are allowed. United States v. McFadyen, 1998 WL 742395 (A.F. Ct. Crim. App. Sept. 9, 1998).

146. *See generally* United States v. Burnell, 40 M.J. 175, 177 n.5 (C.M.A. 1994) (holding that the government can include as a provision in a pretrial agreement that the accused must proceed to trial by military judge alone, and stating that "[no accused has] a right to a sentence-limiting, pretrial agreement."). *See also* United States v. Weasler, 43 M.J. 15 (1995) (holding that a pretrial agreement can also contain a term by which the accused waives an unlawful command influence issue).

147. *See generally* United States v. Gregory, 21 M.J. 952, 959 n.3 (A.C.M.R. 1986). While the ACCA eschews pretrial confinement credit as a substitute for the due process and military due process protections contained in R.C.M. 305, the discussion could just as easily have been about speedy trial rights. These protections are what "so strongly separates military service in a democracy from military service in a police state." *Id.*

A Few New Developments in the Fourth Amendment

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Introduction

The past year has been relatively quiet along the Fourth Amendment front. The Supreme Court has issued only four opinions addressing significant search and seizure issues.[1] Similarly, the Court of Appeals for the Armed Forces (CAAF) has issued only a handful of published opinions on the topic.[2] Given the paucity of cases, one might assume that the Fourth Amendment, despite all of its requirements and exceptions, is a relatively stable body of case law. One might also expect that the few cases from the Supreme Court and the military courts leave important Fourth Amendment doctrines unchanged, and that few questions remain.

Those assumptions would be incorrect. Several of the recent cases dealt with extremely important Fourth Amendment issues and further developed Fourth Amendment doctrines. Other cases raised new Fourth Amendment issues. Thus, while it may have been a "light" year for the Fourth Amendment in terms of the number of opinions on the topic, it was certainly not an insignificant one.

This article examines the major Fourth Amendment case holdings by the Supreme Court and the military courts during 1998. After offering a brief analysis of the opinions, the article then presents some practical considerations for counsel confronted with Fourth Amendment issues. For purposes of clarity, this article first address those cases that deal with the predicate question of whether an expectation of privacy exists. The article then examines the cases that discuss probable cause. Next, the article examines the concept of the "reasonableness" of the execution of a search, addressed in *United States v. Ramirez*.[3] Finally, this article examines cases that discuss some of the exceptions related to Fourth Amendment requirements, and reviews *United States v. Jackson*, a military case that deals with military inspections.[4]

Reasonable Expectations of Privacy

Expectations of Privacy in Financial Records

For the Fourth Amendment to apply at all, the person asserting its protections must claim that the government intruded into an area in which he had a "reasonable expectation of privacy."[5] This is normally broken down into a two-part test, as set forth in *Katz v. United States*.[6] First, the person who asserts the Fourth Amendment protection against unreasonable searches and seizures must show that he actually believed he had an expectation of privacy in the area that was searched or the property that was seized. Second, he must show that society would view this belief as objectively reasonable.[7] This is the so-called subjective/objective test that is the starting point for much of Fourth Amendment analysis. If the accused cannot show that he had both a subjective and objective expectation of privacy, the question about whether law enforcement officials properly conducted the search is moot.[8] In such a case, his privacy, as defined under the law, is not intruded upon in that case, the Fourth Amendment is not implicated, and no search or seizure took place.

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1. *See, e.g.*, United States v. Ramirez, 118 S. Ct. 992 (1998); Pennsylvania Bd. of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998); Knowles v. Iowa, 119 S. Ct. 484 (1998); Minnesota v. Carter, 119 S. Ct. 469 (1998).

2. *See, e.g.*, United States v. Hester, 47 M.J. 461 (1998); United States v. Miller, 48 M.J. 49 (1998); United States v. Curry, 48 M.J. 115 (1998); United States v. Light, 48 M.J. 187 (1998); United States v. Jackson, 48 M.J. 292 (1998).

3. *Ramirez*, 118 S. Ct. at 992.

4. *Jackson*, 48 M.J. at 292.

5. Fourth Amendment protections were originally conceived as property-type interests. *See* Boyd v. United States, 116 U.S. 616 (1886). The seminal case in modern search and seizure law, in which the Supreme Court shifted to analyzing Fourth Amendment protections as privacy, not proprietary, interests is *Katz v. United States*. *See* Katz v. United States, 389 U.S. 347 (1967) (establishing the Fourth Amendment "reasonable expectation of privacy" standard).

6. *Id.* at 361 (Harlan, J., concurring).

7. *Id.*

8. Unlike most constitutional tests, the burden of proof in establishing a reasonable expectation of privacy is on the defendant, who must establish *both* prongs of the test. *See* Smith v. Maryland, 442 U.S. 735 (1979); United States v. Thatcher, 13 M.J. 75 (C.M.A. 1982); United States v. Ayala, 26 M.J. 190 (1988).

What has happened from time to time, however, is that lawmakers have passed statutes that create privacy rights in areas in which courts had previously deemed that no expectation of privacy exists. One such statute is the Right to Financial Privacy Act (RFPA).[9] The RFPA resulted from a Supreme Court holding that stated that a person has no reasonable expectation of privacy in financial records.[10] As a result, Congress enacted the RFPA in 1978, which makes it illegal to obtain personal finance records without obtaining some form of warrant through the appropriate court or agency.[11]

The question as to whether the RFPA applies to military members, thus providing them with the same financial privacy rights as civilians, arose in *United States v. Curtain*.[12] In a recent case, *United States v. Dowty*,[13] the CAAF revisited this issue, along with the related question of whether the RFPA applies to the military *in its entirety*, or whether parts of it are "trumped" by statutes that deal with the same issues under the UCMJ.[14]

In *Dowty*, the Naval Criminal Investigative Service (NCIS) investigated the accused for filing fraudulent claims to Bethesda Naval Medical Center since 1994. The NCIS agents subpoenaed the accused's records with a Department of Defense inspector general subpoena.[15] One of the provisions of the RFPA provides that when such an agency issues an administrative subpoena for financial records, the agency must notify the person whose records have been subpoenaed that he has the right to contest the subpoena in the appropriate federal court.[16] Dowty contested the subpoena in federal court and the parties litigated the issue for eight months.

Several criminal acts allegedly had occurred in 1990 and 1991. As a result, when the government finally preferred the charges in 1996, the five-year statute of limitations under Article 43, UCMJ, had elapsed.[17] Under the RFPA, however, the eight months spent litigating the subpoena tolled any applicable statute of limitation.[18] The operative question for the CAAF was whether the RFPA tolling provision should apply to Article 43, UCMJ.

Judge Effron's analysis had to do more with statutory application per se than the Fourth Amendment. He stated that, in absence of a valid military purpose, service members have the same rights as civilians, and statutes protecting those rights apply equally to them.[19] Therefore, in dealing with this issue, counsel must look to the *purpose* of a statute and consider whether the statute potentially contradicts military good order and discipline if it is applied to military personnel.[20]

In *Dowty*, Judge Effron held that the RFPA did not contradict military good order and discipline.[21] Accordingly, the rules of RFPA, including its rules on tolling statute of limitations, apply. In so holding, the CAAF rejected the government's argument that the sole exceptions to the Article 43 statute of limitations are contained in Article 43 itself.[22] It premised this rejection on four grounds. First, allowing the statute of limitations rules in Article 43 to "trump" the RFPA tolling requirement would turn the RFPA into a "sword" to defeat criminal prosecutions and not just a "shield" to protect financial privacy.[23] Second, when Congress modified Article 43 in 1986, it did so only to increase the length of the statute of limitations and did not consider its relationship to other statutes.[24] Third, as evident in the RFPA's

9. *See, e.g.*, 12 U.S.C.A. §§ 3401-3422 (West 1999).

10. *See* United States v. Miller, 425 U.S. 435 (1976).

11. Unless the customer consents, the RFPA requires the federal government to obtain financial records by means of an administrative subpoena, search warrant, judicial subpoena, or formal written request. 12 U.S.C.A. § 3402.

12. United States v. Curtin, 44 M.J. 439 (1996).

13. 48 M.J. 102 (1998).

14. *Id.* at 109-10.

15. *Id.* at 104.

16. 12 U.S.C.A. § 3410.

17. UCMJ art. 43(b)(1) (West 1999). Article 43(b)(1), UCMJ states: "[A] person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." *Id.*

18. 12 U.S.C.A. § 3419.

19. *Dowty*, 48 M.J. at 107.

20. *Id.*

21. *Id.* at 108.

22. *Id.*

language, Congress intended the RFPA to apply to all applicable statutes.[25] Finally, the Department of Defense and the military services contemporaneously implemented the RFPA.[26]

What are the implications of *Dowty* for Fourth Amendment law in the military? Beyond the immediate impact of the tolling provision applying to service members, it establishes a precedent for analyzing other statutes that provide privacy protections in the absence of, or even contrary to, judicial decisions. In analyzing such statutes, counsel should look initially to the court's holding that such statutes presumptively apply to service members. Next, counsel should consider the courts holding that the presumption is overcome only if the statute, as applied to service members, would contradict good order and discipline. The court in *Dowty,* however, goes further: it examines whether *parts* of a statute should apply, or whether the statute should apply in its entirety. The irony in *Dowty* is that allowing the operative military law—Article 43(b)(1), UCMJ—to apply potentially would undermine good order and discipline. The whole application of the RFPA, to include its statute of limitations, would not. The language of *Dowty* suggests that CAAF will look at a statute's particular parts as well and possibly "pick and choose" which parts should or should not apply to the military, based on policy reasons. Whether or not this sets a destabilizing precedent is hard to say.[27] With increasingly sophisticated technology that impacts privacy interests (such as e-mail communications, Internet websites, and cellular phones), Congress will likely pay more and more attention to privacy; more privacy legislation is therefore likely.

Expectations of Privacy in the Barracks: United States v. Curry

The issue of what constitutes a "reasonable expectation of privacy" in a barracks—if such an expectation even exists—has been one of the most prominent Fourth Amendment issues in military law since *United States v. McCarthy.*[28] In *United States v. Curry,*[29] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) again dealt with the privacy issue. Yet, when the case came before the CAAF, the court only dealt with this issue in a brief *per curium* opinion, and did not discuss the reasonable expectation of privacy issue at all.[30] In light of *McCarthy,* the status of a right to privacy in the barracks remains somewhat unresolved.

In *Curry,* military police (MP) responded to a call that a homicide would take place in fifteen minutes at a barracks room on the base.[31] They arrived at the room, knocked on the door, and received no answer.[32] One MP then lifted another MP up on his shoulders to look into the barracks room through a gap in the curtains.[33] Inside, he saw a man lying motionless on the bed. The MPs knocked again, but the occupant did not respond.[34]

23. *Id.* at 109-10.

24. *Id.* at 110.

25. *Id.* at 111.

26. *Id.*

27. Judge Cox's dissent in *Dowty* reads the majority's approach as a form of judicial policy-making. According to him:

> Indeed, when you read that opinion [Judge Effron's] you get a warm feeling that it is the right thing to do. It seems just and proper that we toll the statute of limitations against the appellant, because it must be said that he availed himself of the procedural protections of the Right to Financial Privacy Act, 12 U.S.C.A. §§ 3401-3422. How can he now be heard to complain that the statute of limitations found in Article 43 was tolled while he sought the protection of the courts from the governmental search of his bank accounts?
>
> . . . .
>
> This approach, however, begs the question: Can we, or should we, look without the Uniform Code of Military Justice to find laws to expand the statute of limitations on prosecutions of offenses committed by military members?

Id. at 113 (Cox, J., dissenting).

28. 38 M.J. 398 (C.M.A. 1993).

29. 46 M.J. 733 (N.M. Ct. Crim. App. 1997).

30. 48 M.J. 115 (1998) (per curiam).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

After waiting for several minutes for the barracks duty officer to arrive with the passkey, the MPs entered the barracks room and found Curry laying face up with his wrists slashed and bleeding.[35] While applying first aid, one MP noticed several sheets of paper folded in a bracket in a nearby desk.[36] Thinking they might be suicide notes that might help them determine if Curry had ingested something lethal, an MP opened them and found two notes incriminating Curry in the murder of a lance corporal.[37]

At trial, Curry moved to suppress the letters. The military judge, however, ruled that looking into the room from a public sidewalk was not a search, and the entry itself was lawful as an emergency search to save a life.[38] On appeal, the NMCCA considered whether or not looking into the room constituted a search. In so doing, the court placed little emphasis on *Katz v. United States*.[39] Rather, the court focused more attention on *Dow Chemical v. United States*, which held that the government has greater latitude to conduct warrantless inspections in areas where there is a "reduced expectation of privacy."[40]

The Navy-Marine Corps Court applied *Dow's* "reduced expectation of privacy" standard to interpret the *McCarthy* holding.[41] The court stated that *McCarthy* need not be read "to say that there is no circumstance under which a military member would have a reasonable expectation of privacy in a military barracks room to conclude that this appellant [Curry] had, at least, a *reduced* expectation of privacy in his barracks room."[42] In light of this reduced expectation of privacy, the court held that the judge did not abuse his discretion in ruling that the initial observation was not a search.[43] In so holding, the court relied on several facts: (1) that the MPs had not physically intruded into the room when they saw the body, (2) that the MPs did not use sophisticated surveillance equipment, and (3) that the MPs were on a public sidewalk (although not at the same height a normal person would be) when they looked into the room.[44]

That "abuse of discretion" standard applied by the lower court created an appellate issue when the case went before the CAAF. The CAAF upheld the decision in a *per curium* opinion.[45] The CAAF clarified that Fourth Amendment issues are reviewed *de novo*, and not under an abuse of discretion standard.[46] With only scant discussion, the opinion simply asserted that the military judge "did not err" in admitting the evidence under the emergency exception to the Fourth Amendment. The CAAF did not comment on the initial peering through the gap in the curtains prior to the emergency search. The CAAF also did not comment on the NMCCA's opinion that a "reduced expectation of privacy" in the barracks existed, rather than no expectation of privacy at all. It did not indicate the NMCCA was correct in its reading of *McCarthy.* Moreover, the CAAF did not step in and indicate that the NMCCA's analysis of the search was unnecessary because no reasonable expectation of privacy exists in the barracks.[47]

Reading these two cases together, therefore, leads one to assume that *McCarthy* did not abolish any expectation of privacy in the barracks, but reduced it to a lower level than one finds in private civilian dwellings. By failing to comment on the standard in *Curry*, which was modeled on *Dow*, the CAAF allows itself flexibility in deciding how to establish more definitive guidelines. At least the lower court's decision in *Curry* reaffirmed that the "sacred curtilege" doctrine does not apply in the military barracks. Accordingly, peering through gaps in the curtains into a barracks room will *not* constitute an unreasonable intrusion.[48] Although it did not look at the reasonable expectation of privacy issue, the CAAF did address the ques-

35. *Id.*

36. *Id.*

37. *Id.* at 115-16.

38. United States v. Curry, 46 M.J. 733, 736 (N.M. Ct. Crim. App. 1997).

39. *Id.* (citing Katz v. United States, 389 U.S. 347 (1967)).

40. *Id*. at 739-40 (citing Dow Chemical v. United States, 476 U.S. 227 (1985)). The court also discussed reduced expectations of privacy in automobiles. *Id.* (citing California v. Carney, 471 U.S. 386 (1984); South Dakota v. Opperman, 428 U.S. 364 (1976)).

41. "Therefore we will apply by analogy the *Dow* reduced expectation of privacy standard in determining whether surveillance of a service member in a military barracks room constitutes a Fourth Amendment search." *Id.* at 740.

42. *Id.* (emphasis added).

43. *Id.*

44. *Id.*

45. United States v. Curry, 48 M.J. 115 (1998) (per curiam).

46. *Id.* at 116.

47. *Id*.

tion of physically *entering* the room under the emergency search doctrine, which also applies in the civilian context. Therefore, it is difficult to determine exactly what a "diminished expectation of privacy" in the barracks means, aside from apparently meaning that the "sacred curtilege" doctrine does not apply. *McCarthy*, read in light of *Curry*, will continue to generate controversy.

Minnesota v. Carter: Asserting Privacy During Business (Whether Legal or Not)

The Supreme Court also focused on expectations of privacy in *Minnesota v. Carter*.[49] In that case, the Court held that the defendants, who were in another person's apartment for a brief period of time for the sole purpose of packaging cocaine, did not have a reasonable expectation of privacy in the apartment.[50]

In *Carter*, a police officer, relying on a tip from a confidential informant, went to an apartment building to investigate drug activity.[51] He looked through the same window that the informant had peered through. Through a gap in the curtains, he observed two men bagging cocaine.[52] It was later revealed that the two men had never been to the apartment before, were there for only two and half-hours, and had come to the apartment for the sole purpose of bagging the cocaine.[53]

Writing for the majority, Chief Justice Rehnquist rejected any analysis under the Fourth Amendment's "standing" doctrine, citing the Court's rejection of that doctrine in the case *Rakas v. Illinois*.[54] Instead, Rehnquist focused on the substantive Fourth Amendment doctrine of whether the defendants had a reasonable expectation of privacy in the apartment.[55] The test, as enunciated by Rehnquist was twofold: "[A] defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable . . . ."[56]

While that language evokes the two-part *Katz* test, the court did not explicitly read the facts under the *Katz* subjective/objective test. Although Rehnquist referred to the famous line from *Katz* that "[T]he Fourth Amendment protects people not places,"[57] he focused in particular on the Court's holding in *Minnesota v. Olson*, which held that overnight guests do have an expectation of privacy.[58] Distinguishing the two cases, Rehnquist focused on several particular facts in *Carter*: (1) the lack of a previous connection between the apartment owner and the defendant, (2) the "purely commercial nature of the transaction," and (3) the short amount of time on the premises by the defendant.[59]

While *Minnesota v. Carter* may not shed light on the debate about expectations of privacy in the barracks, it did reaffirm (even if it did not explicitly follow) the "reasonable expectation of privacy" doctrine of *Katz*. Additionally, it rejected any idea of analyzing Fourth Amendment searches and seizures under the "standing" concept. Finally, it again demonstrated that drug dealers "rarely win in the Supreme Court by invoking the Fourth Amendment."[60] It would be misleading to conclude that it creates a "bright line rule," with "private" activity as protected and "commercial" activity as not. Several questions remain unanswered. For example, at what point would the drug dealers' activities in the apartment become "private" and not simply commercial? What if the operation had taken them through the night, forcing them to sleep there, even briefly? The fluidity of the reasonable expectation of privacy concept—criticized by Scalia in his concurrence[61]—lends itself to this fact-dependent determination, and, consequently, to the endless permutations on the scope of Fourth Amendment protection.

