Re-interpreting the Rules: Recent Developments in Speedy Trial and Pretrial Restraint

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Introduction

During the 1997 term, both the Court of Appeals for the Armed Forces (CAAF) and the service level courts issued significant decisions regarding the rules and laws that govern speedy trial and pretrial restraint.

Speedy Trial

With respect to speedy trial, the CAAF, joined by the Navy-Marine Corps Court of Criminal Appeals, continued to chip away the strict procedural requirements of the 120-day speedy trial rule promulgated by the President under Rule for Courts-Martial (R.C.M.) 707.[1]

Following closely on the heels of last year's groundbreaking decision in *United States v. Dies*,[2] the CAAF created another exception to R.C.M. 707's requirement that pretrial delays must be contemporaneously approved by competent authority. In *United States v. Thompson*,[3] the CAAF held that the special court-martial convening authority's (SPCMCA's) approval of two delays, after-the-fact, were not chargeable to the government because the delays were initiated by the *defense*. The CAAF was unwilling to grant the accused windfall speedy trial relief when the delay was granted at the behest of the defense. The Navy court reached a similar conclusion in *United States v. Anderson*.[4] The court concluded that a ninety-eight-day delay was properly excluded[5] when the special court-martial convening authority withdrew the charges in response to a *defense request* for delay pending discovery.

The Navy court also addressed two cases alleging government subterfuge to avoid the expiration of the 120-day speedy trial clock. In *United States v. Ruffin*,[6] the court held that preferral of charges one day after the accused was released from sixty days of restriction was not a subterfuge to avoid a speedy trial. In the later case of *United States v. Robinson*,[7] however, the same court concluded that the government's dismissal of charges on day 115 and re-preferral of essentially identical charges one week later *was* a subterfuge.

Pretrial Restraint

The CAAF issued two significant opinions regarding administrative credit for illegal pretrial punishment. In *United States v. Combs*,[8] the CAAF found that the government's refusal to permit the accused to wear his technical sergeant rank (E-6) pending the government's appeal of an adverse opinion from the Air Force Court of Criminal Appeals rose to the level of illegal pretrial punishment. The CAAF awarded the accused day-for-day credit for the twenty months he served as an E-1 pending the government appeal. In *United States v. McCarthy*,[9] the CAAF attempted to explain the applicable standard of review for appellate courts when reviewing allegations of illegal pretrial punishment. Unfortunately, the majority opinion does not provide as much clarity as desired.

The Army Court of Criminal Appeals issued an important opinion that explains the difference between sentence credit for illegal confinement and sentence credit for illegal pretrial

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1995) [hereinafter MCM].

2. 45 M.J. 376 (1996).

3. 46 M.J. 472 (1997).

4. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

5. *See* MCM, *supra* note 1, R.C.M. 707(d). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule [120-day clock] has run." *Id.*

6. 46 M.J. 657 (N.M. Ct. Crim. App. 1997).

7. 47 M.J. 506 (N.M. Ct. Crim. App. 1997).

8. 47 M.J. 332 (1997).

9. 47 M.J. 162 (1997).

punishment. In *Coyle v. Commander, 21st Theater Army Area Command*,[10] the Army court clarified the rule that credit for illegal pretrial *confinement* is to be awarded against the *approved* sentence. Credit for illegal pretrial *punishment*, on the other hand, is to be assessed against the *adjudged* sentence. Under certain conditions, such pretrial punishment may also be assessed against the *approved* sentence.

Speedy Trial and the Slippery Slope of R.C.M. 707

Rule for Courts-Martial 707 was amended in 1991 with the specific intent to "provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable."[11] The thrust of the rule change was to require counsel to secure approval of delays by competent authority at the time of the desired delay.[12] The paramount goal was to reform the previous practice of excluding "time periods covered by certain exceptions."[13]

In *United States v. Dies*,[14] the CAAF re-opened a door that had long been thought to be closed by the President's 1991 revision to R.C.M. 707.[15] The CAAF concluded that R.C.M. 707(c) was not an exclusive list of excludable time periods for the 120-day speedy trial rule.

Dies marked a return to the pre-1991 practice of categorically excluding certain time periods and a rejection of the President's rule requiring contemporaneous approval of delays. Although the equities in *Dies* support the conclusion,[16] the court's rationale opened the door to the possibility of other exceptions to what previously had been a clear procedural rule of military justice. It did not take long for the CAAF to find itself confronted with another case involving similar equitable circumstances favoring the government.

In *United States v. Thompson*,[17] the SPCMCA denied the defense request to delay the Article 32[18] investigation so that the accused could retain civilian counsel. Unbeknownst to the convening authority, the defense renewed its request before the Article 32 investigating officer, who granted the defense two delays during the course of the investigation. Prior to forwarding the charges to the general court-martial convening authority, the trial counsel informed the SPCMCA of the delays and advised him to approve the delays after-the-fact. The accused was ultimately arraigned on day 130.[19]

At trial, Thompson claimed that he was denied the right to a speedy trial under R.C.M. 707, because the Article 32 investigating officer was not authorized to exclude delays for speedy trial purposes, and that the convening authority could not exclude such time after the fact.[20] The military judge denied the motion, concluding that "the investigating officer was a

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10. 47 M.J. 626 (Army Ct. Crim. App. 1997).

11. MCM, *supra* note 1, R.C.M. 707 analysis, app. 21, at A21-40. In *United States v. Dies*, the CAAF recounted how, under the former R.C.M. 707, speedy trial motions often degenerated into "pathetic sideshows of claims and counter-claims, accusations and counter-accusations . . . as to who was responsible for this minute of delay . . . over the preceding months." United States v. Dies, 45 M.J. at 376 (1996).

12. *See* MCM, *supra* note 1, R.C.M. 707(e)(1). The convening authority approves delays after preferral; the military judge approves delays after referral.

13. *Id*. R.C.M. 707(c) analysis, app. 21, A21-41 (stating that "this section follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay").

14. 45 M.J. 376 (1996). In *Dies*, the government failed to secure an approved delay from the convening authority during the accused's 23-day AWOL. The defense argued that, under the strict provisions of R.C.M. 707, these 23 days were not excludable for purposes of calculating the 120-day limit for speedy trial. The CAAF disagreed, stating that the accused was "estopped" from asserting the right to a speedy trial and that R.C.M. 707(c) was not an exhaustive list of excludable delays. *See* 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. In her article, Major Frisk posed this insightful question:

> The question for practitioners is whether, based on *Dies*, there are other periods of time that are also automatically excluded from government accountability. Although the court characterized its holding in *Dies* as "limited," it clearly opened the door to the creation of additional categories of "excludable delays" where the same equitable arguments apply on behalf of the government.

Id. at 17.

15. MCM, *supra* note 1, R.C.M. 707.

16. In *Dies*, the accused's own 23-day AWOL caused the delay on which the accused based his motion at trial that he was denied his right to a speedy trial. *Dies*, 45 M.J. 376.

17. 46 M.J. 472 (1997).

18. UCMJ art. 32 (West 1995).

19. *Thompson*, 46 M.J. at 473.

20. *Id.*

quasi-judicial officer with inherent power to grant such requests, and that, in any event, it would be unfair under these circumstances to hold the government accountable for delays that occurred solely at the request of the defense."[21]

On appeal, the Navy-Marine Corps Court of Criminal Appeals strictly construed R.C.M. 707(c)'s provisions regarding excludable delays. While recognizing that investigating officers are quasi-judicial officers, the Navy court found "no explicit or inherent authority in that officer to exclude delays from the speedy-trial clock."[22] The court also rejected the SPCMCA's after-the-fact approval of the delays, highlighting how "the entire thrust of R.C.M. 707(c) is that exclusion decisions are to be made before the delay occurs."[23]

In an opinion strikingly similar to *Dies*, the CAAF reversed the Navy court on both legal and equitable grounds. While acknowledging that "advance approval by the convening authority may be desirable," the court concluded that "the text of R.C.M. 707(c) does not require specifically that the delay be approved in advance in order for it to be excluded from the Government's accountability."[24] Any doubts regarding the court's view of the President's intent to require contemporaneous approval of delays were eliminated by its concluding remark: "the rule as it has existed since 1991 does not preclude after-the-fact approval of a delay by a convening authority that otherwise meets good cause and reasonableness-in-length standards."[25]

The CAAF's liberal interpretation of R.C.M. 707(c) was not the only justification offered for its conclusion in *Thompson*. Equitable considerations also played a major role. Based on the court's de novo review, the CAAF listed several factors which supported the trial judge's original decision to deny the speedy trial motion. Among those factors were: (1) both delays were requested by and for the direct benefit of the defense;[26] (2) no delays were the result of acts or omissions by the government; (3) this was not an after-the-fact delay—the SPCMCA's acts simply ratified an otherwise timely approved delay by the investigating officer; (4) since it was approved prior to referral, the delay and exclusion were approved while the SPCMCA still controlled the case; and (5) the facts were well documented and presented to the military judge for him to evaluate the good cause and reasonableness-in-length standards.[27] Chief Judge Cox authored a concurring opinion to emphasize his view that the two most important factors were that "the defense requested the delays and the convening authority ratified the investigating officer's decision to grant them."[28]

While two cases do not necessarily establish a trend, the results in *Dies* and *Thompson* come close. The results in these two cases—one a case relying primarily on the fact that the *defense initiated the delays*[29] and the other based upon *defense* related misconduct (AWOL)—demonstrate the CAAF's determined resistance to grant an accused a speedy trial windfall. In the wake of *Dies* and *Thompson*, the government stands a strong chance of overcoming the duty to obtain a contemporaneous delay from an appropriate authority in those cases where delays can be attributed to the conduct of the defense. Trial counsel should not, however, view *Dies* and *Thompson* as a green light to violate carelessly or willfully the provisions of R.C.M. 707 whenever the defense requests a delay. The CAAF issued a stern caution to the government that since such post hoc requests "likely will be viewed with considerable skepticism if it appears to be a rationalization for neglect or willful delay, the Government runs substantial risk by seeking approval from a convening authority only after a delay has occurred."[30]

Although the CAAF's equitable interest in preventing a significant windfall lends support to these two decisions, it does not justify them. The drafters of revised R.C.M. 707 recognized that the new rule might lead to an unfair advantage for the accused. To ensure that such a windfall to an accused was not excessive, the drafters included the intermediate remedy of dismissal without prejudice.[31] Consequently, to the extent that *Dies* and *Thompson* reflect a desire to avoid granting an excess benefit to an accused, the CAAF fails to account for

21. *Id.* at 474.