48. The Court of Military Appeals (now the CAAF) previously addressed this question in *United States v. Wisniewski*. In *Wisniewski* the court held that peering through a 1/8 inch by 3/8 inch crack in the venetian blinds from a barracks was not a search. *See* United States v. Wisniewski, 21 M.J. 370 (C.M.A. 1986).

49. 119 S. Ct. 469 (1998).

50. *Id.*

51. *Id.* at 471.

52. *Id.*

53. *Id.*

54. *Id*. at 472 (citing Rakas v. Illinois, 439 U.S. 128, 139-40 (1978)).

55. *Id.*

56. *Id.* (citation omitted).

57. *Id.* at 473 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

58. *Id.* at 473-75 (citing Minnesota v. Olson, 495 U.S. 91 (1990)).

59. *Id.* at 474.

60. David G. Savage, *Police Peeking Protected*, A.B.A. J., Feb. 1999, at 32.

Probable Cause Issues

Probable Cause: Aguilar and Spinelli are Dead . . . Sort of . . . .

One of the most important determinations in Fourth Amendment law is whether probable cause exists to justify a search or seizure. If the government intrudes into an area where a person has a reasonable expectation of privacy, the search or seizure must be supported by probable cause, unless an appropriate Fourth Amendment exception applies. Probable cause determinations were, for many years, made using the two-pronged *Aguilar-Spinnelli* test, named after a pair of Supreme Court cases.[62] The two prongs that had to be satisfied were: (1) the "basis of knowledge" prong (how did an informant know evidence was where he said it was), and (2) the "veracity" prong (why is the informant reliable or credible?).[63] Furthermore, the government could use corroborative evidence to "bolster" one or both of the prongs.[64]

The Supreme Court replaced the *Aguilar-Spinnelli* test with a more fluid "totality of the circumstances" test in the landmark case *Illinois v. Gates*.[65] *Aguilar-Spinnelli*, however, did not "die," at least as a valuable method to determine probable cause.[66] The CAAF recently demonstrated the usefulness of this test in *United States v. Hester*.[67]

Hester was convicted of possessing and distributing marijuana, and received eight years confinement. The issue before the CAAF was whether the search authorization of his on-post room at the Young Men's Christian Association (YMCA) by a military magistrate was supported by probable cause.[68] In arguing that probable cause did not exist, Hester asserted that the informant, who provided the information for the search, had no history of credibility, had made no statement against interest, was jealous because he was seeing another woman, was herself a drug user, and had never been in the YMCA room.[69]

Writing for the majority, Judge Crawford acknowledged that the required test was the *Illinois v. Gates* "totality of the circumstances" test. Nevertheless, she analyzed the probable cause question under the old *Aguilar-Spinnelli* test.[70] According to Judge Crawford, the government satisfied the first prong of the test. In the facts, Hester had told the informant that he had forty-five bags of marijuana stored (strangely enough, in *her* own house), that he intended to distribute the marijuana, that he resided in room 103 at the YMCA, and that he would be "rocking" (slang for making crack) in his YMCA room.[71]

Using the *Aguilar-Spinnelli* test, the troublesome questions arose concerning the "veracity" prong. While Hester's own statements to the informant established her basis of knowledge, how was this informant credible? As permitted by *Aguilar-Spinnelli*, the court relied on the corroboration of some of her statements. This first-hand information was at least partially corroborated prior to the search taking place: forty-five bags of marijuana were indeed found in her house, and a CID agent confirmed that Hester was staying at room 103 in the YMCA.[72] Therefore, both prongs were sufficiently satisfied, and probable cause existed to conduct the search.[73]

One may wonder—as Judge Sullivan did in his concurrence—about using a test that is no longer required.[74] The answer may be that, while *Aguilar-Spinelli* is not required, it

61. *Carter*, 119 S. Ct. at 476 (Scalia, J., concurring). "In my view, the only thing established about the *Katz* test . . . is that, unsurprisingly, those actual (subjective) expectation[s] of privacy that society is prepared to recognize as reasonable . . . bear an uncanny resemblance to those expectations of privacy this Court considers reasonable." *Id*. (citing *Katz*, 389 U.S. at 361).

62. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

63. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 9.04, at 131 (2d ed. 1997).

64. *Spinelli*, 393 U.S. at 415.

65. 462 U.S. 213 (1983).

66. *Id.* at 272-74 (White, J., concurring).

67. 47 M.J. 461 (1998).

68. *Id.*

69. *Id.*

70. *Id.* at 463-65.

71. *Id.* at 462.

72. *Id.* at 465.

73. *Id*.

74. *Id.* at 466 (Sullivan, J., concurring).

still provides a practical standard for the court. This test is a way for the court to break probable cause down into two understandable elements, as opposed to the amorphous "totality of the circumstances" test of *Illinois v. Gates*. Further, the older test is more "stringent" than *Illinois v. Gates*:[75] the judge making the ruling can feel assured that if the *Aguilar-Spinelli* criteria are met, the required *Illinois v. Gates* threshold will be cleared. In light of *Hester*, it may be helpful for the government to consider using the older test when establishing probable cause, for analytical clarity, while understanding that the test is not the required one.

Polygraphs and Probable Cause

Does Military Rule of Evidence (MRE) 707, which prohibits the use of polygraph evidence, apply to *all* phases of a court-martial, to include motions hearings, or solely to the trial on the merits?[76] The CAAF deliberately avoided answering that question this year in a case involving polygraph testing and probable cause. The case, *United States v. Light*,[77] involved stolen night vision goggles (NVGs). After an overnight training exercise, Light's commander discovered that a set of NVGs was missing. The command subsequently locked down the unit for twenty-three days.[78] Suspicions centered on Light, who failed a polygraph.[79] Three weeks after the NVGs were discovered missing, a Texas justice of the peace issued a warrant to search Light's off-post apartment, based, in part, on the failed polygraph test.[80] Investigators found the NVGs in the apartment, and Light was charged and subsequently convicted of larceny.[81]

One question before the court was whether the probable cause determination was valid, given that it was based, in part, on the polygraph examination.[82] Judge Crawford examined both MRE 707, which appears to prohibit the use of polygraph information in courts-martial, and MRE 104, which allows a military judge to use any unprivileged information when determining preliminary evidentiary questions.[83] Noting the inherent tension between the two, she avoided ruling on which rule "trumps" the other. Instead, she asserted that the President "may choose to clarify" the matter.[84] The court upheld the warrant because there was sufficient information independent of the polygraph test to justify a probable cause search.

Because of the ambiguity in MRE 707, it is safe to conclude that the polygraph result itself should not be the *sole* basis for a probable cause determination. What gives the issue added complexity, however, is the possibility of the "good faith" exception for law enforcement officials who obtain the search warrant or authorization.[85] If the magistrate makes a probable cause determination on the basis—in part or totally—of a polygraph result, and the police rely in "good faith" on the warrant, why would obtained evidence be excluded? The MRE do not explicitly prohibit the government from presenting polygraph results to a magistrate; therefore, it would be hard to say that "bad faith" existed. Furthermore, under the *Illinois v. Gates* "totality of the circumstances" test, one might reasonably conclude that this type of evidence is appropriate for a magistrate to use in making the probable cause determination. Until a definite statement on the applicability of MRE 707 is made, however, government counsel who are attempting to use polygraph evidence for preliminary matters, such as motions, should proceed with caution.

The Reasonableness of Executions of Searches and Seizures

"Knock and Announce": Warrants and the Destruction of Property

75. "Thus, the military magistrate had probable cause to issue the search authorization, even under the more stringent *Aguilar-Spinelli* probable cause test." *Id*. at 465.

76. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (1998) [hereinafter MCM].

77. 48 M.J. 187 (1988).

78. *Id*. at 188.

79. *Id.* at 189.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 190-91. The court noted that MRE 707 was, in part, an adaptation of section 351.1(a) of the California Evidence Code. Military Rule of Evidence 707, however, omits the provision in that statute that prohibits the use polygraph evidence in pre- and post-trial motions and hearings. *Id.* at 191.

84. *Id*. at 191.

85. The Supreme Court announced the "good faith" exception in *United States v. Leon. See* United States v. Leon, 468 U.S. 897 (1984). This exception provides that evidence obtained pursuant to a search warrant that lacks probable cause may nevertheless be admitted into trial if the law enforcement official who obtained the warrant reasonably believed the warrant was valid. *Id.* For the military, MRE 311(b)(3) codifies the good faith exception. MCM, *supra* note 76, MIL. R. EVID. 311(b)(3).

The Supreme Court has recently devoted more attention to how law enforcement officials execute a Fourth Amendment search,[86] focusing in particular on so-called "no-knock" warrants.[87] The Supreme Court further developed this area of Fourth Amendment law in *United States v. Ramirez,*[88] which dealt with property destruction during the execution of a warrant.

In *Ramirez*, police obtained information that an armed and highly dangerous felon was staying in Ramirez's home.[89] The police also had information that there might be a stash of weapons in his garage.[90] In order to protect themselves from someone obtaining a weapon from the garage during the warrant's execution, they broke a single garage window.[91] An officer pointed a gun through the broken window to dissuade entry into the garage, while other officers simultaneously announced the warrant.[92]

The lower courts held that the police violated both the Fourth Amendment and California law because there was insufficient exigency to warrant the destruction of the window. The lower courts made this finding even though the government met the reasonable suspicion standard for a "no-knock" warrant under *Richards v. Wisconsin*.[93] While a "mild exigency" might be sufficient to justify a no-knock entry, more specific inferences of exigency were needed to justify property destruction.[94]

The Supreme Court rejected the necessity for a higher standard to justify the destruction or damage of private property during the execution. The same test the Supreme Court articulated for a so-called "no-knock warrant"—whether there is reasonable suspicion that knocking and announcing would be dangerous, futile, or destructive to investigation—applies in determining whether property needs to be destroyed.[95]

The case does not fully explain the "reasonable suspicion" test. It appears, however, that destruction of property is permissible if a law enforcement official has a reasonable suspicion that something will occur that would be dangerous, futile, or destructive to an investigation, and that destruction of property would prevent this. Of course, the Court implies that the destruction must be reasonable.[96] Thus, a police officer who has a reasonable suspicion that an event will occur (for example, that someone would go into the garage and get a firearm), must still execute the warrant in a fashion that is tailored to this suspicion. In this case, breaking one window was reasonable because it caused minimal property damage. Obviously, setting the garage ablaze would have been unreasonable. The more problematic question is how far the police can go in executing a warrant to ensure injury or evidence destruction does not happen. In the modern world of well-armed drug traffickers, extremists, and terrorists, *Ramirez* leaves some interesting questions unanswered.

United States v. Miller: "Suspect" and "Reasonable Suspicion"— What One Word Can Do

The standard for what justifies a so-called "*Terry*" stop, based upon the famous Supreme Court case *Terry v. Ohio*,[97] is reasonable suspicion. This standard is defined for the military in MRE 314(f).[98] But is having reasonable suspicion as defined in MRE 314(f) equivalent to considering a person a "suspect?" Language in a recent CAAF opinion, *United States v. Miller*,[99] suggests that the court considered the standards the same.

86. The most recent case is *City of West Covina v. Perkins*, which was decided in January 1999. *See* City of West Covina v. Perkins, 119 S. Ct. 678 (1999) (holding that when police seize property, they are not required to provide the owner with notice of available state law remedies to recover the property).

87. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927 (1995) (discussing the common law requirement that law enforcement officials must knock and announce their presence before executing a warrant); Richards v. Wisconsin, 520 U.S. 385 (1997) (holding that blanket statutory exceptions to this requirement are not permitted; case-by-case assessment required).

88. 118 S. Ct. 992 (1998).

89. *Id.* at 995.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 996. Under *Richards v. Wisconsin*, police can dispense with the "knock and announce" requirement if they have reasonable suspicion that knocking and announcing could be dangerous, futile, or destructive to investigation's purpose. *See* Richards v. Wisconsin, 520 U.S. 385 (1997).

94. *Ramirez*, 118 S. Ct. at 996.

95. *Id.* at 998.

96. Regarding the facts in *Ramirez*, the Court stated: "As for the manner in which the entry was accomplished, the police here broke a single window in respondent's garage . . . . Their conduct was clearly reasonable and we conclude that there was no Fourth Amendment violation." *Id.* at 997 (footnote omitted).

97. 392 U.S. 1 (1968).

Miller was one of five Marines who had been interviewed by an MP about a robbery.[100] That MP had released them back to their barracks when another MP, Lance Corporal Sepulvado, came on the scene.[101] Sepulvado had been investigating the same robbery that evening.[102] Miller then made some incriminating remarks to Sepulvado.[103]

Writing for the majority, Judge Gierke discussed the constitutional and UCMJ issues that were implicated in Sepulavdo's questioning. The CAAF first ruled that Sepulvado's interview of Miller was not a Fifth Amendment custodial interrogation because Miller was not restrained during the questioning.[104] It also held that Sepulvado did not conduct an interrogation that would have required him to advise Miller of his Article 31(b) rights.[105] The CAAF then moved into a Fourth Amendment analysis. It stated that Sepulvado's questioning did not constitute a *Terry* stop. Instead, Sepulvado only questioned the five Marines to find witnesses. The investigation had not narrowed enough for Sepulvado's questioning to "amount to a *Terry* stop."[106]

One might conclude that because the court held that Sepulvado's questioning did not amount to a *Terry* stop, such a stop has a lower threshold for invoking the rights advisement than does Article 31(b). But the actual language the court used equates the two. The opinion states: "We agree with the court below that the information available to Sepulvado falls short of the reasonable suspicion required for a *Terry* stop, and that no *Terry* stop occurred. *Accordingly,* we hold that appellant was not a suspect within the meaning of Article 31[b]."[107] In this case, the word "accordingly" creates the issue. In that last sentence, the court apparently equated the standard for being a "suspect" under Article 31(b) with the standard for making a *Terry* stop.

Are the standards the same? Case law discussing Article 31(b) requires an interrogator to give the rights advisement when he believes or should reasonably believe that the person being interrogated has committed an offense.[108] In the military, the *Terry* standard focuses on whether criminal activity may be afoot.[109] While the standards seem very similar, the editors of the *Military Rules of Evidence Manual* acknowledge, at least implicitly, that they are not synonymous.[110] Likewise, in the analysis of MRE 314(f), the drafters also comment that the two standards are generally—but not always—the same.[111]

98. According to Military Rule of Evidence 314(f):

> A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

MCM, *supra* note 76, MIL. R. EVID. 314(f).

99. 48 M.J. 49 (1998).

100. *Id.* at 53.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 54.

105. *Id.*

106. *Id.*

107. *Id.* (emphasis added).

108. *See* United States v. Morris, 13 M.J. 297 (C.M.A. 1982).

109. Military Rule 314(f) states:

> A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot.

MCM, *supra* note 76, MIL. R. EVID. 314(f).

110. "Although the Rule [314(f)] does not address the issues of duration or type of questioning which may take place after the stop, those making such stops should be sensitive to the *possibility* that the person detained may be a suspect entitled to rights warnings before being questioned." STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 373 (4th ed. 1997) (emphasis added).

Furthermore, in federal courts, the permissible basis for *Terry* stops have included so-called "unparticularized" bases for stops probably not rising to the level of Article 31(b) suspicion. These include reactions to the presence of police, the fact that a person does not "belong" at a particular place, and the locations where police observe suspects.[112] If the CAAF equates Article 31(b) and *Terry*, then it seems to reject such unparticularized *Terry* stops, for it would make no sense to read someone his Article 31(b) rights if the law enforcement official cannot particularize the offense he suspects the person of having committed.

This has obvious advantages for the defense. If a *Terry* stop occurs under this reading, an Article 31(b) rights advisement is required. Furthermore, if there is not "particularized" suspicion, then the *Terry* stop is invalid, and any evidence derived should be suppressed. A defense counsel may want to persuade a judge to hold the two standards synonymous using the language in *Miller.* The government's response may be to say that the CAAF was unclear on whether particularized suspicion is needed for a *Terry* stop. Furthermore, even if standards are practically synonymous in some cases, analysts have concluded that is not always the case.[113] Therefore, *Miller's* use of that word should not, in and of itself, define *Terry* stops in the military.

Searches Incident to Arrest: Drawing the Line at Arrest

One familiar Fourth Amendment exception is the search conducted incident to an arrest. The Supreme Court has held that if a person is arrested, police can search him as well as the area immediately within his "wingspan" without further probable cause or a search warrant.[114] When the police make arrests in automobiles, the "wingspan" includes the entire passenger compartment of the vehicle.[115] While this is a settled point of Fourth Amendment case law, an Iowa statute extended the ability to conduct such a search beyond arrests made pursuant to traffic stops. The Iowa statute allowed police to conduct a "wingspan" search when they issued traffic citations in lieu of making arrests.[116]

The Supreme Court held this statute unconstitutional in *Knowles v. Iowa*.[117] In that case, the police stopped Knowles after clocking him driving at forty-three miles per hour in a twenty-five mile per hour zone.[118] While under Iowa law the police officer who stopped Knowles could have arrested him, he instead issued a citation and then conducted a full search of the car. Under the driver's seat he found a bag of marijuana and a "pot pipe."[119] The police officer arrested Knowles and charged him with dealing controlled substances.[120]

At trial, Knowles argued that the search was not lawful under the "search incident to arrest" rationale because the police officer did not arrest him, even though the Iowa statute permitted such searches when the police give citations in lieu of arrests.[121] The Supreme Court of Iowa upheld the conviction, but the Supreme Court reversed. Writing for a unanimous court, Chief Justice Rehnquist noted that the two reasons that justify searches incident to arrest—the need to disarm a suspect in order to take him into custody and the need to preserve evidence for later use at trial—are far less persuasive when a

111. "*Generally* it would appear that any individual who can be lawfully stopped is *likely* to be a suspect for the purposes of Article 31(b)." MCM, *supra* note 76, MIL. R. EVID. 314(f) analysis, app. 22, at A22-26 (emphasis added).