22. United States v. Thompson, 44 M.J. 598, 602 (N.M. Ct. Crim. App. 1996).

23. *Id.* (finding that "[b]ecause the investigating officer had no power to exclude delay and because the appointing authority's attempt to exclude delay retroactively was ineffective . . . the delay was not excluded from the speedy trial clock").

24. *Thompson*, 46 M.J. at 475.

25. *Id.* at 476. In light of the majority's rationale for reversing the Navy court, the CAAF did not address the certified issue of whether an Article 32 investigating officer has "the inherent power to exclude delay for speedy trial purposes under R.C.M. 707." *Id*.

26. *Id.* The court further noted: "[w]e see no reason to grant the defense a windfall from a claimed violation of R.C.M. 707 that the defense itself occasioned." *Id*.

27. *Id.*

28. *Id.* at 476.

29. *Id.* The fact that the defense requested the delay was also the first factor cited by the four judges in the lead opinion.

30. *Id.* at 475.

the intermediate remedy provided under the revised rule. Perhaps the CAAF's characterization of this intermediate remedy as "ephemeral"[32] reflects an unspoken critical attitude toward the existing speedy trial provisions of revised R.C.M. 707. After reading *Dies* and *Thompson*, one cannot help but get the impression that the CAAF sees little value in respecting the strict provisions of R.C.M. 707 when the remedy is perceived to be of so little, if any, benefit to the accused.

It did not take long for the CAAF's view of R.C.M. 707 to trickle down to the service courts. In *United States v. Anderson*,[33] the accused was charged with rape and indecent assault. At the Article 32 investigation, the defense renewed its previous request for a continuance in the proceedings until the government provided to the defense the results of a sex crime kit.[34] Shortly after receiving the request, the SPCMCA withdrew the charges "in the interests of justice, to honor [the defense] request for evidence . . . and to avoid any prejudice to the accused . . . ."[35] During the three months it took to process the sex crime kit, the defense twice demanded a speedy trial and raised the issue again with a speedy trial motion before the military judge. The military judge denied the motion,[36] concluding that the two demands for speedy trial did not negate the original defense request to delay the proceedings until provided with the results of the sex crime kit. Consequently, there was no violation of R.C.M. 707 because the defense was "accountable" for ninety-eight days of delay prompted by their initial request for a continuance.[37]

After a lengthy review of the facts, the Navy-Marine Corps Court of Criminal Appeals found that the SPCMCA's withdrawal of charges was excludable delay for R.C.M. 707 speedy trial purposes.[38] It was clear to the Navy court that the convening authority "approved—in fact ordered—a delay by withdrawing the charges to await possible exculpatory evidence *requested by the defense*."[39] Playing both ends against the middle, the Navy court emphasized that its holding was not based solely on the fact that the defense requested the delay.[40] The court also cited a prior Air Force case, *United States v. Nichols*,[41] which held that excludable delays under R.C.M. 707 are not limited to only those delays requested by parties to a trial. In *Nichols*, the Air Force court held that "there need not be a request for a delay from either the accused or the government before a delay is excludable under R.C.M. 707(c); the military judge or convening authority may approve a delay on his or her own initiative."[42]

The Navy court's reference to *Nichols* is important because it offers a fall-back position to the court's conclusion that the two subsequent defense demands for speedy trial did not negate the original defense request for delay to obtain the results of the sex crime kit. The fact that the convening authority withdrew the charges partly "in the interests of justice . . . and to avoid any prejudice to the accused,"[43] and not solely because the defense requested the delay, indicates that the convening authority had an independent justification for delaying the proceedings on his own initiative.[44] Although the withdrawal/delay in *Anderson* is more easily defensible as a contemporaneous delay approved

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31. R.C.M. 707(d) includes the provision that "dismissal will be with or without prejudice to the government's right to re-institute court martial proceedings against the accused for the same offense at a later date." MCM, *supra* note 1, R.C.M. 707(d).

32. *Thompson*, 46 M.J. at 476.

33. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

34. *Id.* at 542.

35. *Id.* at 543.

36. *Id.* at 545. The military judge made specific findings of fact that the accused was not denied his right to a speedy trial under R.C.M. 707 or the Sixth Amendment.

37. *Id.* The Navy court criticized the trial judge for "attributing" delay to one side or the other, noting that under the current rule the "military judge only need determine what is excludable delay—without attribution—because *even* Government delay can be excluded from the 120-day count." *Id.* at 545 n.4.

38. *Id.* at 546. The court declined to review whether the SPCMCA "meant 'dismissal' when he said 'withdrawal' . . . of charges." *Id.*

39. *Id.* at 546 (emphasis in original).

40. For if it did, the court would have had to respond more fully to the argument that the two subsequent defense demands for speedy trial negated its earlier request for delay.

41. 42 M.J. 715 (A.F. Ct. Crim. App. 1995).

42. *Id.* at 720-21.

43. *Anderson*, 46 M.J. at 543.

44. It is not difficult to imagine circumstances where both the government and defense were eager to proceed to trial, but the convening authority, based on a review of the facts, wanted to obtain additional evidence (such as a sex crime kit or DNA evidence) before proceeding to trial. Since commanders control the military justice system, the rules should permit them to make independent determinations regarding the need for delay absent specific requests from attorneys involved in the system.

by proper authority under R.C.M. 707, rather than a delay independently initiated by the convening authority, the Navy court's decision nevertheless reflects further willingness to liberally interpret R.C.M. 707 as necessary to avoid granting a windfall to the accused.

The emerging pattern established by *Dies*, *Thompson*, and *Anderson* reflects a fading interest in protecting the right of an accused to a speedy trial, at least with respect to the accused's right under the 120-day rule of R.C.M. 707. Judge Wynne expressed similar thoughts in his concurring opinion in *Anderson*. Judge Wynne concluded that the court had no duty to review the accused's alleged speedy trial error because the accused had not been denied a "substantial right."[45] Article 59 of the UCMJ states that the findings or sentence of a court-martial "may not be held incorrect . . . unless the error materially prejudices the substantial rights of the accused."[46] While Judge Wynne believed that dismissal of charges *with prejudice* to be a substantial right worthy of review, he believed that R.C.M. 707's lesser remedy of dismissal *without prejudice* was not.[47]

Both trial and defense counsel can take lessons from this series of cases. Defense counsel can no longer rely on the government's failure to comply with R.C.M. 707(d) to carry the day in a speedy trial motion. Trial counsel, perhaps tempted by these decisions to ignore their obligations under the rule, should do so with an understanding that they will be viewed with "great skepticism by the appellate courts."[48] On the positive side, government counsel facing motions alleging violations of R.C.M. 707's 120-day speedy trial rule can now refer the military judge to three cases that adopt a liberal interpretation of R.C.M. 707 in favor of the government.

Was That a Subterfuge?

In 1997, the Navy-Marine Corps Court of Criminal Appeals reviewed two cases of first impression involving allegations of government subterfuge. In *United States v. Ruffin*,[49] a closely divided Navy court concluded that the government did not have to wait a "significant period" of time to prefer charges after the accused was released from pretrial restriction in order to restart the R.C.M. 707 speedy trial clock. In *United States v. Robinson*,[50] however, the government's dismissal of charges on day 115, and re-preferral five days later, was closely scrutinized by the Navy court and was found to be a subterfuge.

In *Ruffin*, the accused was restricted for sixty-seven days prior to preferral of charges. The day after his restriction was lifted, the government preferred charges. Restriction was not reimposed. The accused was ultimately arraigned within 120 days of preferral, but not within 120 days of his original restriction. At trial, the accused alleged that his right to a speedy trial under R.C.M. 707 had been denied. He argued that the speedy trial clock should not have been reset when he was released from restriction, because he was not released for a "significant period"[51] before charges were preferred.

45. *Anderson*, 46 M.J. at 547 (Wynne, J., concurring).

46. UCMJ art. 59 (West 1995).

47. *Anderson*, 46 M.J. at 547. Judge Wynne's frustration over the futile remedial provisions of R.C.M. 707 is evident from his additional observation that:

> Dismissal without prejudice under R.C.M. 707 remedies the denial of a speedy trial by further delaying the trial, or prejudices the government's case when new proceedings are otherwise barred. When we attempt to retroactively dismiss charges or specifications without prejudice, we choose the oxymoron to which our phrases will be added. "Where the circumstances of delays [in trial] are not excusable . . . it is not remedy to compound the delay by starting all over."

Id. (citation omitted). Nevertheless, Judge Wynne encourages all trial judges and convening authorities to comply with the provisions of R.C.M. 707 just as they do with hundreds of other provisions in the *Manual for Courts-Martial*. *Id.* at 548.

48. United States v. Thompson, 46 M.J. 472, 475 (1997).

49. 47 M.J. 506 (N.M. Ct. Crim. App. 1997).

50. 46 M.J. 657 (N.M. Ct. Crim. App. 1997).

51. *See* MCM, *supra* note 1, R.C.M. 707(a). The rule provides, in pertinent part:

> (a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:
> (1) Preferral of charges; [or]
> (2) The imposition of restraint under R.C.M. 304(a)(2)-(4) [restraint , arrest, pretrial confinement] . . . .