112. *See* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 987-1001 (1998) (discussing United States v. Holland, 510 F.2d 895, 897 (5th Cir. 1992); United States v. Bautista, 684 F.2d 1286, 1289 (6th Cir. 1982)). Harris criticizes the lower courts' "loosening" of the concept of particularized suspicion that he contends the Supreme Court intended to create in *Terry v. Ohio*. *Id.*

113. *See supra* notes 108-09 and accompanying text.

114. *See* Chimel v. California, 395 U.S. 752 (1969).

115. *See* MCM, *supra* note 76, MIL. R. EVID. 314(g). This exception should not be confused with the "automobile exception" that allows a search of a mobile automobile without a search warrant if the law enforcement official has probable cause that evidence of a crime is in the automobile. *Id*. MIL. R. EVID. 315(g)(3).

116. IOWA CODE ANN. § 805.1(4) (West Supp. 1997).

117. 119 S. Ct. 484 (1998).

118. *Id.* at 486.

119. *Id.*

120. *Id.*

121. *Id.*

police officer only issues a citation.[122] A routine traffic stop, as opposed to an arrest, is relatively brief, and less inherently dangerous than an arrest.[123] Furthermore, once the police obtain evidence, such as a vehicle registration or a driver's license, immediately after the stop, a further search is not necessary—the evidence obtained is sufficient. The police officer can arrest the driver, if he needs further evidence to prove identification.[124]

While this second rationale makes considerable sense, one could argue that vehicle stops involving citations may be *as* dangerous as those involving arrests. This is precisely because the driver or passengers have *not* been arrested, but are relatively free to move inside or around the vehicle while the citation is being issued. Nevertheless, perhaps to avoid tumbling down a never-ending "slippery slope" of exceptions, the court has drawn the line at arrests. Here, at least, is one bright line law in Fourth Amendment jurisprudence: a search incident to arrest really means what it says—if something other than an arrest occurs, one should look beyond this exception to justify a search.

This case has impact for military practitioners not just at trial, but also while performing legal reviews of on-post procedures for stopping vehicles for minor traffic infractions. What must be clear in reviewing such procedures are the distinctions between searches incident to arrest/apprehension and searches based upon the "automobile exception."[125] A search incident to arrest or apprehension would allow a search of the passenger compartment of a vehicle based upon the probable cause for the arrest/apprehension itself. The automobile exception would allow a police officer to search a vehicle, including the trunk, without a search warrant/authorization, if the police officer had probable cause to believe that evidence was in the vehicle. Understanding the "arrest" limitation in *Knowles*, as well as the distinction between the two exceptions, is critical in evaluating any traffic stop procedures.

United States v. Jackson: Does MRE 313b Have a Future?

By far, the most important military Fourth Amendment case of 1998 was *United States v. Jackson*,[126] which dealt with the so-called "subterfuge" rule in MRE 313(b).[127] Under MRE 313(b), if the purpose of an inspection is to locate weapons or contraband, and if (1) the inspection was ordered immediately after the report of a crime, or (2) specific individuals were selected for inspection, or (3) persons inspected were subjected to substantially different intrusions, the government must prove by clear and convincing evidence that the primary purpose of the inspection was administrative and not a criminal search.[128]

In *Jackson*, an anonymous friend of the accused reported that she had seen Jackson selling drugs in his barracks room on the previous evening and that he hid the drugs in a stereo speaker in his barracks room.[129] The unit commander, who had received this information from a Criminal Investigation Division (CID) agent, consulted with his legal advisor, who told him there was insufficient probable cause to authorize a search of the room.[130] An hour and a half later, the commander ordered a health and welfare inspection of all barracks rooms. He used drug-sniffing dogs and posted noncommissioned officers as guards at all entrances and exits of the barracks to prevent anyone from removing evidence.[131] A dog alerted on Jackson's stereo speakers, and marijuana was found there.[132]

At trial, the unit commander testified that the primary purpose of the inspection was "unit readiness and also to find out on a whole what the unit was like for drugs . . . [i]f there was any contraband in the rooms or anything else."[133] Finding that the primary purpose of the examination was to ensure unit

122. *Id.* at 487-88.

123. *Id.* at 487.

124. *Id.* at 488.

125. *See* MCM, *supra* note 76, MIL. R. EVID. 314(g) (discussing searches incident to apprehension), 315(g)(3) (discussing the military's version of the "automobile exception").

126. 48 M.J 292 (1998).

127. MCM, *supra* note 76, MIL. R. EVID. 313(b).

128. *Jackson*, 48 M.J. at 292.

129. *Id.* at 294.

130. *Id.*

131. *Id.*

132. *Id.* at 293.

133. *Id.*

readiness, the military judge admitted the marijuana into evidence.[134]

In affirming the military judge's ruling, the CAAF held that the government overcame the "clear and convincing" evidentiary standard of the subterfuge rule.[135] How did the court determine that by "clear and convincing evidence" the government showed that the primary purpose of the examination was administrative? The court looked primarily at the commander's testimony that his primary purpose in conducting the inspection was unit readiness.[136] The commander's additional testimony that he considered that any contraband discovered could be used for UCMJ purposes did not affect the validity of the inspection, since that is permitted under MRE 313(b).[137] In addition, the presence of drug detector dogs and CID agents did not taint the inspection because MRE 313(b) permits an inspection to locate weapons and contraband.[138] Another key consideration was the nature of the contraband—illegal drugs. Judge Effron, writing for the majority, stated: "Any commander who ignores the potential presence of illegal drugs in the unit does so in disregard of his or her responsibility and accountability for the readiness of that unit."[139]

Jackson was a four-to-one decision. Judge Gierke wrote a sharp dissent, asserting that the decision removed privacy from soldiers in the barracks, virtually erased the subterfuge rule, and made probable cause analysis in the barracks all but superfluous.[140] He wrote that the opinion would result in the situation "where it may be unlawful to invade the privacy of one soldier unless the privacy of 100 others is invaded at the same time."[141] He further stated that the fact that drugs impair unit readiness "tells us little about prosecutorial intent."[142] Finally, in determining the purpose of the inspection, he wrote: "While the commander's stated intent is an important factor, it is not a talisman at which legal analysis stops."[143] But Judge Gierke thought the trial court *did* indeed stop there. He noted that there was neither a pre-planned inspection nor an apparent unit-wide drug problem.[144]

Does *Jackson* signal the end of the MRE 313(b) subterfuge rule? Is it a further reduction in barracks privacy, begun by *United States v. McCarthy*?[145] Or is it a case decided, in large part, on very particular facts? The *nature* of the contraband appeared to be particularly significant; in his discussion, Judge Effron more than once referred to the impact of drugs on unit readiness.[146] Thus, one approach is to look at *Jackson* conservatively and distinguish it from other cases based upon the contraband (drugs) and where the contraband was found (in the barracks). Another distinguishing point is that the commander "triggered" the subterfuge rule by doing the inspection immediately after the report of an offense. The commander did not subject soldiers to different intrusions or subject only certain soldiers to an inspection—the other two prongs of the subterfuge rule. While Judge Effron does not explicitly make this point, he does mention that the command inspected all thirty-six barracks rooms and did not specifically target the accused after receiving the anonymous tip.[147]

134. *Id.*

135. *Id. See* MCM, *supra* note 76, MIL. R. EVID. 313(b).

136. *Jackson*, 48 M.J. at 293.

137. *Id.* at 295.

138. *Id.* at 296.

139. *Id.* at 295. In a footnote to his opinion, Judge Effron also made reference to the "ongoing problem of drug distribution in the barracks." *Id.* at 296 n.2.

140. "In my view the majority opinion removes any expectation of privacy for soldiers living in a barracks, eliminates any meaningful distinction between a search and an inspection, and renders [MRE] 315 (probable cause searches) . . . meaningless and unnecessary." *Id*. at 297.

141. *Id.*

142. *Id.*

143. *Id.* at 298.

144. *Id.* at 299.

145. 38 M.J. 398 (C.M.A. 1993).

146. Judge Effron states:

> Physical and mental fitness are the quintessential requirements of military readiness. The use of illegal drugs significantly diminishes the user's physical and mental capabilities. . . . Given the oft-cited adverse impact of drugs on unit readiness, it is permissible for the military judge to take into account the nature of the contraband in determining that the threat to unit readiness, rather than the criminal prosecution of an individual, was the primary purpose of the inspection.

Jackson, 48 M.J. at 296-97.

Distinguishing *Jackson* based upon the nature of the contraband seized and how many prongs of MRE 313(b) triggered the subterfuge rule is perhaps a defense counsel's best initial position.[148] Furthermore, defense counsel should be alert to statements made by the commander or other members of the chain-of-command while they are conducting the inspection. Such statements could indicate what the primary purpose was and should be evaluated along with any statements made during court.

For the government, caution again would be in order. Judge Effron notes that whether the government can meet the clear and convincing standard "depends on the specific facts and circumstances of the case, including the nature of the contraband."[149] Therefore, applying *Jackson* to circumstances not involving drugs in the barracks goes beyond the holding of the case and could lead to a different result. It will often be more prudent to work on establishing probable cause from an anonymous tip, rather than immediately conducting an inspection. Again, however, context is important. A commander whose unit is ready to deploy overseas has a considerably stronger argument that his primary purpose is unit readiness than a commander of a unit in garrison status. Nevertheless, *Jackson* stands as the latest of a series of recent cases that present a more restrictive view of the subterfuge rule than in years past.[150]

Conclusion

While it is difficult to pick out any "trends" in the above cases, some of them stand for major propositions that will affect Fourth Amendment jurisprudence, both in the military and civilian communities. In the military, the consequences of *Jackson* will be particularly worth noting. Will there be anything left of the subterfuge rule, as Judge Gierke doubted in his dissent,[151] or will the next case be yet another fact-specific Fourth Amendment holding? The Supreme Court's rulings in *Knowles* and *Carter* reaffirm the Court's adherence to standard Fourth Amendment doctrines. *Knowles* states that a search incident to an arrest must really accompany an arrest. *Carter* reaffirms the Court's post-*Rakas* rejection of typical standing concepts in favor of the expectation of privacy rationale formulated in *Katz*.[152] Other cases discussed either leave certain questions unanswered (such as whether polygraphs can be used in probable cause determinations)[153] or perhaps create questions themselves (such as whether the definitions of "suspect" and "reasonable suspicion" are synonymous).[154] Still, even the relatively few cases on the Fourth Amendment front lead practitioners to conclude that search and seizure remains a controversial and unsettled body of law in both the military and civilian communities.

Addendum: *Wyoming v. Houghton:* Another Bright Line?

If *Knowles v. Iowa* represents a "bright line" Fourth Amendment rule favoring defendants who are stopped but not arrested, a recent case, *Wyoming v. Houghton*,[155] shows the Supreme Court attempting to make a bright line rule favoring law enforcement.[156] This time, the Supreme Court holds that, when conducting an automobile search based upon probable cause, there is no need for the law enforcement official to distinguish between containers within the vehicle that belong to a passenger and not the driver – all such containers may be searched.[157]

In *Houghton*, a patrol officer stopped a vehicle for speeding and driving with a faulty brake light.[158] While he questioned the driver, the officer noticed a hypodermic syringe in the driver's shirt pocket.[159] The driver admitted that he used the syringe to take drugs.[160] As a result, the patrol officer ordered the two

147. *Id.* at 295-96.

148. Only an inspection for weapons or contraband triggers the subterfuge rule. Contraband is defined as "material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation or order. For example, if liquor is prohibited aboard ship, a shipboard inspection for liquor must comply with the rules for inspection for contraband." MCM, *supra* note 76, MIL. R. EVID. 313(b) analysis, app. 22, at A22-23 (1998).

149. *Jackson*, 48 M.J. at 296 n.2.

150. *See* United States v. Taylor, 41 M.J. 168 (C.M.A. 1994) (holding that an accused's urinalysis inspection test results were properly admitted despite an officer-in-charge, who knew of a report of drug use, volunteering the accused's section for the urinalysis); United States v. Shover, 45 M.J. 119 (1996) (holding that an inspection was proper where its primary purpose was to end "finger pointing" and "tension").

151. *Jackson*, 48 M.J. 292, 297 (1998) (Gierke, J., dissenting).

152. *See* Knowles v. Iowa, 119 S. Ct. 484 (1998); Minnesota v. Carter, 119 S. Ct. 469 (1998).

153. *See* United States v. Light, 48 M.J. 187 (1998).

154. *See* United States. v. Miller, 48 M.J. 49 (1998).

155. Wyoming v. Houghton, No. 98-184, 1999 WL 181177 (Sup. Ct., Apr. 5, 1999)

156. Knowles v. Iowa, 119 S. Ct. 484 (1998).

157. *Houghton*, 1999 WL 18117, at *1.

158. *Id.* at *2.

other passengers, one of whom was the defendant, out of the car.[161] An officer then began a search of the passenger compartment of the vehicle.[162] He found a purse, which Houghton claimed as hers.[163] Inside the purse he found a brown pouch that contained drug paraphernalia and a syringe containing 60ccs of methamphetamine, and a black container, containing 10 ccs of methamphetamine.[164]

The Wyoming Supreme Court reversed Houghton's conviction for possession of methamphetamine. In so doing, the court announced that if, during an automobile search, an officer knows or should know that a container belongs to a passenger, who is not suspected of criminal activity, the container is outside the scope of the search.[165] The Wyoming Supreme Court did hold that such a search could be valid if someone could conceal contraband within the a passenger's personal effects to escape detection. In this case, however, there was no reason to believe that such contraband had been placed in Houghton's purse.[166]

The Supreme Court reversed the Wyoming Supreme Court's decision. Justice Scalia wrote the majority opinion, and his opinion is interesting not only for the proposition it announces, but for the method he used to arrive at his conclusion. In most Fourth Amendment cases, opinion writers start from seemingly accepted jurisprudential premises such as "reasonable expectations of privacy." In *Houghton*, Justice Scalia states that the first inquiry must be historical: an examination of common law at the time of the Framers to determine whether the action was regarded as an unlawful search and seizure.[167] If that yields no answer, then standard Fourth Amendment analysis is used: an evaluation "under traditional standards of reasonableness by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[168]

In *Houghton*, both the common law at the time of the Framers and the legitimate governmental interests favored the government. Justice Scalia cited past precedents which held that the Framers would have concluded that warrantless searches of automobiles and containers within automobiles were reasonable.[169] Justice Scalia further pointed out that distinctions based upon ownership were irrelevant when conducting the searches.[170] In addition, Justice Scalia opined that governmental interests outweighed privacy interests and passengers have reduced expectations of privacy with regard to items they transport.[171] Requiring additional, independent probable cause to search a passenger's containers could create a potential "safe haven" for storing the contraband or evidence of a driver's criminal activity.[172]

At first glance, *Houghton* appears to be a "bright line" rule providing that law enforcement officials may search containers within automobiles, regardless of ownership. But how far can *Houghton* extend? After all, the case does not do away with the probable cause analysis. Law enforcement officials must still have probable cause to believe that an item is in a particular

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at *3.

167. *Id.* at *3. This drew criticism in a footnote in Justice Stevens' dissent: "To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law yields "no answer." *Id*. at *9 n3 (Stevens, J., dissenting).

168. *Id.* at *3.

169. *Id* at *3-4. Specifically, Justice Scalia relied on a series of cases in which the Court concluded "that the Framers would have regarded such a search [warrantless automobile search] as reasonable in light of legislation from the Founding era and beyond—that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to duty." *Id* at *3 (citing United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925); Boyd v. United States, 116 U.S. 616 (1886)).

170. *Houghton*, 1999 WL 1811177, at *4.

171. *Id.* at *5.

172. "[A] car passenger . . .will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* at *6.

container. One of the cases that Justice Scalia's opinion relied upon, *United States v. Ross*, states that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[173] Thus the standard probable cause restrictions (such as whether an item could reasonably fit into a container) independent of ownership still apply. Justice Scalia also asserted that *Houghton* does not extend to a search of a person within the automobile—even a limited search of outer clothing.[174] In a concurring opinion, Justice Breyer concluded that it would not extend to a search of a container "attached" to a person, such as a woman's purse worn on her shoulder.[175]

Whether *Houghton* will be used to justify searches of passenger containers in other contexts—such as public transportation, in temporary lodging, or in other persons' homes—is uncertain. Rhetorical and analytical overkill—from both political directions—often follows opinions that are written by Justice Scalia. Often overlooked is that the comparatively idiosyncratic historical approach of Scalia makes his cases easy to distinguish, not only because their reliance on history may provide a "brake" on somewhat amorphous concepts such as "reasonable expectation of privacy" but also because they are often considered outside the so-called jurisprudential "mainstream" approach. What is clear is that *Houghton* allows law enforcement officials to search containers, regardless of ownership, during a warrantless automobile search.

173. *Id.* at *4 (citing United States v. Ross, 456 U.S. 798 at 826 (1982)).

174. *Id.* at *5. Justice Breyer points this out in his concurrence as well. *Id.* at *7 (Breyer, J., concurring).

175. *Id.* at *7 (Breyer, J., concurring).

New Developments in Evidence 1998—The Continuing Saga[1]

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Introduction

As in years past, 1998 was an exciting year for evidence junkies. A review of this year's cases demonstrates the wide diversity of issues covered under the heading "evidence law." This article does not attempt to discuss every evidence case issued in 1998. Rather, it focuses on those cases and areas that are likely to have the biggest impact on the day-to-day practice of criminal law in the military. Specifically, the article reviews uncharged misconduct evidence admitted under Military Rule of Evidence (MRE) 404(b), protections and exceptions to the rape shield rule (MRE 412), evidence admitted under MRE 413 and MRE 414, the psychotherapist-patient privilege, expert testimony and expert evidence issues, and hearsay exemptions and exceptions.

Bad Acts Evidence is Hard to Keep Out

Military Rule of Evidence 404(b)[2] prohibits the government from offering uncharged misconduct, or "bad acts" evidence, to prove that the accused is a bad person. The government, however, may use such evidence to prove an element of the charged offense, such as intent or identity.[3] The military judge should consider several factors when balancing the probative value of "bad acts" evidence against the danger of unfair prejudice to the accused.[4] While either party can seek to introduce evidence under this rule, MRE 404(b) is most often used by the government to introduce evidence of the accused's misconduct under a non-character theory of relevance. Two recent cases, one case from the Court of Appeals for the Armed Forces (CAAF), and one from the District of Columbia Court of Appeals, underscore the difficulty that defense counsel may face in trying to keep this evidence from the fact-finder.

Rules for Courts-Martial Do Not Trump 404(b) Evidence

In *United States v. Ruppel*,[5] the CAAF held that MRE 404(b) evidence is admissible even if it is in direct contradiction to the Rules for Courts-Martial (R.C.M.). In *Ruppel*, the accused was convicted of sodomy and taking indecent liberties with his minor stepdaughter, CH, and indecent acts with his natural daughter, JR.[6] The convening authority ordered a post-trial hearing to investigate a defense claim that the government had withheld relevant and material information. At the post-trial session, the military judge found that the defense complaint was valid. The convening authority ordered a rehearing on findings on all affected offenses against the stepdaughter. The convening authority also ordered a rehearing on the sentence. The convening authority, however, did not disturb the finding of guilty of an indecent act that the accused had committed with his daughter.[7]

At the rehearing, a different panel convicted the accused of the offenses involving his stepdaughter. At the second trial, the military judge allowed the government to introduce under MRE 404(b) evidence of the indecent act the accused committed with

1. *See* Lieutenant Colonel Steven Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1. In this article, Lieutenant Colonel Henley intimated that there would be no more new developments in evidence law after his departure from The Judge Advocate General's School. This past year, however, reminded us that Lieutenant Colonel Henley's article, like this one, is not the final chapter. Rather, it is one installment in the continuing saga.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1998) [hereinafter MCM]. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

3. *Id*.

4. *Id.* MIL. R. EVID. 403. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the members, of by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

5. 49 M.J. 247 (1998).

6. *Id.* at 248.

7. *Id.*

his natural daughter. The government's theory of admissibility was that the indecent assault by the accused of his natural daughter, JR, demonstrated his intent to commit similar offenses with his stepdaughter, CH.[8]

The defense objected to the admission of this evidence at the rehearing, because it violated the provisions of R.C.M. 810(a)(3).[9] The defense claimed that R.C.M. 810(a)(3) precluded the government from making any reference to offenses involving JR at the rehearing on the merits.

Although the CAAF recognized this issue as a case of first impression, they previously addressed a similar issue involving the discussion to R.C.M. 910(g)(3).[10] The discussion to this rule says that the military judge should ordinarily refrain from informing the members of the offenses to which the accused has pleaded guilty until after the panel enters findings on the remaining offenses. The court cited its opinion in *United States v. Rivera*,[11] which held that, in a mixed plea case, the government could introduce evidence on the offenses to which the accused pleaded guilty if it qualifies for admission under MRE 404(b) and is not precluded by MRE 403.[12]

According to the court, the situation in *Ruppel* is no different. If R.C.M. 810 was strictly construed, it would render 404(b) evidence inadmissible in combined rehearing cases. The court was unwilling to elevate what they termed as a procedural rule into an evidentiary rule.[13] The court also rejected the defense claim that use of this evidence at the rehearing violated notions of fundamental fairness. The court held that the proper application of MRE 404(b) and MRE 403 ensured fundamental fairness for the accused.[14]

The court's opinion that MRE 404(b) trumps the plain language of R.C.M. 810(a)(3) is problematic. First, its analogy of 810(a)(3) to *Rivera* and the discussion to R.C.M. 910(g)(3) is not a good comparison. The conflict that the court addressed in *Rivera* was between MRE 404(b) and the discussion to R.C.M. 910(g). The discussion to R.C.M. 910(g)(3) is not part of the rule and arguably does not carry the same weight of authority as the rule itself. In addition, the language in the discussion to R.C.M. 910(g) still gives the military judge some discretion in deciding whether to admit or exclude evidence of the offenses to which the accused pleaded guilty.[15] The same cannot be said of R.C.M. 810(a)(3). Here, the conflict is between MRE 404(b) and the language of R.C.M. 810(a)(3) itself, not the discussion. Also, the language of R.C.M. 810(a)(3) does not give the military judge discretion to admit this evidence. The rule says, "the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only."[16] In light of these differences, it seems that the CAAF is trying to "fit a square peg into a round hole" by analogizing this situation to *Rivera*.

A second troubling aspect of the opinion is the court's statement that they were not willing to elevate a procedural rule into an evidentiary rule. The interest served by R.C.M. 810(a)(3) is to keep prejudicial information that has the potential to undermine the presumption of innocence away from the members.

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8. *Id.* at 249. The military judge did order the trial counsel to refrain from making any mention of the fact that the accused had actually been convicted of the indecent assault against JR. *Id.*

9. MCM, *supra* note 2, R.C.M. 810(a)(3). This rule provides:

> When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After the findings on the merits are announced, the members if any, shall be advised of the offenses on which the rehearing on sentence has been directed.

Id.

10. *Id.* R.C.M. 910(g)(3) discussion. The discussion states: "If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has plead guilty until after findings on the remaining offenses have been entered." *Id.*

11. 23 M.J. 89 (C.M.A. 1986).

12. *Ruppel*, 49 M.J. at 250.

13. *Id*. at 251.

14. *Id.*

15. MCM, *supra* note 2, R.C.M. 910(g) discussion. The discussion states:

> If the accused pleaded guilty to some specifications but not others, the military judge should consider, and solicit the views of the parties, whether to inform the members if the offenses to which the accused has pleaded guilty. It is ordinarily appropriate to defer informing the members of the specifications to which the accused has plead guilty until after findings on the remaining specifications are entered.

Id.

16. *Id.* R.C.M. 810(a)(3).

The CAAF does not explain or justify why this interest is merely procedural. It would seem that such a fundamental interest is more than simply an issue of procedure. The court also fails to explain why MRE 404(b) should enjoy a higher status than a rule intended to protect the presumption of innocence. The court also fails to enumerate any factors or give judges and practitioners any guidance about what rules for courts-martial are procedural and can be trumped by the rules of evidence. Thus, practitioners are left to guess how CAAF will decide the next case where an evidentiary rule is in conflict with a rule for courts-martial.

Advice

This case is strong precedent for the government to argue that the rules favor the admissibility of 404(b) evidence. Government counsel should use this case to support an argument that the probative value of 404(b) evidence is not substantially outweighed by the risk of unfair prejudice, even when admissibility is in direct conflict with the rules for courts-martial and potentially impacts on the presumption of innocence. For defense counsel, this case illustrates their difficulty in trying to keep out 404(b) evidence, even when the rules for courts-martial support the exclusion of this evidence. Finally, the opinion serves as notice that, in deciding conflicts between the military rules of evidence and rules for courts-martial, the rules of evidence may preempt the rules of courts-martial.

Defense Stipulations Do Not Trump 404(b) Evidence

Another method defense counsel may try to use to keep 404(b) evidence out of the court room is to stipulate to the elements that the 404(b) evidence is intended to prove. A recent opinion from the United States Court of Appeals for the District of Columbia, however, significantly limits the defense's ability to force the government into such stipulations. In *United States v. Crowder (Crowder II),*[17] the United States Court of Appeals for the District of Columbia held that a defendant's offer to concede intent does not prohibit the government from using "bad acts" evidence to prove intent. *Crowder II* is a reconsideration and reversal of the court's earlier opinion in *Crowder I.*[18] In *Crowder I*, the court ruled that the defense could prohibit the government from introducing "bad acts" evidence under Federal Rule of Evidence (FRE) 404(b)[19] by conceding intent.

Crowder I and *Crowder II* involved two cases (*Crowder* and *Davis*) that were combined on appeal. In *Crowder*, three police officers saw Rochelle Crowder engage in an apparent drug transaction, exchanging a small object for cash. The police stopped and gestured for Crowder to approach. Crowder turned and ran and the police followed. During the chase, Crowder discarded a brown paper bag. The brown bag contained ninety-three zip-lock bags of crack cocaine and thirty-eight wax-paper packets of heroin. While searching Crowder, the officers also found a beeper and $988 in small denominations. Crowder denied ever possessing the bag containing drugs. His first trial ended in a mistrial.[20]

At his second trial, the government gave notice of intent to prove Crowder's knowledge, intent, and modus operandi with evidence that Crowder sold crack cocaine to an undercover officer in the same area seven months after his initial arrest. To keep this evidence from the jury, Crowder offered to stipulate that the amount of drugs seized was consistent with distribution so that anyone who possessed them had the intent to distribute. The judge refused to force the government to stipulate and admitted evidence of the later sale over the defense objection.[21]

In the companion case, *Davis*, an undercover police officer purchased a rock of crack cocaine from Horace Davis on a Washington D.C. street corner. After the transaction, the undercover officer broadcast Davis' description over the radio. The police apprehended Davis near the scene a few minutes later as he opened his car door. During a subsequent search of the car, the police found twenty grams of crack cocaine.[22]

At trial, Davis put on a defense of misidentification. He claimed that he walked out of a nearby store just before his

17. United States v. Crowder, 141 F.3d. 1202 (D.C. Cir. 1998) [hereinafter Crowder II].

18. United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) [hereinafter Crowder I].

19. FED. R. EVID. 404(b). Federal Rule of Evidence 404(b) is identical to the military rule and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

20. *Crowder II*, 141 F.3d at 1204.

21. *Id.* at 1203.

22. *Id.*

arrest. The government sought to introduce evidence that Davis made three prior cocaine sales in this same area to prove his knowledge of drug dealing and his intent to distribute. To exclude this evidence, Davis offered to stipulate that the person who sold the drugs to the undercover officer had the knowledge and intent to distribute. The district court ruled that the government did not have to accept Davis' concession and could prove knowledge and intent through his prior acts.[23]

In *Crowder I*, the D.C. Circuit Court of Appeals held that a defendant's unequivocal offers to concede intent, coupled with an instruction to the jury that the government no longer had to prove that element, made the evidence of other bad acts irrelevant.[24] The court reasoned that the defense concessions, combined with the jury instruction, gave the government everything it required and eliminated the risk that a jury would consider the uncharged misconduct for an improper purpose.[25]

The Supreme Court granted certiorari.[26] The Court vacated the judgment in *Crowder I* and remanded the case for further consideration in light of the Court's opinion in *Old Chief v. United States*.[27] In *Old Chief*, though the Court held that the government should have acquiesced to the defense's offer to stipulate, the Court said that this case was an exception. Justice Souter, writing for the majority affirmed the general rule saying, "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the government's need for evidentiary richness and narrative integrity in presenting a case."[28] The Court also said, "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense."[29]

On remand, the D.C. Circuit Court of Appeals reversed its earlier decision, and held that the district court did not err by admitting evidence of uncharged misconduct under FRE 404(b), notwithstanding the defense's willingness to concede intent.[30] The majority noted that *Crowder I* was based on the premise that a defendant's offer to concede a disputed element renders the government's evidence irrelevant. In *Crowder II*, the court reasoned that this premise failed in light of the Supreme Court's holding in *Old Chief*. Evidentiary relevance under FRE 401[31] is not affected by the availability of alternative forms of proof, such as a defendant's concession or offer to stipulate.[32]

According to the court, the analysis of "bad acts" evidence does not change simply because the defense offers to concede the element at issue. The first step in the analysis remains a determination of whether the "bad acts" evidence is relevant under FRE 401. If the government's evidence makes the disputed element (such as intent) more likely than it would otherwise be, the evidence is relevant despite the defendant's offer to stipulate. The next question is whether the government is attempting to properly use the evidence under FRE 404(b). The court reiterated that FRE 404(b) is quite permissive. Finally, even if the evidence is both relevant and admissible under FRE 404(b), the trial judge can still exclude the evidence if it is unfairly prejudicial, cumulative, or misleading.[33]

One factor that the trial judge should consider when making a balancing determination is whether the defendant is willing to concede the element that the evidence is being offered to prove.[34] Counsel will need to focus their efforts on whether a

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23. *Id*. at 1205.

24. *Crowder I*, 87 F.3d at 1410-11.

25. *Id*. at 1414.

26. United States v. Crowder, 518 U.S. 1087 (1997).

27. 519 U.S. 172 (1997). In 1993, the police arrested Johnny Lynn Old Chief after a fight involving at least one gunshot. Old Chief was charged with, inter alia, violating 18 U.S.C. § 922 (felon in possession of a firearm) and aggravated assault. Old Chief had been previously convicted of assault causing serious bodily injury. To keep this prior conviction from the jury, Old Chief offered to stipulate that he was previously convicted of a crime punishable by imprisonment exceeding one year. *Id*. at 175. The government refused to join in a stipulation. The district court ruled that the government did not have to stipulate and the Ninth Circuit affirmed. *Id*. at 175-76. The Supreme Court granted certiorari and reversed. *Id*. at 194. The Court ruled that it was an abuse of discretion under FRE 403 for the district court to reject the defendant's offer to concede a prior conviction in this case. The district court erred in admitting the full judgment over defense objection when the nature of the prior offense raises the risk that the jury will consider the prior judgment for an improper purpose. It was significant that the only legitimate purpose of the evidence was to prove the prior conviction element of the offense. *Id.* at 174-94.

28. *Id.* at 186-87.

29. *Id*.

30. United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) [hereinafter *Crowder II*].

31. FED. R. EVID. 401. Like the military rule, FRE 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.*

32. *Crowder II*, 141 F.3d at 1209.

33. *Id*. at 1210.

defense offer to concede an element renders the "bad acts" evidence unduly prejudicial.[35]

In *Old Chief*, the Supreme Court recognized that the trial judge must be cognizant of the government's need for "evidentiary richness." The Court also accepted the proposition that the government is entitled to prove its case free of a defendant's offer to stipulate. This does not help defense counsel who are seeking to limit the government's use of 404(b) evidence through stipulations.

The D.C. Circuit's reconsideration and reversal of its earlier opinion in *Crowder II* further complicates defense counsel's task. In the future, defense counsel will find it difficult to argue that their willingness to stipulate to a disputed element renders the government's "bad acts" evidence irrelevant. In light of these cases, the better approach for defense counsel is to argue that an accused's willingness to concede the element makes the "bad acts" evidence unfairly prejudicial.

On the other hand, government counsel should use the decisions in *Old Chief* and *Crowder II* to their advantage. Citing the Supreme Court's language, government counsel should argue that the defense cannot dictate the manner in which the government may try its case. Trial counsel must articulate why a stipulation would deny them the ability to preserve the evidentiary richness and narrative integrity of the 404(b) evidence. Finally, government counsel should argue that the defense's willingness to concede the disputed element is only one factor that the military judge should consider in a MRE 403 balancing. The government must show how other factors tip the scale in favor of admissibility.

Adopting a similar analysis, the CAAF recently held that an accused's decision not to contest an element of the offense does not relieve the government from the burden to prove that element. Accordingly, the government can prove that element with MRE 404(b) evidence. In *United States v. Sweeney,*[36] the accused was charged under North Carolina law[37] with stalking his estranged wife by attempting to gain entrance into her room, posting derogatory comments about her in public places, and willfully damaging her car. At trial, the government introduced evidence that showed that the accused's relationship with his wife deteriorated about two years after their marriage. After his wife filed for divorce, she asked him to stop contacting her. Despite this request, he continued to call, write, and harass her on a daily basis.[38] In order to prove the accused's intent to cause emotional distress, the government introduced evidence under MRE 404(b) that the accused stalked his former wife in a similar manner.[39]

The defense argued that the evidence was inadmissible because they were not contesting the accused's intent to stalk.[40] The CAAF rejected this argument, citing the Supreme Court's holding in *Estelle v. McGuire*.[41] In *McGuire*, the Supreme Court held that "nothing in the Due Process Clause of the Fourteenth Amendment requires the [s]tate to refrain from introducing relevant evidence simply because the defense chooses not

34. *Id.*

35. Although no military court has addressed this issue directly, the Court of Military Appeals has hinted at the issue. *See* United States v. Orsburn, 31 M.J. 182 (C.M.A. 1990). Staff Sergeant Steven Orsburn was charged with indecent acts with his eight-year-old daughter. The government offered evidence of three pornographic books found in Orsburn's bedroom to show his intent to gratify his lust or sexual desires. *Id.* at 188. The defense argued that the evidence was irrelevant because if someone did commit indecent acts with the eight-year-old girl, there was no question that he did so with the intent to gratify his lust or sexual desires. The military judge admitted the evidence over the defense objection. Then-Chief Judge Sullivan, writing for the majority, held that the military judge did not abuse his discretion in balancing the probative value of this evidence against the danger of unfair prejudice. *Id.* Judge Sullivan noted that Orsburn "refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent." *Id.* In light of *Old Chief* and *Crowder II*, a defense offer to concede intent should not act as a per se bar of "bad acts" evidence in military practice.

36. 48 M.J. 117 (1998).

37. N.C. GEN STAT. § 14-277.3 (1992). This statute states:

> (a) Offense–A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose:
> (1) With intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;
> (2) After reasonable warning or request to desist by or on behalf of the other person; and
> (3) The acts constitute a pattern of conduct over a period of time evidencing continuity of purpose.

Id.

38. *Sweeney*, 48 M.J. at 119.