See also id. R.C.M. 707(b)(3)(B). The rule specifies:

> (B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of:
> (i) the date of preferral of charges; [or]
> (ii) the date on which restraint under R.C.M. 304(a)(2)-(4) is reimposed . . . .

Both the trial judge and a split Navy court disagreed with Ruffin's argument. Relying heavily on the drafters' analysis of R.C.M. 707(b)(3)(B), the majority concluded that the requirement that an accused must be released from pretrial restraint for a "significant period" in order to restart the 120-day clock was only intended to apply to instances in which restraint is reimposed.[52] This conclusion is supported by the drafters' analysis of the related situation when charges are preferred while the accused is under restraint. Under these circumstances, if the accused is later released from restraint (and restraint is not reimposed), the speedy trial clock is reset to the day of preferral.[53] Final justification for the majority's interpretation is that it was consistent with achieving the dual policy goals of minimizing pretrial restraint and promoting speedy trial. In the instant case, the accused was restricted only for a short portion of the overall pretrial processing time. Moreover, permitting the government to prefer charges immediately after release from restraint avoids the undesirable result of further slowing the process by forcing the government to wait a "significant period" before preferring.[54]

In his dissenting opinion, Judge Lucas argued that the accused had jumped from the proverbial kettle of pretrial restriction to the fire of preferred charges.[55] Judge Lucas wrote in his opinion that both events were significant enough to trigger the speedy trial clock.[56] Since the accused was continuously under conditions that independently triggered the speedy-trial clock, Judge Lucas concluded that "there should be no interruption of the obligation of the government to continue to proceed to trial within [120 days]."[57]

Though Judge Lucas' reasoning did not carry the majority in *Ruffin*, his views did prevail in *United States v. Robinson*.[58] In *Robinson*, charges of indecent assault were dismissed on day 120.[59] Five days later, with no significant change to the legal status of the accused,[60] essentially identical charges were preferred. Despite a defense demand for speedy trial, the accused was not arraigned on the re-preferred charges until day 114. In response to Robinson's speedy trial motion, the government claimed that the convening authority's unfettered discretion to dismiss charges was not subject to judicial review.[61] The government relied on the plain language of R.C.M. 707(b)(3)(A)(i) to support its position that dismissal and re-preferral of charges starts a new 120-day clock.[62] The accused countered that the dismissal was a subterfuge solely to avoid the 120-day clock and that the dismissal was, therefore, subject to review by the court.[63]

Though ultimately in agreement with the government's assertion that a convening authority has unfettered discretion to dismiss charges, the Navy court held that "[u]nder the unique circumstances of this case,"[64] the speedy trial clock was not reset by dismissal on day 120. The court found that the

52. *Ruffin*, 46 M.J. at 659. "Subsection (3)(B) clarifies the intent of this portion of the rule. The harm to be avoided is continuous pretrial restraint." *Id*. *See* MCM, *supra* note 1, R.C.M. 707 analysis, app. 21, at 21-41. The court also relied on prior case law to support its holding, citing Chief Judge Everett's concurring opinion in *United States v. Gray*, 26 M.J. 16, 22 (C.M.A. 1988). In *Gray*, Chief Judge Everett noted that the "primary reason for the 'significant period' requirement in the rule is to preclude short, sham releases from restraint for 'a few hours or a day,' in order to stop the speedy-trial clock and obtain a zero restart of the clock on re-imposition of restraint." 26 M.J. at 22.

53. *Ruffin*, 46 M.J. at 660. Take the example where the accused is restricted on day 1, and charges are preferred on day 10; if restriction is lifted on day 20 for a "significant period," the 120-day speedy trial clock is reset to begin on day 10, when charges were preferred.

54. *Id.* at 662.

55. *Id.* at 665.

56. *Id. See* MCM, *supra* note 1, R.C.M. 707(a)(1) and (2).

57. *Ruffin*, 46 M.J. at 665. Judge Lucas feared that the majority's interpretation would permit commanders to release an accused from restraint on day 119 and prefer charges anew on day 120, thereby doubling the time they could take to get to trial.

58. 46 M.J. 506 (N.M. Ct. Crim. App. 1997).

59. *Id*. at 508. Both parties agreed that five of the 120 days were excludable under R.C.M. 707(c), thus making it day 115 for speedy trial purposes. The government claimed that the dismissal was due to "new" evidence that they were unable to discover at an earlier date. The majority disagreed with this justification for dismissal.

60. *Id.* at 510. Even after dismissal, the accused remained under suspended transfer orders, was on legal hold, was prohibited from working in his area of expertise, and was restricted in his ability to take leave.

61. *Id. See* MCM, *supra* note 1, R.C.M. 306 (c)(1), 401(c), 707(b)(3)(A).

62. *Robinson*, 46 M.J. at 508-09. *See* MCM, *supra* note 1, R.C.M. 707(b)(3)(A)(i).

63. *Robinson*, 46 M.J. at 509.