39. *Id.* at 119. The accused's former wife testified that at the time of their divorce the accused continued to contact her in spite of her requests. He entered her house without her consent; he jumped on her car and banged on the windows; he damaged her car by placing stones in her oil system; and he parked his car in her neighborhood in a surreptitious manner. *Id.*

40. *Id.* at 120. The defense's theory was that the misconduct never occurred and that the victim was never afraid for her life. *Id.*

to contest the point."[42] The CAAF held that Sweeney's argument was similarly without merit because the government was required to prove his intent to cause emotional distress in spite of the defense's theory of the case.[43]

The defense also contended that the government did not meet its burden of proving this uncharged misconduct by a preponderance of the evidence. According to the defense, the evidence of the uncharged misconduct was circumstantial and there was no direct or conclusive evidence that the accused harassed his former wife. The CAAF rejected this argument as well. The court said that the standard of proof required for the admission of 404(b) evidence is less than the standard required for a finding of guilty. The proper standard for admitting 404(b) evidence is whether the evidence reasonably supports a finding by the court members that the accused committed the misconduct. In this case, the evidence met that standard because the accused's former wife testified about these prior incidents and provided uncontraverted direct and circumstantial evidence of the prior incidents.[44]

Advice

The court's holding in *Sweeney*, read in conjunction with *McGuire*, *Old Chief*, and *Crowder II*, shows that the defense will likely fail in attempting to keep 404(b) evidence out on claims that the defense is not contesting these elements. The government's need to prove the elements of the offense, preserve evidentiary richness, and maintain narrative integrity will likely trump any defense claim that the bad act evidence is inadmissible.

Sweeney also reminds practitioners of the low standard of proof required to admit 404(b) evidence. As long as the military judge determines that the evidence reasonably supports a finding by the court members that the accused committed the uncharged misconduct and it is not unfairly prejudicial, the evidence should be admitted. Defense claims that the evidence is not conclusive proof that the accused committed the uncharged misconduct go to the weight the panel members may give that evidence, not its admissibility.[45]

The Rape Shield Rule v. The Constitution

The CAAF decided three significant cases this year dealing with the rape shield rule, MRE 412.[46] Practitioners can glean three important points from these cases. First, the defense must lay an adequate foundation to show that evidence of the victim's past sexual behavior is constitutionally required. Second, the defense has the burden of showing that the evidence is constitutionally required. Finally, evidence of the victim's sexual orientation is not per se admissible as an exception to the rape shield rule.

In sexual misconduct cases, MRE 412 excludes evidence that the victim engaged in other sexual behavior and evidence of the victim's sexual predisposition. The rule is intended to shield victims of sexual assaults from embarrassing or degrad-

41. 502 U.S. 62 (1991). Mark McGuire was found guilty in a California state court of the second degree murder of his infant daughter, Tori. McGuire sought habeas corpus relief from his conviction, claiming, among other things, that the trial judge erroneously admitted evidence that the child had suffered a number of injuries prior to the injuries which caused her death. *Id.* at 67-68. The prosecution introduced this evidence to show that the child's death was not accidental. The defendant argued that since he did not claim that the death was accidental, this evidence was irrelevant and should not have been admitted. *Id.* The Supreme Court disagreed. Chief Justice Rehnquist, writing for the majority, noted that intent was an element of the offense that the government had to prove and evidence of prior injury is relevant to show intent. The Court held that nothing in the Due Process Clause of the Fourteenth Amendment requires the state to refrain from introducing relevant evidence simply because the defense chooses not to contest the point. *Id*. at 69-70.

42. *Id*.

43. *Sweeney*, 48 M.J. at 121-22.

44. *Id*. at 120.

45. MCM, *supra* note 2, MIL. R. EVID. 104(a). This rule establishes the military judge's role in determining the admissibility of evidence. The rule states: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, *the admissibility of evidence*, an application for a continuance, or the availability of a witness shall be determined by the military judge." *Id.* (emphasis added).

46. *Id.* MIL. R. EVID. 412. This rule provides in part:

> (a) The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
>
> . . . .
>
> (C) evidence the exclusion of which would violate the constitutional rights of the accused.

Id.

ing cross-examination questions.[47] Prior to this rule, exploring the victim's past sexual activity was common in sexual assault cases. The drafters of the rule recognized that this evidence was not only extremely embarrassing to the alleged victim, but the probative value of this evidence was also low, and it often discouraged legitimate victims from reporting crimes.[48] The rape shield rule does, however, allow the defense to admit evidence of the victim's sexual behavior or predisposition if the defense can show that it is constitutionally required. As the following cases indicate, this is not a broad exception.

In *United States v. Carter*,[49] the accused was charged with rape. At trial, the victim's roommate testified that she entered the victim's room and found the accused and the victim in bed. The victim was partially dressed and unconscious. The victim claimed that the accused raped her while she was asleep. The defense wanted to cross-examine the victim about an alleged homosexual relationship she had with her roommate. The defense contended that such a relationship would give the victim and her roommate a motive to lie about the alleged rape. After an Article 39(a)[50] session, the judge ruled that MRE 412 prevented the defense from cross-examining the victim about this relationship.[51]

At the Article 39(a) session, the military judge allowed the defense to show why a cross-examination of the victim on this issue was constitutionally required. The defense proffered that an unnamed female sergeant saw the victim and her roommate at an all-female club dancing and hugging and kissing each other. The victim testified at the hearing that no one could have seen her at a club hugging and kissing her roommate. The military judge allowed the defense to call the unnamed witness to testify at the hearing in order to establish a foundation for the cross-examination. The defense, however, did not call the witness, and the military judge ruled that the defense had not met their burden to show why the cross-examination was constitutionally required under MRE 412 (b)(1)(C).[52]

The CAAF affirmed the military judge's ruling. The court said that the question of whether evidence of the victim's past sexual behavior is constitutionally required is reviewed on a case-by-case basis. In each case, the defense must establish a foundation demonstrating constitutionally required relevance. In this case, the CAAF held that the defense failed to lay an adequate foundation for the military judge to determine if the evidence was constitutionally required.[53]

The holding in *Carter* reminds defense counsel that they must lay an adequate factual foundation for the victim's sexual behavior before they can argue that its admissibility is constitutionally required. Although the adequacy of the foundation is fact-specific, if the victim testifies at the Article 39(a) hearing and denies the allegations, the defense cannot rely solely on the counsel's proffer to establish the foundation. At a minimum, the defense must call a witness to counter the victim's denials.

In the second rape shield case, *United States v. Velez*,[54] the CAAF held that before the accused could introduce evidence of the victim's sexual behavior, the evidence must be relevant to the defense's theory of the case. The defense cannot use this evidence to launch a smear campaign against the victim. At his rape and assault trial, the accused sought to cross-examine one of the alleged victims about her past sexual behavior. Specifically, the defense wanted to question the alleged victim about three incidents. The first regarded statements that she had made to others about waking up naked in another Marine's room after drinking and playing pool. The second involved the victim's alleged sexually aggressive behavior in a bar. The third incident involved a report of rape that the victim had previously made against another Marine.[55]

The defense argued that this evidence was constitutionally required as an exception to MRE 412. The defense asserted that this cross-examination was necessary to impeach the credibility of the victim's complaint. The military judge did not allow the defense to cross-examine the victim about any of this past sexual behavior.[56]

The CAAF upheld the military judge's decision to exclude this evidence. The court said that MRE 412 places reasonable

47. *See id.* app. 22.

48. *Id.*

49. 47 M.J. 395 (West 1998).

50. UCMJ art. 39(a) (West 1999).

51. *Carter*, 47 M.J. at 396.

52. *Id*. at 396-97.

53. *Id*.

54. 48 M.J. 220 (1998).

55. *Id.* at 226.

56. *Id.*

limits on the accused's right to cross-examine a witness.[57] The court then analyzed each of the incidents about which the defense wanted to cross-examine the witness.

The defense contended that the earlier pool playing incident was factually similar to her claim of rape in this case and it was necessary to question the victim about the earlier incident in order to assess her credibility. In the earlier incident, the victim had allegedly been drinking heavily and playing pool with a Marine who was not her husband. She later said she woke up naked in the Marine's barracks room. In her complaint in this case, the victim stated that she had been drinking and wanted to play pool with the accused, a Marine who was not her husband.[58]

The court said the differences in the previous incident were greater than the similarities. Most notably, in the prior incident, the victim never made a claim of rape. Thus, the relevance of this evidence on the issue of the victim's credibility was not obvious.[59] The court also noted that the similarity of the two incidents was not significant. Drinking, playing pool, being with a Marine who was not the victim's husband, and some sexual activity were not so unique that they suggested that the victim had made up the rape allegation.[60]

The CAAF also affirmed the military judge's decision to preclude the defense from questioning the victim about her sexual aggressiveness towards another man at a bar. The defense argued that this evidence was admissible under MRE 404(b) to show the victim's lack of credibility. In the case at issue, the victim claimed that she was unable to resist the accused because she was intoxicated, and yet in the previous incident she had acted in a sexually aggressive manner in spite of her intoxication.[61]

The CAAF correctly rejected this argument. The defense has the burden of showing how the victim's sexual aggressiveness to one man undermined her credibility with respect to her charge of rape by the accused. The court saw the defense's argument as a thinly veiled attempt to suggest that a woman sexually aggressive with one man on one occasion cannot be truthful in claiming rape by another man on a different occasion. The CAAF held that this is exactly the type of evidence and argument that MRE 412 is intended to exclude.[62]

The court also rejected the defense's attempt to introduce evidence that the victim had previously made a rape complaint against another Marine. The court rejected this evidence because it failed to meet the basic requirements of logical and legal relevance. According to the court, there was no evidence that the prior rape complaint was false, and the mere filing of a complaint has no bearing on the truthfulness or untruthfulness of the complainant. Accordingly, the evidence had no relevance on this unrelated case.[63]

Finally, the court noted that all of this evidence was inconsistent with the defense's theory of the case. At trial, the accused denied that any sexual incident ever happened. Under this theory, the victim's past sexual history with other men had no relevance. According to the court, the defense was attempting to launch a "smear campaign" that would paint the victim in a bad light.[64]

Advice

This case is a further reminder that the court is unwilling to let the exception in MRE 412(b)(1)(C) swallow the rule. Just because there may be evidence of the victim's past sexual conduct, the evidence is not necessarily admissible. The defense has the burden to show that this evidence is relevant, consistent with their theory of the case, and constitutionally required. The CAAF clearly separated out each of the defense claims in this case and critically analyzed them.

While the court does not specifically say when evidence of the victim's sexual behavior is constitutionally required, the opinion lists several factors that practitioners should consider. First, is the victim's sexual misconduct consistent with the defense theory of the case? If, as in *Velez*, the accused claims he was not involved in any sexual contact, the victim's past sexual behavior or propensity has no relevance. Second, is the victim's past sexual behavior factually similar to the allegations against the accused? In *Valez*, if the victim had alleged that the Marine she had previously played pool with and spent the night with had raped her, this evidence may have some relevance to the accused's case. Third, is the victim's past sexual behavior with one man relevant on the issue of consent with the accused?

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id*. at 227.

61. *Id.*

62. *Id.*

63. *Id*.

64. *Id*. at 228.

In this case, the defense was unable to show how the victim's sexual aggressiveness with one Marine on one occasion had any relevance to sexual contact with the accused on a different occasion. Finally, is the victim's past sexual behavior relevant to her character for truthfulness? In *Velez*, if the defense could have shown that the victim's prior rape allegation was false, it would have had some bearing on her character for truthfulness and may have been admitted under MRE 608(b).[65] What is clear from this case is that CAAF is wary of the defense using sexual behavior evidence to launch a smear campaign against the victim.

In the third rape shield case, the CAAF held that the victim's homosexual orientation is not automatically relevant on the question of whether the victim consented to sexual contact with someone of the same sex. In *United States v. Grant*,[66] the accused was convicted of forcible sodomy and indecent assault. The victim, Senior Airman (SrA) B claimed that after a night of heavy drinking, he was sleeping in the accused's bunk and that while he was asleep, the accused fondled his genitals and performed oral sodomy on him. The accused admitted to fondling SrA B's genitals, but claimed that this was consensual. The accused denied performing oral sodomy on SrA B.[67]

At trial, the defense did not cross-examine SrA B about his sexual orientation, although they sought to elicit testimony from another witness that SrA B was a homosexual. The defense contended that SrA B's sexual orientation was relevant on the issue of consent in this case. The government objected and the military judge ruled that evidence of SrA B's sexual orientation was inadmissible under MRE 412.[68]

On appeal, the defense argued that this evidence was constitutionally required under MRE 412(b)(1)(C) on the issue of consent and also to show SrA B's motive to lie to avoid being exposed as a homosexual. The CAAF rejected the defense's argument that sexual orientation was relevant to the victim's consent. Military Rule of Evidence 412 is a rule of relevancy. The premise of the rule is that reputation or opinion about the victim's past sexual behavior is not a relevant indicator of consent. The court held that evidence of the victim's sexual orientation, without a showing that the conduct is so particularly unusual and distinctive as to verify the accused's version of the events, is not relevant.[69] The court believes that a victim's homosexual orientation is not so unusual or distinctive that it would verify an accused's claim that the homosexual contact was consensual.[70]

The court did not decide whether this evidence was admissible to show the victim's motive to lie. The court held that the defense waived this argument because they did not proffer the evidence on this basis at trial.[71]

Advice

This case is a reminder that MRE 412 requires a higher showing of relevance than is required by MRE 401.[72] Under the low standard of MRE 401, the victim's homosexual orientation has some tendency to show that he is more likely to have consented to the accused's contact than if he were a heterosexual. Under the higher relevance standard of MRE 412, however, the court did not believe that homosexual conduct is so particularly unusual and distinctive that it would have verified the defendant's version of events. This case also reminds counsel to articulate all theories of admissibility at trial. Had the defense argued at trial that this evidence was relevant to show SrA B's motive to lie in order cover up his own homosexuality, the military judge may have admitted the evidence or the CAAF may have reversed the judge's decision to exclude the evidence on this basis.

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65. MCM, *supra* note 2, MIL. R. EVID. 608(b). This rule states:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of a crime as provided in MRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness . . . .

Id.

66. 49 M.J. 295 (1998).

67. *Id.* at 296.

68. *Id*. at 297.

69. *See* United States v. Sanchez, 44 M.J. 174, 179-80 (1996).

70. *Grant*, 49 M.J. at 297.

71. *Id.*

72. MCM, *supra* note 2, MIL R. EVID. 401. This rule defines relevant evidence as: "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

Once a Molester, Always a Molester

Two fairly new rules that federal and military courts have begun to struggle with are MRE 413 and 414.[73] These rules represent a significant departure from the longstanding prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct.[74] Both rules state that evidence that an accused committed either acts of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. Absent from these rules are the familiar limitations found in MRE 404(a) and (b) that specifically prohibit the government from using uncharged misconduct to prove that the accused has a bad character or that he has the propensity to commit the charged offenses. Free from these limitations, trial counsel can now argue that, because the accused has committed similar misconduct in the past, he is more likely to have committed the charged offenses. Courts must now decide whether there are any limits to the use of uncharged misconduct under these rules and whether the use of this evidence to show the accused's bad character violates the Due Process Clause or the Equal Protection Clause of the Constitution.[75] Three cases illustrate how the courts are trying to resolve these issues.

The first case involved a constitutional challenge to FRE 414.[76] In *United States v. Castillo*,[77] the defendant was charged with several acts of child sexual abuse against his daughters. At trial, the children testified not only to the charged abuse, but also to other uncharged acts of abuse. The doctors who treated the victims also testified that one of the victims told him that the defendant had molested her at least ten other times. This evidence was admitted under FRE 414. At trial, and on appeal, the defendant challenged FRE 414 as a violation of his Due Process and Equal Protection rights.

The Tenth Circuit Court of Appeals began its review by noting that this rule is a significant departure from FRE 404(b). The court said that in child abuse cases, FRE 414 replaces the restrictive FRE 404(b) and allows the government to prove the defendant's bad character and argue his propensity to molest children.[78]

Citing the language of the Supreme Court in *Michelson v. United States*,[79] the court noted that a ban on the use of propensity evidence may have a constitutional dimension. In spite of *Michelson*, the court said that there is no case that directly holds that the use of propensity evidence violates the Due Process Clause. For a rule of evidence to violate the Due Process Clause, the rule must violate fundamental conceptions of justice.[80] The court said FRE 414 did not violate these fundamental concepts of fairness for three reasons.

First, the court cited historical practice. In the court's view, while there is a long history in the United States of courts excluding propensity evidence, the record regarding evidence of one's sexual character is more ambiguous.[81] According to the court, several states have relaxed the rules against the use of propensity evidence in cases involving illicit sex. Some states even developed a "lustful disposition" rule allowing past sexual misconduct to be admitted to show a defendant's bad character. The court said this historical ambiguity favors the use of this evidence because the protection afforded the defendant is not deeply rooted.[82]

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73. *Id.* MIL. R. EVID. 413, 414. Military Rule of Evidence 413 states in part: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and my be considered for its bearing on any matter to which it is relevant." *Id.* MIL. R. EVID. 413. Military Rule of Evidence 414 states: "In a court-martial in which the accused is charged with an offense of sexual child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and my be considered for its bearing on any matter to which it is relevant." *Id.* MIL. R. EVID. 414.

74. *See* Michelson v. United States, 335 U.S. 469 (1948) (discussing the prohibition against using uncharged misconduct to prove the accused's bad character). In *Michelson* the Court said propensity evidence is inadmissible because it weighs too much with the jury and may overpursuade them. The jury may convict an accused because of a bad general record without focusing on the offense that the accused stands charged with. *Id*. at 469-70. This common law principle is reflected in both the federal and military rules of evidence. Military Rules of Evidence 404(a) and (b) state that evidence of a persons character is not admissible for the purpose of proving that the person acted in conformity with that character on a particular occasion. MCM, *supra* note 2, MIL R. EVID. 404(a), (b).

75. U.S. CONST. amend. V, XIV.

76. Federal Rules of Evidence 413 and 414 mirror the military rules in all pertinent parts. Federal Rule of Evidence 414 states: "In a criminal case in which the defendant is accused of an offense of sexual child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible and my be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 414(a).

77. 140 F.3d 874 (10th Cir. 1998).

78. *Id.* at 879.

79. 335 U.S. 469 (1948).

80. *Castillo*, 140 F.3d. at 881.

81. *Id.*

82. *Id*.

Second, the court noted that other rules of evidence have been found to be constitutional even though there is a risk that a defendant will be convicted because of his bad character. The most notable rule in this category is FRE 404(b). In spite of this risk, the Supreme Court has upheld the constitutionality of that rule.[83]

Third, and most importantly, FRE 403 still applies to the admissibility of this evidence. According to the court, this is the most significant factor favoring the constitutionality of FRE 414. The court held that the FRE 403 balancing test applied to evidence admitted under FRE 414 in spite of the rule's language that says that evidence of other similar misconduct "is admissible."[84] Under this balancing test, the trial judge must ensure that the evidence is both relevant and not unfairly prejudicial. Accordingly, the judge should always exclude evidence that would violate the defendant's fundamental right to a fair trial. The court remanded the case to the trial court for a fuller explanation of how the judge conducted the FRE 403 balancing in this case.

The defendant also challenged the rule as a violation of the Equal Protection Clause. He argued that the rule treats this class of suspects differently than other suspected criminals and affords them fewer protections. The court acknowledged that the rule does treat this class of criminal suspects differently than others, but in conclusory language, the court held that this was not a violation of the Equal Protection Clause.[85] The court reasoned that under the rational basis test, Congress intended the rule to enhance effective prosecutions in child molestation cases. According to the court, these cases are often difficult to prove and these rules provide important corroboration evidence that would otherwise be lacking. This was a sufficient basis for the disparate treatment of this class of suspects.[86]

Comment

Castillo is an important case for military practitioners. This is one of the first federal cases to address the constitutionality of either the federal or the military rule. The opinion provides a template that other courts, including the Air Force Court of Criminal appeals, have followed in analyzing these new rules of evidence. The court's view that FRE 414 specifically allows the government to use evidence of other misconduct to argue that the accused has a bad character or criminal propensity is significant. In spite of the rule's language, not all courts have been as willing to accept this proposition.[87]

In its decision, the court avoided a strict reading of the rule. The rule itself says that prior misconduct of a similar nature "is admissible." The rule does not indicate that other rules of evidence provide any limitation on the admissibility of this evidence. Nevertheless, *Castillo* reads a FRE 403 balancing requirement into the rule. Absent this balancing requirement, it is unlikely that the court would have found the rule to be constitutional. The question remains whether FRE 403 sufficiently protects the accused's Due Process rights because the rule itself favors the admissibility of relevant evidence unless the probative value is substantially outweighed by the risk of unfair prejudice. The court does not give any guidance to trial judges on what factors they should consider in balancing these interests.

Following closely on the heels of *Castillo* and adopting a very similar analysis, the Air Force Court of Criminal Appeals upheld the constitutionality of MRE 413 in *United States v. Wright.*[88] In *Wright*, the accused was charged with rape, housebreaking, and two specifications of indecent assault with two different victims. The accused pleaded guilty to one specification of indecent assault and unlawful entry, but pleaded not guilty of indecent assault and rape of the second victim. At trial, the military judge allowed the government to introduce evidence under MRE 413 of the indecent assault to which the accused pleaded guilty. The judge specifically allowed the government to use this evidence to argue that the accused had the propensity to commit the indecent assault and rape of the second victim. The military judge also instructed the members concerning the use of this evidence to show propensity.[89]

On appeal, the defense argued that MRE 413 is unconstitutional on its face because it violates the Constitution's Due Process and Equal Protection Clauses. Addressing the Due

83. *Id.* at 882

84. *Id.*

85. *Id.* at 883.

86. *Id.*

87. *See e.g.*, United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998). This case involved the admission of evidence under MRE 414 against the accused. The Air Force Court did not address the constitutionality of the rule, but evaluated how the rule was applied in that particular case. In a concurring opinion, Senior Judge Snyder explained that MRE 414 still does not allow the government to argue that the accused has the propensity to molest children. Judge Snyder said that MRE 414 just expands the arguments that the government could already make under MRE 404(b). According to Judge Snyder, MRE 414 expressed Congress's preference for this testimony to be admitted even if there is some risk that the members may use it as propensity evidence. *Id.* at 730-31 (Snyder, J., concurring). It is difficult to see how Judge Snyder's view is supported by either the language or legislative history of the rule, neither of which put any limits on how this evidence is to be used. Further, the legislative history specifically assumes that evidence admitted under this rule will be used to show the accused's propensity. *See, e.g.*, 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Representative Molinari); *Id.* S12990 (daily ed. Sept. 20, 1994) (statement of Senator Dole).

88. 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

Process challenge, the court assumed, as did the Tenth Circuit with FRE 414, that MRE 413 allows the government to use similar uncharged misconduct evidence to prove the accused's propensity to commit sexual assault crimes.

The Air Force Court said that in order for MRE 413 to violate the Due Process Clause, the rule must violate fundamental notions of fairness. Adopting much of the analysis of the *Castillo* court, the Air Force Court held that historically there is "no fundamental conception of justice which precludes admission of prior bad acts of the same type as those of which the accused stands charged."[90] The court concluded that the protections against the use of propensity evidence in sexual assault cases are not so fundamental to our system of justice that they equate to a due process right.[91]

Absent from the court's opinion is any direct mention of MRE 403 and how it should serve to protect the accused against the admission of unfairly prejudicial evidence. In a footnote, the court said, without elaboration, that the military judge in this case properly conducted a MRE 403 balancing. In that same footnote, the court also sent a clear message to military judges that MRE 403 should not pose much of a hurdle to the admissibility of MRE 413 and MRE 414 evidence. The court said, "during such balancing, judges should recognize that the presumption is in favor of admission."[92]

The defense also challenged the rule on equal protection grounds, alleging that it prevents a group of suspects from receiving a fair trial. According to the defense, because MRE 413 denies these suspects a fair trial, the court should apply a strict scrutiny standard of review. The court rejected this argument as well. The court applied a rational basis standard of review because sexual offenders were not members of a suspect class and MRE 413 does not otherwise violate fundamental notions of fairness. Under this standard, the court held that Congress had a rational basis for this rule to provide a means by which evidence of patterns of abuse and similar crimes could be admitted into evidence.[93] Therefore, MRE 413 does not violate the Equal Protection Clause.

This is the first military case to address the constitutionality of either MRE 413 or MRE 414 directly. The Air Force Court turned to the Tenth Circuit and adopted much of its rationale for upholding the constitutionality of this rule. Indeed, *Wright* reads like a condensed version of *Castillo*. In this condensed version, however, the Air Force Court omits some critical aspects of *Castillo.*

In *Castillo*, the court stressed the need for the trial judge to conduct a FRE 403 balancing test before admitting this evidence. The court even remanded the case to the trial court so the judge could develop the FRE 403 balancing on the record. The Air Force Court, however, did not mention the role MRE 403 plays in ensuring that the accused's due process rights are protected. This failure is unfortunate because it may send an unintended message that military judges do not need to do a detailed balancing, or that they do not need to articulate how they did the balancing test. The court in *Wright* should have done more than simply adopt the Tenth Circuit's analysis. They should have specifically addressed how MRE 403 applies to this evidence and what they expect of the military judge in conducting a balancing test.

On the equal protection issue, the Air Force Court again was too willing to adopt the Tenth Circuit's opinion without any independent analysis. The court said that the strict scrutiny standard did not apply to MRE 413 because no court has identified sex offenders as a suspect class.[94] The court's reasoning places the cart before the horse, because the court assumes that these suspects are sexual offenders when that is the very issue at trial. Further, MRE 413 does not limit admissibility of uncharged misconduct only to prior convictions or determinations that the accused is a sexual offender. The rule says "evidence of the accused's commission of one or more offenses of sexual assault is admissible."[95] The court failed to adequately address why suspects of sexual assault and child molestation should get less procedural protections than other classes of suspects.

The third case to tackle these new rules is *United States v. Henley.*[96] Here, the accused was charged with molesting his son and daughter over a five-year period. The government introduced other instances of molestation that allegedly occurred outside the five-year statute of limitations. The government offered this evidence under MRE 404(b) and MRE 414. The

89. *Id.* at 899.

90. *Id*. at 901.

91. *Id.*

92. *Id*. at 899 n.1.

93. *Id.* at 901.

94. *Id.*

95. MCM, *supra* note 2, MIL R. EVID. 413(a).

96. 48 M.J. 864 (A.F. Ct. Crim. App. 1998).

military judge admitted this evidence over the defense's objection.

On appeal, the defense argued that the military judge erred in admitting this evidence under MRE 414. Appellate defense counsel did not challenge the admissibility of this evidence under MRE 404(b). The Air Force Court held that the evidence was admissible under 404(b) and that any issue of the evidence's admissibility under MRE 414 was, therefore, moot. The court reasoned that because MRE 404(b) is a more restrictive rule, evidence admitted under that rule is per se admissible under MRE 414.[97]

The court's reasoning is incorrect. Even if the evidence is admissible under MRE 404(b), that does not automatically render it admissible under MRE 414. This is because evidence admitted under MRE 404(b) can only be admitted for a non-character purpose. Further, the military judge will give a limiting instruction to the panel that specifically tells them that they cannot consider this evidence to conclude that the accused has a bad character or has a propensity to commit criminal misconduct. These limitations are in contrast with the theory behind the admissibility of evidence under MRE 414. Under MRE 414, the evidence is expressly admitted for its tendency to show the accused's propensity to commit this type of offense. Because the theories of admissibility under MRE 404(b) and MRE 414 differ, evidence admitted under MRE 404(b) does not moot questions of admissibility under MRE 414. Judge Snyder, who wrote the opinion, believes that evidence admitted under MRE 414 cannot be used as propensity evidence.[98] Judge Snyder's opinion illustrates that judges who are uncomfortable with the broad language of MRE 413 and MRE 414 may look to more familiar rules of evidence to analyze the admissibility of uncharged misconduct in sexual assault and child molestation cases.

Advice

These three cases provide military practitioners some important insights about the use of these new rules. First, in spite of the broad language of the rules, courts may narrow their application. No court is likely to take the term "is admissible" at face value. On the contrary, courts like *Castillo* will apply other rules to control the admissibility and use of this evidence. The most significant control is MRE 403. This rule gives the military judge the discretion to preclude evidence that is unfairly prejudicial, even if otherwise admissible.

Practitioners should also analyze the admissibility of evidence under MRE 413 and MRE 414 under the same rubric they use for MRE 404(b) evidence. Counsel should ask whether: (1) the evidence is relevant, (2) the evidence is sufficient and in an admissible form, and (3) the risk of unfair prejudice substantially outweighs the probative value.[99]

Finally, in spite of the rule's language and its legislative history, some courts may agree with Judge Snyder and be unwilling to admit this evidence for its tendency to show the accused's bad character or his propensity to commit sexual assaults or child molestation. Accordingly, government counsel must be prepared to argue other non-character theories of relevance for the admissibility of this evidence under MRE 404(b).

Your Secret is Safe With Me . . . NOT!

In 1997, the Army Court of Criminal Appeals stated in *United States v. Demmings* that a psychotherapist-patient privilege may exist in the military.[100] The Army Court's opinion was dicta, and raised the question of whether such a privilege really exists. In 1998, a different panel of the Army Court addressed the issue directly and held that there is no psychotherapist-patient privilege.

97. *Id.* at 870.

98. United States v. Hughes, 48 M.J. 700, 730 (A.F. Ct. Crim. App. 1998) (Snyder, J., concurring). *See supra* note 86 and accompanying text.

99. *See, e.g.*, United States v. Miller, 46 M.J. 63, 65 (1996).

100. *See* United States v. Demmings, 46 M.J. 877 (Army Ct. Crim. App. 1997) (citing Jaffe v. Redmond, 518 U.S. 1 (1996)). In *Jaffe*, the Court held that there is a psychotherapist-patient privilege under federal common law that extends to licensed social workers. *Jaffe*, 518 U.S. at 16.

United States v. Rodriguez[101] involved an accused convicted of intentionally injuring himself by shooting himself in the abdomen. At trial, the accused claimed that the self-inflicted wound was an accident. During his medical treatment prior to trial, however, the accused told a psychiatrist that he wanted to cause some injury to himself so he could get sent home.[102] At trial and on appeal, the defense tried to suppress these statements claiming privilege.[103]

The Army Court rejected the defense's claim for two reasons. First, the court held that the federal common law privilege without specifically tailored parameters and exceptions necessary in a military environment is not practical.[104] The court said an unrestricted general privilege could endanger safety and security, and commanders could be deprived of critical information, thereby, putting their soldiers and missions in jeopardy.[105] The court cited the language of MRE 501(a)(4)[106] to support its holding. Military Rule of Evidence 501(a)(4) says that the military recognizes the common law privileges to the extent that these privileges are practical and not inconsistent with the code, these rules, or the *Manual for Courts-Martial*. The court believed that a broad psychotherapist-patient privilege is not practical in a military context.

The court also said that MRE 501(d) already bars the application of the *Jaffe* privilege for psychiatrists employed by the armed forces. Military Rule of Evidence 501(d) says that information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian in a professional capacity.[107] The court held that this language covers not only doctors but psychiatrists as well.[108]

Advice

Because a psychotherapist-patient privilege is both impractical, and inconsistent with the language of MRE 501(d), the court said it does not exist and will not exist until the President expressly creates one.[109] A draft proposal recognizes a limited psychotherapist-patient privilege in the military.[110] The proposed MRE 513 would offer a limited privilege to persons subject to the UCMJ and psychotherapists. This rule will not likely be adopted before late 1999. For now, Army practitioners should assume that there is no privilege. Defense counsel must take this into consideration in advising clients to seek counseling.

Expert Evidence

Last year was a banner year in the area of expert testimony and scientific evidence. Two of the most important cases came from the Supreme Court. In one, the Court addressed the standard of review that appellate courts should apply when reviewing a trial judge's decision to admit or exclude scientific evidence. In the second, the Court held that the judge's gatekeeping function applies to all types of expert evidence. Finally, the Supreme Court ruled on the constitutionality of MRE 707. The CAAF also addressed a number of expert evidence issues. For the first time, the court looked at the admissibility of expert testimony in the area of eyewitness identification. The CAAF also revisited a recurring issue regarding the scope of an expert's opinion.

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101. 49 M.J. 528 (Army Ct. Crim. App. 1998).

102. *Id.* at 529.

103. *Id.*

104. *Id.* at 531-32.

105. *Id.*

106. MCM, *supra* note 2, MIL. R. EVID. 501(a)(4). This rule states:

> (a) A person may not claim a privilege with respect to any matter except as required or provided for in:
>
> . . . .
>
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

Id.

107. *Id.* MIL R. EVID. 501(d).

108. *Rodriguez*, 49 M.J. at 533.

109. *Id.* at 532.

110. Appendix A to this article contains the text of proposed MRE 513.

Standard of Review

After the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[111] the federal circuits were confused about the standard of review that appellate courts should apply when reviewing a trial judge's decision to admit or exclude scientific evidence. In *General Electric Company*, et al. *v. Joiner*,[112] the Supreme Court resolved this dispute. In this case, the plaintiff claimed that his exposure to polychlorinated biphenyls (PCBs) manufactured by General Electric caused his lung cancer. To support this claim, the plaintiff intended to call two experts to testify about studies showing that exposure to PCBs caused cancer in laboratory animals. The trial judge ruled that the plaintiff's expert testimony did not show a sufficient link between PCBs and lung cancer. The court excluded the testimony and granted summary judgment for the defendant.[113]

The Eleventh Circuit Court of Appeals reversed the district court's ruling. The appellate court applied a "particularly stringent standard of review" when it reviewed the judge's decision to exclude the expert testimony. The court reasoned that this stricter standard was necessary because the federal rules of evidence governing scientific evidence display a preference for admissibility.[114]

The Supreme Court granted certiorari and reversed the Eleventh Circuit. The Court rejected the Eleventh Circuit's "particularly stringent standard." A unanimous Court held that abuse of discretion is the proper standard for reviewing a trial judge's decision, and nothing in *Daubert* or the federal rules created a stricter standard with scientific or other expert testimony.[115]

Advice

This case reminds practitioners and judges that there is nothing so unique about the admissibility of expert testimony that requires the appellate courts to apply a special standard to the trial judge's decision. As with most evidentiary rulings, the standard of review for the judge's decision is abuse of discretion. This holding, coupled with the Court's ruling in *Daubert*, gives the trial judge significant power over the admissibility of scientific testimony. The military judge must serve as the gatekeeper to ensure that only reliable scientific testimony reaches the fact finder. In that gatekeeper role, the judge has wide discretion and should not be second-guessed by the appellate courts simply because they disagree with the trial judge's decision.

Supreme Court Clarifies Daubert

In the second decision,[116] the Supreme Court clarified another nagging issue that remained unanswered after their landmark opinion in *Daubert*[117] In clear, understandable language, the Court held that the trial judge's gatekeeping responsibility in evaluating the reliability of expert testimony applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge.[118] The Court also clarified that the trial judge can use the factors announced in *Daubert* as well as other appropriate factors to evaluate the reliability of scientific and non-scientific expert testimony.[119] Finally, the Court's opinion reiterated the considerable leeway and broad latitude that the trial judge must have in making reliability determinations regarding expert evidence.[120]

In an age of increasing reliance on expert evidence in courts-martial, *Kumho Tire* has important implications for criminal practitioners and military judges. When read in connection with *Daubert*, and *General Electric v. Joiner*,[121] *Kumho Tire* completes a trilogy of cases on expert testimony and sets the course for the admissibility of expert evidence for decades to come. There are several points practitioners must take away

111. 509 U.S. 579 (1993). In *Daubert*, the Supreme Court overruled the *Frye* test, which federal courts had used to evaluate the reliability of novel scientific theories. The Court set out factors that trial judges should use to evaluate the reliability of evidence developed through the scientific method. The Court also stressed the role of the trial judge as the gate keeper, charged with keeping the courtroom free of "junk science."

112. 118 S. Ct. 512 (1997).

113. *Id.* at 516.

114. *Id.*

115. *Id.* at 517.

116. Kumho Tire v. Charmichael, 119 S. Ct. 1167 (1999).

117. 509 U.S. 579 (1993).

118. *Kumho Tire*, 119 S. Ct. at 1171.

119. *Id.*

120. *Id.*

121. 522 U.S. 136 (1997).

from this trilogy. First, the trial judge's gatekeeping responsibility applies to all types of expert testimony. Second, the trial judge can use the factors announced in *Daubert* as well as other appropriate factors to evaluate the reliability of expert evidence. Third, the role of the trial advocate in demonstrating the reliability of expert testimony is more important than ever before. Finally, military judges will enjoy broad discretion in deciding on the reliability and admissibility of expert testimony.