64. *Id.* at 511. The unique facts in this case were: (1) dismissal on the 115th chargeable day was for the sole purpose of avoiding the 120-day rule; (2) the government repreferred essentially identical charges five days later; (3) there was no practical interruption in the pending charges; and (4) there was no real change in the legal status of the accused during those five days. *Id*.

dismissal was a subterfuge done solely to avoid the 120-day speedy trial clock and was legally ineffective in resetting the speedy-trial clock. The court observed:

> Were we to conclude that the dismissal action on day 120 did reset the clock, R.C.M.707(a) would become meaningless and the protection of R.C.M. 707 would effectively be eliminated . . . . To carry the Government's position to its logical extreme, there would be no R.C.M. 707 violation even if a convening authority were to repeatedly dismiss preferred but unreferred charges on day 119 of the speedy-trial clock just to reset the clock.[65]

Like Judge Wynne in his concurring opinion in *Anderson*,[66] Judge Paulson dissented on the ground that there was no prejudice to the "substantial rights" of the accused, since the remedy ordered by the majority was dismissal *without prejudice* to the government.[67] Judge Paulson also objected to the majority's willingness to create a judicial remedy that the drafters of R.C.M. 707 did not intend. Though it may seem unfair that convening authorities have virtually unbridled discretion to dismiss charges, Judge Paulson noted that the drafters of R.C.M. 707 could have easily fixed the problem, had they intended to do so, by requiring the convening authority to explain the rationale for dismissal of charges. In the absence of such a rule, Judge Paulson would defer to the absolute authority of convening authorities to dismiss charges, even when done with the intent to re-prefer at a later date.[68]

The outcomes in both *Ruffin* and *Robinson*, like the prior trilogy of excludable delay speedy trial cases, were based largely on the degree to which the Navy court was willing to honor the President's rule-making authority. In *Ruffin*, the split Navy court deferred to the President and refused to extend the government's obligation to wait a "significant period" beyond the specific instances listed in R.C.M. 707. In *Robinson*, a slightly different Navy court[69] exhibited less deference to the President's rules regarding a convening authority's discretion to dismiss and to re-prefer charges.

Balancing Interests in Speedy Trial Issues

These divergent results provide an excellent example of the unique dilemma facing military appellate courts. They frequently must balance their duty to safeguard justice and the individual rights of the accused against their duty to honor general principles of separation of powers that demand deference to Congress' delegation of its rule-making authority to the President. With respect to speedy trial issues arising under R.C.M. 707, the balance lies clearly with the former duty, as our appellate courts repeatedly exhibit less respect for the Rules for Courts-Martial promulgated by the President.

Sentence Credit for Illegal Pretrial Punishment

Only in the *twilight zone* of post-trial processing, government appeals, and sentence rehearings could military appellate courts conclude that an accused suffered illegal *pretrial* punishment for conduct occurring months after the trial was completed. But that is exactly what happened in *United States v. Combs*.[70] In 1990, Tech Sergeant Combs was convicted and sentenced to fifty years confinement for assaulting his three-year-old daughter and murdering his eighteen-month-old son. In 1992, the Air Force Court of Military Review set aside the murder conviction and the sentence and ordered a rehearing, if practicable. Combs was released from confinement when the government appealed the Air Force court's decision. Upon release from confinement, the accused was assigned as a casual to Lowry Air Force Base and was later transferred to the Charleston Navy Brig in Charleston, South Carolina. The CAAF eventually denied the government's appeal in 1994. A year later, Combs pleaded guilty to the murder of his son in return for a twenty-year sentence limitation.

Though he never raised the issue while on casual status or during his subsequent guilty plea, Combs later alleged on appeal that he had been subjected to illegal *pretrial punishment*

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65. *Id.* at 510. Due to the fact-specific nature of this case, the majority was quick to emphasize what they were *not* holding.

> We make no general holding . . . that a convening authority must always give a reason for dismissal . . . that a convening authority does not have absolute discretion to dismiss charges, or that dismissal of preferred but unreferred charges can never result in a resetting of the speedy-trial clock when there is no apparent change in the legal status of an accused.

Id. at 510-11.

66. *See supra* note 47 and accompanying text.

67. *Robinson*, 46 M.J. at 511 (Paulson, J., dissenting).

68. *Id.* at 513. *See* United States v. Bolado, 34 M.J. 732, 738 (N.M.C.M.R. 1991), *aff'd* 36 M.J. 2 (C.M.A. 1992) (where the unavailability of Navy criminal investigators deployed to Operation Desert Storm prompted the convening authority to dismiss charges with the intent to reprefer once the witnesses were available).

69. Judge Paulson replaced Judge Wynne on the court.

70. 47 M.J. 330 (1997).

between trials because he was forbidden to wear his technical sergeant rank during the twenty months he served on active duty while awaiting the results of the government appeal and rehearing. The Air Force court held that the accused was improperly denied his original rank of technical sergeant. Based on the accused's failure to voice a prompt complaint, however, and his silence on the subject at his rehearing, the court was convinced that the denial of his rank was not due to a punitive intent on behalf of the government, but rather on a lack of clear guidance as to his legal status while "trapped in the twilight of the court-martial process." The Air Force court denied the appellant's request for credit.[71]

The CAAF reversed the Air Force court's decision and found that the accused's unrebutted affidavit unequivocally established the government's punitive intent.[72] The CAAF rejected the government's argument that Article 13's[73] prohibition against pretrial punishment did not apply to an accused who is not in pretrial confinement at the time of his alleged mistreatment.[74] The CAAF also refused to invoke waiver against the accused. Citing the unique procedural history of the case, characterized by the Air Force court as being "trapped in the twilight of the court-martial process,"[75] the CAAF concluded that Combs' "legal status between trials was so unique that neither the Government nor appellant were fully aware of his legal rights."[76] The court awarded the accused administrative credit for twenty months of confinement.