Polygraphs

In *United States v. Scheffer*,[122] the Supreme Court reversed the CAAF, holding that MRE 707,[123] which excludes polygraph evidence from courts-martial, does not unconstitutionally abridge an accused's right to present a defense.[124]

The accused was charged with, among other offenses, wrongful use of methamphetamine. At trial, the accused offered an innocent ingestion defense and moved to introduce the results of an exculpatory polygraph test administered by the Air Force Office of Special Investigation in order to corroborate his in-court testimony. Citing MRE 707, the military judge refused to allow the accused to introduce or attempt to lay a foundation for the introduction of the polygraph examination results.[125]

On appeal, the CAAF reversed the military judge, holding that MRE 707 violated the accused's Sixth Amendment[126] right to present a defense.[127] The CAAF adopted the Supreme Court's rationale in *Rock v. Arkansas*,[128] where the Court stated that a legitimate interest in barring unreliable evidence does not extend to an exclusion that may be reliable in an individual case.[129] The CAAF concluded that the trial court should rule on the admissibility of polygraph evidence on a case-by-case basis and remanded the case to the trial court for an evidentiary hearing on the admissibility of the polygraph results.[130] The government appealed and the Supreme Court granted certiorari.[131]

On 31 March 1998, the Supreme Court reversed, holding that MRE 707's exclusion of polygraph evidence does not unconstitutionally abridge the right of accused members of the military to present a defense.[132] Writing for an eight-person majority, Justice Thomas held that rules restricting the accused from presenting relevant evidence do not violate the Sixth Amendment so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.[133]

The Court then examined the reliability of polygraph evidence. The Court found that there was no scientific consensus

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122. 118 S. Ct. 1261 (1998).

123. MCM, *supra* note 2, MIL. R. EVID. 707. This rule provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Id.

The President promulgated Military Rule of Evidence 707 pursuant to Article 36(a), UCMJ. The stated reasons for the ban were: (1) there is no scientific consensus on the reliability of polygraph evidence, (2) the belief that panel members will rely on the results of polygraph evidence rather than fulfill their responsibility to evaluate witness credibility and make an independent determination of guilt or innocence, and (3) the concern that polygraph evidence will divert the focus of the members away from the guilt or innocence of the accused.

124. *Scheffer*, 118 S. Ct. at 1261.

125. *Id.*

126. U.S. CONST. amend. VI.

127. United States v. Scheffer, 44 M.J. 442, 445 (1996). The court assumed but did not address whether the President acted in accordance Article 36(a) UCMJ in promulgating Military Rule of Evidence 707. *Id.*

128. 483 U.S. 44 (1987) (striking down Arkansas' ban on post hypnotic testimony).

129. *Id.* at 61.

130. *Scheffer*, 44 M.J. at 449.

131. United States v. Scheffer, 117 S. Ct. 1817 (1997).

132. United States v. Scheffer, 118 S. Ct. 1261, 1263 (1998).

133. *Id.* at 1264.

that polygraph evidence is reliable. The Court noted that most state courts and some federal courts still impose a ban on polygraph evidence and that courts continue to express doubt about whether such evidence is reliable even in jurisdictions that do not have a ban.[134] Given the widespread uncertainty about the reliability of polygraph evidence, the Court held that the President did not act arbitrarily or disproportionately in promulgating MRE 707.[135]

In a concurring opinion, Justice Kennedy, joined by three other justices, stated that the only valid interest served by MRE 707 is to prevent unreliable evidence from being introduced at trial. Because of the ongoing debate about the reliability of polygraph evidence, he was unwilling to require all state, federal, and military courts to consider this evidence.[136] Justice Kennedy then said that while MRE 707 is not unconstitutional, he doubts that a rule of exclusion is wise, and that some later case may present a more compelling case for the introduction of polygraph evidence.[137] He did not indicate what a more compelling case may be.

The only dissenter, Justice Stevens, said the President's promulgation of MRE 707 may violate Article 36(a) of the Uniform Code of Military Justice (UCMJ)[138] because there is no identifiable military concern that justifies a special evidentiary rule for courts-martial.[139] Justice Stevens also believed that polygraph evidence is as reliable as other scientific and non-scientific evidence that is regularly admitted at trial.[140] Given this reliability and the very sophisticated polygraph program administered by the Department of Defense, Justice Stevens said it is unconstitutional to deny an accused the use of this evidence.[141]

Analysis

Scheffer guarantees that polygraph evidence will continue to be excluded from the trial phase of courts-martial. Despite this ruling, the case raises a number of questions. Eight justices held that, because there is no scientific consensus about the reliability of polygraph evidence, the President's ban is not unconstitutional. The majority opinion, however, does not give any guidance as to the level of scientific consensus required before MRE 707's ban would no longer be justified. Furthermore, neither Justice Thomas' opinion nor Justice Kennedy's concurrence discusses how a ban on polygraph evidence is compatible with *Daubert*, which gives wide discretion to the trial judge to admit or exclude scientific evidence.

Finally, the majority opinion did not address the issue raised by Justice Stevens in his dissent that the President's promulgation of MRE 707 may violate Article 36(a), UCMJ. The majority opinion did not discuss or note any unique military concerns that justify a special evidentiary rule for courts-martial.

In spite of the 8-1 decision upholding the constitutionality of MRE 707, the Court's support of this unwise ban is lukewarm. Given a more compelling case, four justices may join Justice Stevens and require trial courts to consider the introduction of this evidence.

Polygraph Evidence in Preliminary Hearings

Military Rule of Evidence 104 states that the rules of evidence, except for those with respect to privileges, do not apply at preliminary hearings and other proceedings under Article 39(a), UCMJ.[142] Is polygraph evidence then admissible at these pre-trial hearings because the rules do not apply? The CAAF noted, but avoided, this issue in *United States v. Light*,[143] a post-*Scheffer* case. In *Light*, the accused was convicted of larceny for stealing government equipment. During the investigation he failed a CID polygraph. The polygraph failure was one factor that a Texas justice of the peace used to justify granting a search warrant of the accused's civilian quarters. On appeal, the CAAF considered whether the polygraph results can be considered in deciding probable cause. The CAAF noted the apparent tension between MRE 104 and MRE 707, but decided the case on other grounds. The court did say that this is an area that the President may want to clarify in the future.[144] Nothing

134. *Id* at 1266.

135. *Id.*

136. *Id.* at 1269 (Kennedy, J., concurring).

137. *Id.*

138. UCMJ art. 36(a) (West 1999).

139. *Scheffer*, 118 S. Ct. at 1272 (Stevens, J., dissenting).

140. *Id.* at 1276 (Stevens, J., dissenting).

141. *Id.* at 1270 (Stevens, J., dissenting).

142. MCM, *supra* note 2, MIL. R. EVID. 104.

143. 48 M.J. 187 (1998).

in MRE 707 or any other evidentiary rule prohibits the convening authority from considering the accused's passing or failing of a polygraph examination in deciding the appropriate disposition of the case.

Limits on the Expert's Opinion

One recurring issue that the appellate courts seem to face every year is the scope of an expert's opinion. The question most often arises in child molestation and sexual assault cases. Often the government seeks to introduce expert testimony about common reactions that victims of these crimes suffer. The expert then opines that the victim in the case at trial suffered similar reactions. The problem is that often the expert's opinion can cross the line and become a comment on the victim or another witness's credibility. Military and federal courts have consistently held that such testimony is not helpful to the fact finders because the witness has no expertise on questions of witness credibility.

The case that best illustrates the point this year is *United States v. Birdsall.*[145] In *Birdsall*, the accused was convicted of indecent acts, indecent liberties, and sodomy of his two sons. Two psychologists interviewed both boys several times before trial. Both boys claimed that the accused fondled them and performed anal sodomy on them on several occasions. No physical evidence corroborated the molestation, and the accused denied ever touching the boys inappropriately.[146]

At trial, the two doctors who interviewed the boys testified as experts in pediatrics and child abuse. Both experts testified about statements the victims made to them. Over a defense objection, the first doctor also testified that in his opinion the children were victims of sexual abuse. The second doctor testified that in her opinion the cases were founded and the children were the victims of abuse and incest. She further testified that the victims suffered post traumatic stress disorder because of sexual abuse. The defense counsel did not object to the second expert's testimony.[147]

On appeal, the accused contended that it was plain error for the military judge to admit this testimony. The CAAF agreed. The court held that both experts exceeded their areas of expertise by commenting on the credibility of the victims, an issue reserved for the fact finder.[148] The court said the doctors' opinions that sexual abuse had occurred were neither useful nor helpful to the jury because the jury was equally capable of making this determination. The court stated that the expert cannot act as a human lie detector. According to the court, such opinions violate MRE 608(a)'s limits on character evidence and exceed the scope of the witness's expertise. This testimony also usurped the role of the panel, which has the exclusive function to decide witness credibility issues.[149]

The testimony of these experts violated this rule because they both rendered an opinion as to the ultimate issue. The second expert also violated these rules because she testified that the boys were victims of incest. The court noted that she prefaced her testimony with the assertion that she was qualified to distinguish between founded and unfounded cases.[150]

Advice

This case shows that counsel must walk a very thin tight rope when dealing with expert testimony. Qualified experts can inform the panel of the characteristics found in sexually abused children. A doctor who interviews the victim may also repeat the victim's statements identifying the abuser as a family member if there are sufficient guarantees of the statement's trustworthiness. An expert can also summarize the medical evidence and testify that the evidence in this case is consistent with the victim's allegations of abuse. The expert, however, cannot go beyond that and comment on the credibility of witnesses or testify that sexual abuse has occurred and identify the perpetrator of the abuse.[151]

Eyewitness Identification

In recent years, an increasing number of cases have involved expert testimony on eyewitness identification. Typically, the expert is used to undermine the reliability of an eyewitness's identification by testifying about a number of factors that adversely affect the eyewitness's ability to accurately observe and relate the identification. In two cases this year, *United States v. Brown*[152] and *United States v. Rivers*,[153] the CAAF, for

144. *Id.* at 191.

145. 47 M.J. 404 (1998).

146. *Id.* at 407.

147. *Id.* at 407-08.

148. *Id.*

149. *Id.* at 409-10.

150. *Id.* at 408.

151. *Id.* at 410.

the first time, addressed the admissibility of expert opinion evidence relating to eyewitness identification. In both cases, the CAAF declined to announce a rule on the admissibility or inadmissibility of expert testimony on eyewitness identification. Rather, the court said the admissibility of this evidence would depend on the facts of each case.

In *Rivers*, the accused was convicted of distributing cocaine. On one occasion, the accused sold cocaine to a military police informant. On another occasion, he sold cocaine to the same informant and an undercover military police investigator. Prior to trial, the defense requested government funding for an expert in the field of eyewitness identification. The defense contended that the informant who identified the accused as the person who sold him the cocaine was lying. The defense also contended that the identification by the MPI investigator was unreliable because the investigator was inexperienced, nervous, excited, and of a different race than the accused.[154]

The convening authority and the military judge denied the defense request for an expert. The judge said that the defense-requested expert was properly qualified, that this was a proper subject matter of expert testimony, and the expert's conclusions are of the type reasonably relied on in the field. The judge, however, ruled that the probative value of the expert's testimony was substantially outweighed by the danger of confusing the issues, misleading the members, and wasting time. In making this ruling, the judge believed that this information would not help the panel members. According to the judge, under the facts of this case, the panel could consider any weaknesses in the identification without the aid of expert testimony.[155]

In *Brown*, the accused was charged with resisting apprehension, reckless driving, wrongful appropriation of a vehicle, and fleeing the scene of an accident. As a result of a domestic fight, the accused was placed in military confinement overnight. The next day he was escorted back to his quarters to get his medical records. While at the quarters, the accused fought with his wife, threatened his escort with a knife and then fled the scene. According to the escort, the accused was wearing tennis shoes, faded blue jeans, a denim shirt, and a dark blue baseball cap with the letter "A" on it.[156]

A few hours later, a utility worker stopped his truck at a gas station in Killeen, Texas. While getting gas, the utility worker noticed a man about forty feet away talking on a pay phone. According to the utility worker, the man was a thin black male, wearing blue jeans, a dark windbreaker, and a blue baseball cap with a white "A" on it. As the utility worker went to pay for gas, the man in the phone booth got in the truck and started to drive away. The utility worker ran after him and got a look at his face before he drove off in the truck. Later that day, the stolen truck was involved in an accident, and the accused was subsequently apprehended at his on-post quarters where he was hiding in a closet and holding a butcher knife.[157]

When the police searched the stolen truck, they found a blue baseball cap with the letter "A" on it and the name "Brown" embroidered on the side. The utility worker, whose truck was stolen, identified the accused in a photo line-up as the perpetrator.[158]

Before trial, the defense requested that the convening authority appoint a Dr. Cole as an expert witness for the defense in the area of eyewitness identification. The convening authority denied the request, and the defense renewed the request to the military judge at trial. The defense claimed that Dr. Cole would testify that the eyewitness's identification of the accused was unreliable because of several errors in his perception. The military judge denied the defense's witness request.

The judge ruled that Dr. Cole was a properly qualified expert and he had a proper basis to form an opinion. The judge, however, said that the probative value of this evidence was outweighed by the danger of unfair prejudice, and it was misleading to the members. The judge said that the matters Dr. Cole would testify about could be adequately covered in instructions and were not matters outside the members' understanding, where expert testimony would be helpful.[159]

The defense in *Rivers* and *Brown* appealed the military judges' decisions to exclude this testimony. In both cases, the CAAF examined how other courts have treated the admissibility of eyewitness identification experts. The court noted that until recently, most federal courts excluded this testimony. The CAAF, however, noted a trend in both state and federal courts to admit this testimony on a case-by-case basis. In *Rivers*, the

152. 49 M.J. 448 (1998).

153. 49 M.J. 434 (1998).

154. *Id.* at 445.

155. *Id.*

156. *Brown*, 49 M.J. at 449.

157. *Id.* at 450.

158. *Id.* at 451.

159. *Id.* at 452.

court went no further. The court said any error the judge made in excluding this testimony was harmless because ultimately a military judge tried the accused. The court said that even if the expert may have been helpful to lay court members, the expert would not have been helpful to the military judge because he was already fully aware of any problems with the identification.[160]

In *Brown*, the CAAF did a more complete analysis. First, the court noted that the Army Court had ruled that the military judge erred in excluding some of the proffered expert testimony. According to the Army Court, some of the information regarding errors in perception, cross-racial identification, the impact of stress on memory, and the mental process of memory would have been helpful to the members.[161] The CAAF said this part of the Army Court's opinion was consistent with numerous appellate court holdings.[162] The CAAF then noted that several other courts have excluded this evidence because it is either not helpful to the fact-finder, or because of the risk of unfair prejudice. The court avoided adopting a bright line rule on the issue. Instead, the court held that as a general matter this evidence is not inadmissible.[163] The court did express doubt about the ability of the expert in this case to opine that the identification was unreliable. According to the court, there is nothing in the literature to suggest that an expert has the ability to render such a conclusory opinion.[164]

Finally, the CAAF adopted the Army Court's reasoning, which held that even if the judge erred in excluding this testimony, the error was harmless. Because the government's identification case was strong, particularly considering that a baseball cap with the accused's name on it was found in the stolen truck, the expert's testimony would not have had a substantial impact on the outcome of the case.[165]

Advice

These cases provide some valuable insight into the CAAF's view of eyewitness identification evidence. Most importantly, this evidence may be admissible depending on the facts of the case. If the expert is qualified, and the testimony is relevant, reliable, and not unduly prejudicial, the military judge should admit this evidence. Arguments that eyewitness expert-testimony is inadmissible because it is unreliable and not helpful will not be successful. If there is a genuine need for the evidence and a qualified expert is able to testify, the military judge should admit this evidence.

Even if an expert is allowed to testify, according to the CAAF's dicta in *Brown*, the expert could not testify as to the ultimate issue—that the eyewitness's identification is unreliable.[166] The expert simply does not have the ability to render such an opinion, and it would not help the fact-finder. This is consistent with the CAAF's opinions in other areas, particularly experts in child abuse cases, who are precluded from opining about the ultimate issue. Therefore, practitioners who proffer this evidence must limit the expert's opinion to discussing what factors could affect the reliability of an eyewitness's identification. Likewise, opposing counsel must be wary of any attempt by an expert to opine that the identification is unreliable.

Statements and Fabrications

Military Rule of Evidence 801(d)(1)(B) exempts out-of-court statements from the definition of hearsay if the statements are consistent with the witness's in-court testimony and are offered to rebut a charge of recent fabrication.[167] Both the Supreme Court and the CAAF have held that, for an out-of-court statement to be logically relevant rebuttal evidence, it must have been made before the improper influence or motive to fabricate arose.[168] In two cases this year, the CAAF struggled

160. *Rivers*, 49 M.J. at 447.

161. United States v. Brown, 45 M.J. 514, 517 (Army Ct. Crim. App. 1996).

162. *Brown*, 49 M.J. at 454.

163. *Id.* at 456.

164. *Id.*

165. *Id.*

166. *Id.*

167. MRE, *supra* note 2, MIL. R. EVID. 801(d)(1)(B). This rule states:

> (d) A statement is not hearsay if:
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Id.

with the question of how to determine when the improper motive arose.