Characterizing the case as "sandbagging at its worst,"[77] Judge Gierke dissented on the basis that waiver should apply. He also observed that, even if the accused was entitled to relief, it was limited to credit for eight, as opposed to twenty, months. The accused was reduced to the grade of E-1 by operation of law when the convening authority approved the original sentence to confinement. Citing recent case law for the proposition that service court decisions are not self-executing, Judge Gierke concluded that the Air Force court's opinion setting aside the sentence did not take effect until the CAAF affirmed it twelve months later.[78] Consequently, requiring the accused to serve in the grade of E-1 pending the government appeal was not punishment, but a correct application of the law for the initial twelve months.[79]

One of the principal lessons learned from *Combs* is that counsel must be conscious of waiver principles. Only the unique facts of this case prevented the CAAF from applying this doctrine. Practitioners should also note that Article 13's prohibition against pretrial punishment is not limited to instances of pretrial confinement. It applies to anyone "held for trial." Finally, counsel should be wary that what might appear to be simply minor adverse treatment of a soldier pending trial may rise to the level of illegal pretrial punishment if done with a punitive intent.

A Methodology for Determining Punitive Intent

How are courts to determine whether alleged improper pretrial treatment of an accused is done with an intent to punish? In *United States v. McCarthy*,[80] the CAAF shed light on the subject by explaining the procedure appellate courts should follow when reviewing such allegations.

Prior to his trial for committing indecent acts with a child and disobeying protective orders, McCarthy was placed in maximum security pretrial confinement. The first three days of McCarthy's three-week stay in maximum security pretrial confinement included an intense suicide watch. At trial, the accused was awarded three-for-one credit for the three days of suicide watch, but received only day-for-day *Allen*[81] credit for the remaining three weeks of maximum security confinement.[82]

Prior to the CAAF's grant of review in this case, a conflict existed between the Air Force and Army courts regarding the

71. *Id.* at 333 (citing the unpublished opinion of the Air Force Court of Criminal Appeals).

72. *Id.*

73. UCMJ art. 13 (West 1995).

74. *Combs*, 47 M.J. at 333. The CAAF cited *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987), to support its conclusion that UCMJ Article 13 protects anyone "held for trial." *Id.*

75. *Id.* at 332 (quoting the unpublished opinion of the Air Force Court of Criminal Appeals).

76. *Id.* at 334.

77. *Id.* at 336 (Gierke, J., dissenting).

78. *Id*. *See* United States v. Miller, 47 M.J. 352 (1997); United States v. Kraffa, 11 M.J. 453, 455 (C.M.A. 1981); United States v. Tanner, 3 M.J. 924, 926 (A.C.M.R. 1977).

79. *Combs*, 47 M.J. 332, 337 (Gierke, J., dissenting).

80. 47 M.J. 162 (1997).

81. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984). In *Allen*, the accused was awarded day-for-day credit for each day of pretrial confinement served.

proper standard of review for allegations of illegal pretrial punishment.[83] McCarthy urged the CAAF to adopt a de novo standard based on the Air Force decision in *United States v. Washington*.[84] The government supported the Army court standard applied in *United States v. Phillips*.[85] The CAAF resolved the split by concluding that the proper approach is a little bit of both, since the ultimate issue of unlawful pretrial punishment "presents a 'mixed question of law and fact' qualifying for independent review."[86] Some aspects are to be reviewed for an abuse of discretion, while others are to be reviewed de novo. Exactly which aspects are to be reviewed under which standard remains unclear from the majority's opinion.

Unlawful pretrial punishment can take two forms: (1) imposition of restraint with *intent* to punish and (2) unduly rigorous and excessive circumstances which justify a presumption that the accused is being punished.[87] With respect to the former, the CAAF concluded that issues of purpose and *intent* are classic questions of fact and that such "basic, primary, or historical facts . . . will [be] reverse[d] only for a clear abuse of discretion."[88] But, in its detailed analysis of the facts, the majority appears to have conducted a de novo review of these basic, primary, historical facts.[89] In the most confusing portion of its opinion, the CAAF found "no clear abuse of the military judge's discretion,"[90] implying an abuse of discretion standard of review. In the very same paragraph, however, the CAAF expressly applied the de novo standard of review: "Applying de novo Article 13's first prohibition [intent to punish] . . . we hold that there was no violation."[91] These conflicting yet interwoven standards of review add little clarity to what is admittedly a complex aspect of appellate practice.[92] The CAAF was a bit more precise with its conclusion that the second prohibition under Article 13 (unduly rigorous or excessive conditions) is reviewed for an abuse of discretion: "We hold that the judge did not abuse his discretion in finding that the classification was supported by reasonable and legitimate governmental interests."[93]