In *United States v. Faison*,[169] the accused was convicted of indecent acts with his thirteen-year-old stepdaughter. On the evening of 18 February 1994, the accused had an argument with his stepdaughter. Later that night, the accused went into her room and, according to the stepdaughter, he fondled her. The next day, the victim reported this incident to her friend. At trial, the defense challenged the victim's credibility. On cross-examination of the victim, the defense elicited testimony that she had gotten rid of one of her mother's previous boyfriends by alleging that he abused her. The victim also admitted that she was angry at the accused on 18 February 1994 because he told her she could not call her boyfriend anymore. The victim also conceded that there were other times when she thought the accused punished her unfairly. During this cross-examination, the defense implied that the victim made the allegations against the accused, in part, because she was angry with him over the argument they had on 18 February 1994.[170]

On redirect, the trial counsel asked the victim about statements she made to her friends in August 1993 and January 1994. In these statements, the victim told her friends that the accused was "messing" with her. The government proffered this testimony under MRE 801(d)(1)(B) because they preceded her fight with the accused on 18 February 1994. The defense argued that this evidence was inadmissible hearsay because the victim was upset with the accused as early as August 1993 and, therefore, these statements were not made before a motive to fabricate existed. Although, the military judge denied the defense's objection, he did not receive the evidence under MRE 801(d)(1)(B). Instead, he said the statements were admissible, but could only be considered to rebut the defense's attack on the victim's credibility. He then gave a limiting instruction to the members, telling them that they could not consider this statement substantively.[171]

In *Allison*,[172] the accused was convicted of sodomizing his stepson. The victim reported the abuse to a teacher. Soon after this report, the victim provided a videotaped statement detailing the accused's sexual molestation of him. At trial, the defense proffered several theories to show that the victim's testimony was unreliable. One theory was that initially the victim's mother did not believe the accusations, but manipulated the victim to establish grounds for divorce, obtain a monetary settlement, gain custody of the children, and remain in Germany. The defense also presented other theories to challenge the reliability of the victim's testimony.[173]

To rebut the claim that the victim's testimony was a product of his mother's manipulation, the government introduced the videotape that the victim made. At the time this videotape was made, the victim's mother did not yet believe the accused had abused her son. The government introduced this evidence under MRE 801(d)(1)(B). The defense objected, claiming that there had been a number of improper motives that affected the victim's testimony, and many of them had arisen before he made the videotape.

In both cases, the CAAF had to decide if the prior statements were made before a charge of improper motive or recent fabrication was made. In both cases, the court said the statements were made before a charge of improper motive and were admissible. In *Faison*, the defense implied that the argument on 18 February 1994, gave the victim a motive to fabricate her accusations against the accused the next day. According to the defense, her overall motive to fabricate arose earlier than her statements on August 1993 and January 1994.[174] In *Allison*, the defense contended that the victim had more than one motive to fabricate and several of these motives preceded the victim's videotaped statement.[175]

The CAAF said the defense's focus on when the motive to fabricate developed is misplaced. Military Rule of Evidence 801(d)(1)(B) is concerned with rebutting an express or implied charge by the party opponent that an impropriety occurred. The court said that, because it is often difficult, if not impossible, to determine the precise moment that an improper motive arose, the proper focus is on when the charged impropriety occurred, not when the underlying motive developed.[176] In *Faison*, the defense implicitly charged that the victim's argument with the accused on 18 February 1994 gave rise to at least one motive to

168. *See* Tome v. United States, 513 U.S. 150 (1995). *See also* United States v. McCaskey 30 M.J. 188 (C.M.A. 1990).

169. 49 M.J. 59 (1998).

170. *Id.* at 61.

171. *Id.* at 62.

172. 49 M.J. 54 (1998).

173. *Allison*, 49 M.J. at 55-56.

174. *Faison*, 49 M.J. at 61

175. *Allison*, 49 M.J. at 57.

176. *Faison*, 49 M.J. at 61.

fabricate and any statements prior to that date would rebut that charge.[177]

The court made a similar point in *Allison*, using much clearer language. In this case, the court held that, where multiple motives or improper influences are asserted, the statement need not precede all such motives or inferences, only the one it is offered to rebut.[178] In *Allison*, the CAAF said the military judge did not err in admitting this evidence of a prior consistent statement.

Advice

In these cases, the CAAF seeks to clarify the proper focus for rebuttal evidence under MRE 801(d)(1)(B). So long as the prior consistent statement was made before at least one charge of improper motive or fabrication occurred, the statements are admissible to rebut that charge. By focusing not on when the motive may have developed, but on when the incident giving rise to the improper motive occurred, the court has opted for a pragmatic solution to an otherwise difficult proof problem. In doing so, however, the CAAF limited its earlier holding in *United States v. McCaskey.*[179] In *McCaskey,* the court focused on when "the story was fabricated or *the improper influence or motive arose*."[180] That language is certainly broader than the court's holding in either *Allison* or *Faison.*

These cases have important implications for both trial and defense counsel. Counsel must be very precise when attacking a witness's credibility. They must look to the earliest possible incidents that gave rise to a witness's motive to fabricate. They should expressly state that these early incidents are what gave rise to the witness's motive to fabricate. Hopefully, these incidents occurred before the witness made any consistent statements. This alone, however, will not protect counsel from rebuttal evidence if they also allege other incidents that gave rise to improper influence or motive and these incidents occurred after the witness made a statement consistent with his in-court testimony. According to the court's holding in *Allison*, so long as the witness's consistent statement preceded any one of these charged incidents, it is admissible under MRE 801(d)(1)(B). Thus, the counsel attacking the witness may be forced to put all their eggs in one basket by looking for the earliest possible incident giving rise to a motive to fabricate, and not addressing any motives that arose after the witness made a consistent statement.

On the other hand, the counsel proffering the witness should focus very closely on the various incidents that the opponent implies affected the credibility of the witness's testimony. If, for example, the defense alleges that one incident affecting the witness's in-court testimony was rehearsing his testimony with the trial counsel, any consistent statements that preceded these rehearsals are admissible as rebuttal evidence under MRE 801(d)(1)(B).

Hearsay Review

In *United States v. Haner*,[181] the CAAF reviewed three of the most commonly used hearsay exceptions. The court provided insight into the court's most recent view of these exceptions. In *Haner*, the accused was charged with assault and indecent assault on his wife. On the date of the offense, the accused stripped his wife, bound her, beat her with a belt, cut her with a knife, and inserted the handle of the knife into her vagina. The victim eventually escaped wearing nothing but a blanket and ran to a friend's house, where she called the police. When the police arrived about twenty minutes later, the victim was very upset, still wearing nothing but a blanket, shaking, and crying hysterically. She told the police that her husband beat her and threatened her with a knife.[182]

The next day, the police officers and the district attorney referred the victim for medical treatment to document her injuries. Both a doctor and a social worker saw the victim. The victim told both of them what the accused had done to her. The doctor and social worker both testified that they saw the victim both to document the injuries and to provide any necessary medical treatment.[183]

Two days after the assault, the victim moved to Michigan to get away from the accused. A week later, the accused called her and made several threats against her. The victim immediately called the police who came to her home. She typed and signed a sworn statement to the police detailing everything the accused had done to her a week earlier. This statement provided the most detailed account of the assault.[184]

177. *Id.* at 62.

178. *Allison*, 49 M.J. at 57.

179. 30 M.J. 188 (CMA 1990).

180. *Id.* at 192 (emphasis added).

181. 49 M.J. 72 (1998).

182. *Id.* at 74.

183. *Id.* at. 76-77.

Once the victim learned that the Army preferred charges against her husband, she recanted her earlier statements. She claimed that the incident was consensual, sadomasochistic, sexual activity. Faced with these recantations, the government offered the statements she made to the police and to medical personnel as hearsay exceptions. The military judge admitted all three of the statements. On appeal, the CAAF analyzed the admissibility of each statement.[185]

The defense first challenged the admission of the victim's statements to the police just after the incident. The military judge admitted these statements as excited utterances under MRE 803(2).[186] The CAAF noted that the victim made these statements about twenty minutes after she fled from her husband, and at the time she was still upset and crying. The court held that these statements were clearly admissible because the victim made them under the stress of excitement caused by the incident.[187]

Next, the defense challenged the admission of the statements the victim made to the medical doctor and to the social worker. The military judge admitted these statements under MRE 803(4), the medical treatment exception.[188] The defense argued that because law enforcement officials directed the victim to see the doctor and the social worker, the purpose of the visit was to preserve evidence; therefore, they did not fall within the medical treatment exception. The CAAF disagreed. According to the CAAF, it was not critical that law enforcement agencies directed the victim. The critical question was whether the victim had some expectation of treatment when she talked with medical personnel. The court agreed that there was sufficient evidence of the victim's expectation of medical treatment, and the statements were properly admitted. The court also noted that statements to social workers fall under the medical treatment exception.[189]

Finally, the defense challenged the admissibility of the statement the victim made to the police in Michigan a week after the incident. The military judge admitted this statement as residual hearsay under MRE 803(24). The CAAF affirmed the judge's decision. The court said that the statement was material, necessary, and reliable. The court noted the following factors that showed the statement to be reliable: (1) the victim made the statement the day after the accused threatened her and one week after the incident, (2) she prepared the statement free of police questioning, (3) the victim was still in fear that the accused may come to Michigan and attack her, and (4) she took an oath and signed and initialed each page of the statement.[190]

Advice

This case serves as an excellent review of three of the most commonly used hearsay exceptions. Most significant is the court's holding that statements made to law enforcement officials can be admitted under the residual hearsay exception if they have sufficient indicia of reliability. The court noted that the military judge made very specific findings that clearly demonstrated the reliability of these statements. Practitioners should review this case and these factors when litigating the admission of statements made to law enforcement officials under the residual hearsay exception.

Conclusion

Evidence is an ever-changing and dynamic part of our criminal law practice. Indeed, the rules are the heart of our criminal practice and embody the values of our system of justice. Because these values change, courts and legislatures will continue to reevaluate and redefine these rules. Likewise, creative counsel will continue to push courts to interpret the rules in new ways and develop new law. These influences guarantee that this evidence saga will continue for many years to come. Get ready, because the 1999 installment is just around the corner.

184. *Id.* at 75.

185. *Id.*

186. MRE, *supra* note 2, MIL. R. EVID. 803(2). This rule defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

187. *Haner*, 49 M.J. at 76.

188. MCM, *supra* note 2, MIL. R. EVID. 803(4). This rule describes the medical treatment exception as "[s]tatements made for the purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.*

189. *Haner*, 49 M.J. 76-77.

190. *Id.* at 77-78.

Appendix

a. Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by or between the patient to a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertains to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Death of Patient. The patient is dead;

(2) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When federal law, state law, or a service regulation imposes a duty to report information contained in a communication;

(4) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a belief believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) Defense, mitigation, or extenuation. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or MRE 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) Constitutionally required. When admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative of that the filing of the motion has been filed and that the patient has an of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

MRE 513. The analysis to MRE 513 is created as follows:

1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Military Rule of Evidence 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*. Jaffee v. Redmond, 518 U.S. 1 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules when practicable and not inconsistent with the UCMJ, MCM and with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns which that must be met to ensure military readiness and national security. *See* Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955); Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). There is no intent to apply ~~the privilege~~ **MRE 513** in any proceeding other than those authorized under the UCMJ. Military Rule of Evidence 513 was based in part on proposed FRE (not adopted) 504 and state rules of evidence.

Military Rule of Evidence 513 is not a physician-patient privilege, instead it is a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for MRE 302 and MRE 501.

(a) General rule of privilege. The words "under the UCMJ" in this rule mean that ~~**this privilege**~~ **MRE 513** applies only to UCMJ proceedings, and does not limit the availability of such information internally to the services, for appropriate purposes.

. . . .

(d) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment."

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

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The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Marty Sitler LTC Richard Barfield COL Keith Hamack	LTC Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com
23-25 Apr	Dallas, TX 90th RSC/1st LSO/2nd LSO Crown Plaza Suites 7800 Alpha Road Dallas, TX 75240 (972) 233-7600	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigant@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Army War College 686 Cushing Avenue Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Thomas Hong Dr. Mark Foley	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556 jtobin996@aol.com http://home.att.net/~scknd ck/jag/

*Topics and attendees listed are subject to change without notice.
Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1999

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).
10-12 May	1st Joint Service High Profile Case Management Course (5F-F302).
17-21 May	2nd Advanced Trial Advocacy Course (5F-F301).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
21-25 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
14-18 June	29th Staff Judge Advocate Course (5F-F52).
21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
28-30 June	Professional Recruiting Training Seminar

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).
21-23 July	Career Services Directors Conference

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999-26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August-3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October-22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort

Lee) (5-27-C20).

18-21 January — 2000 PACOM Tax CLE (5F-F28P).

26-28 January — 6th RC General Officers Legal Orientation Course (5F-F3).

28 January-7 April — 151st Basic Course (Phase II-TJAGSA) (5-27-C20).

31 January-4 February — 158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February — 73rd Law of War Workshop (5F-F42).

7-11 February — 2000 Maxwell AFB Fiscal Law Course (5F-F13A).

14-18 February — 24th Administrative Law for Military Installations Course (5F-F24).

28 February-10 March — 33rd Operational Law Seminar (5F-F47).

28 February-10 March — 144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March — 46th Legal Assistance Course (5F-F23).

20-24 March — 3rd Contract Litigation Course (5F-F102).

20-31 March — 13th Criminal Law Advocacy Course (5F-F34).

27-31 March — 159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April — 2nd Basics for Ethics Counselors Workshop (5F-F202).

10-14 April — 11th Law for Legal NCOs Course (512-71D/20/30).

12-14 April — 2nd Advanced Ethics Counselors Workshop (5F-F203).

17-20 April — 2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May — 56th Fiscal Law Course (5F-F12).

1-19 May — 43rd Military Judge Course (5F-F33).

8-12 May — 57th Fiscal Law Course (5F-F12).

June 2000

5-9 June — 3rd National Security Crime and Intelligence Law Workshop (5F-F401).

5-9 June — 160th Senior Officers Legal Orientation Course (5F-F1).

5-14 June — 7th JA Warrant Officer Basic Course (7A-550A0).

5-16 June — 5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

12-16 June — 4th Senior Legal NCO Course (512-71D-CLNCO).

12-16 June — 30th Staff Judge Advocate Course (5F-F52).

19-23 June — 11th Senior Legal NCO Management Course (512-71D/40/50).

19-30 June — 5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

26-28 June — Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1999

April

19 April ICLE — Technology and Intellectual Property Issues in a Global Environment

	Swissote Atlanta, Georgia
30 April ICLE	Practical Discovery Marriott North Cental Hotel Atlanta, Georgia
May	
7 May ICLE	Criminal Law, 5th and 6th Amendments Rights Clayton State College Atlanta, Georgia
14 May ICLE	Emerging Issues in Employment Law Omni Hotel Atlanta, Georgia
June	
4 June ICLE	The Jury Trial Sheraton Buckhead Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrator State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7322	-Fifteen hours per year; three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1853	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 100 Van Ness Ave. 28th Floor San Francisco, CA 94102 (415) 241-2117	-Thirty-six hours over 3 year period. Eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics; one hour must be on prevention, detection and treatment of substance abuse/emotional distress; one hour on elimination of bias in the legal profession. -Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094	-Forty-five hours over three year period; seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040	-Thirty hours over a two-year period; three hours must be in ethics, and a minimum of two hours, and a maximum of six hours, in professionalism. -Reporting date: 31 July.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500	-Thirty hours over a three year period; two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.

Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943	-Thirty-six hours over a three year period. (minimum of six hours per year); of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year; two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (913) 357-6510	-Twelve hours per year; two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795	-Twelve and one-half hours per year; two hours must be in legal ethics; mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 528-9154	-Fifteen hours per year; one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (612) 297-1800	-Forty-five hours over a three-year period. Three hours must be in ethics, two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056	-Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128	-Fifteen hours per year; three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5	-Fifteen hours per year. -Reporting date: 1 March
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. 2 Reno, NV 89502 (702) 329-4443	Twelve hours per year; two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampshire**	Registrar NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942	-Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute; six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 (505) 797-6015	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: 31 March.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 26148 (919) 733-0123	-Twelve hours per year; two hours must be in legal ethics; Special three hours (minimum) ethics course every three years; nine of twelve hours per year in practical skills during first three years of admission. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.

North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404	-Forty-five hours over three year period; three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Twenty-four hours every two years including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Twelve hours per year; one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 368	-Forty-five hours over three year period; six hours must be in ethics. -Reporting date: Compliance report filed every three years.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253	-Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942	-Ten hours each year; two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Fourteen hours per year; two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096	-Fifteen hours per year; three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106	-Fifteen hours per year; three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095	-Twenty-four hours, plus three hours in legal ethics every two years. -non-residents if not practicing in state. -Reporting date: 31 December (end of assigned two-year compliance period.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281	-Twenty hours over two year period. -Reporting date: 15 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0578	-Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL4 Seattle, WA 98121-2330 (206) 727-8202	-Forty-five hours over a three-year period including six hours ehtics. -Reporting date: 31 January.

West Virginia	Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992	-Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.	Wyoming * Military exempt (exemption must be declared with state) **Must declare exemption.	CLE Program Analyst WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-3737	-Fifteen hours per year. -Reporting date: 30 January.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Suite 715, Tenney Bldg. 110 East Main Street Madison, WI 53703-3328 (608) 266-9760	-Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.			

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A345826	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98 (226 pgs).
AD A333321	Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).
AD A326002	Wills Guide, JA-262-97 (150 pgs).
*AD A346757	Family Law Guide, JA 263-98 (140 pgs).
AD A353921	Consumer Law Guide, JA 265-98 (440 pgs).
AD A345749	Uniformed Services Worldwide Legal Assistance Directory, JA-267-98 (48 pgs).
*AD A332897	Tax Information Series, JA 269-99 (156 pgs).
*AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, June 1998, 219 pages.

*AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II, June 1998, 223 pages.
AD A329216	Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).
*AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274-99 (84 pgs).
AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

*AD A351829	Defensive Federal Litigation, JA-200-98 (658 pgs).
AD A327379	Military Personnel Law, JA 215-97 (174 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).
*AD A347157	Environmental Law Deskbook, JA-234-98 (424 pgs).
AD A338817	Government Information Practices, JA-235-98 (326 pgs).
AD A344123	Federal Tort Claims Act, JA 241-98 (150 pgs).
AD A332865	AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

*AD A350510	The Law of Federal Employment, JA-210-98 (226 pgs).
AD A360707	The Law of Federal Labor-Management Relations, JA-211-99 (316 pgs).

Developments, Doctrine, and Literature

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A302312	Senior Officer Legal Orientation, JA-320-95 (297 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

*AD A352284	Operational Law Handbook, JA-422-93 (281 pgs).

Reserve Affairs

*AD A345797	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98 (55 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer.*

5. Article

The following information may be useful to judge advocates:

Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasise Method*, 50 FLA. L. REV. 753 (September 1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.