Judge Effron's dissenting opinion provides the clearest and most logical two-step appellate review of alleged intentional pretrial punishment. According to Judge Effron, the historical facts on which the military judge relies for his decision should be reviewed for an abuse of discretion. Under the second step of review, the trial judge's ultimate conclusion "as to whether such facts demonstrate an intent or purpose to punish" would be reviewed de novo, as are other questions of law.[94]

Give Credit Where Credit is Due

A question counsel frequently ask is whether sentence credit is applied against the *approved* sentence or the *adjudged* sentence.[95] The Army Court of Criminal Appeals addressed this issue pursuant to an extraordinary writ in *Coyle v. Commander, 21st Theater Army Area Command*.[96] Coyle was

82. *McCarthy*, 47 M.J. at 165. The military judge's conclusion that the accused was not subjected to illegal pretrial punishment under Article 13 of the UCMJ was supported by detailed findings of fact based on the testimony of those who subjected the accused to pretrial confinement. *Id*.

83. *Id.* at 164.

84. 42 M.J. 547 (A.F. Ct. Crim. App. 1995).

85. 38 M.J. 641 (A.C.M.R. 1993), *aff'd*, 42 M.J. 346 (1995).

86. *McCarthy*, 47 M.J. at 165.

87. *Id.*

88. *Id.*

89. *Id*. at 167. The CAAF stated that it was "not prepared to hold, *as a matter of law* that the brig officials in this case violated the provisions of the *Manual*," and that they agreed with the military judge's finding "that the imposition of maximum custody . . . was 'supported by reasonable and legitimate governmental interest.'" *Id*. (emphasis added).

90. *Id.*

91. *Id.*

92. *Id.* at 168 (Effron, J., concurring). In his concurring opinion, Judge Effron best sums up the majority's opinion with the statement that "although the majority asserts it is applying an 'abuse of discretion' standard, the majority's detailed analysis of the historical events reflects a de novo review." *Id*.

93. *Id.* at 167.

94. *Id.* at 168 (Effron, J., dissenting).

95. In the former, the accused will always receive a tangible benefit; the same is not true in the latter. For example, assume that the accused in a case is awarded 30 days credit, the adjudged sentence includes twelve months confinement, and the convening authority approves ten months confinement. If the 30 days is awarded against the approved sentence, the accused would only have nine months left to serve. But if the 30 days credit is awarded against the 12 month sentence adjudged at trial, the accused would not benefit from the same 30 day reduction against the approved sentence.

convicted of larceny, assault, and provoking speech and was sentenced to a bad-conduct discharge, total forfeitures, reduction to E-1, and twenty-two months confinement. Pursuant to a pretrial agreement, the convening authority approved only twelve months confinement. At trial, the military judge awarded the accused twenty-two days of *Allen*[97] credit and one day of R.C.M. 305(k) credit for an untimely magistrate review.[98] The military judge also ruled that the hourly sign-in requirement and order to submit to urinalysis testing based on mere suspicion rose to the level of unlawful pretrial punishment. Three times during the course of the trial, the military judge informed the accused that he would consider the unlawful pretrial punishment in adjudging an appropriate sentence.[99] After announcing a sentence that included twenty-two months confinement, the military judge explained that he would have otherwise adjudged twenty-four months confinement had there been no unlawful pretrial punishment.[100]

Although the Army court ultimately refused to consider the appellant's extraordinary writ demanding that credit for illegal pretrial punishment be awarded against the approved sentence,[101] the court used this case as a vehicle to restate the procedures for awarding credit for illegal pretrial confinement and pretrial punishment. In instances where the accused is placed in illegal pretrial *confinement*, credit must be awarded against the *approved* sentence. However, when an accused is subjected to illegal pretrial *punishment*, different procedures apply. At a minimum, the nature and extent of illegal pretrial punishment *must* be considered by the sentencing authority in adjudging an appropriate sentence. Depending on the circumstances, credit for illegal pretrial punishment *may* be assessed against the approved sentence.[102]

Conclusion

The most common concern of counsel who face issues of illegal pretrial restraint involves the amount of credit to which an accused is entitled for illegal pretrial *confinement.* These recent cases are important because they demonstrate how other aspects of pretrial treatment of an accused may warrant relief for an accused. Illegal pretrial *punishment* in violation of Article 13 of the UCMJ provides fertile ground for zealous advocacy. Both trial and defense counsel must be wary of circumstances that may rise to the level of illegal pretrial punishment. From the government's perspective, counsel should attempt to prevent pretrial punishment from occurring. From the defense perspective, counsel must initially raise the issue at trial and then zealously argue for the credit to which their clients are entitled.

96. 47 M.J. 626 (Army Ct. Crim. App. 1997).

97. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

98. *See* MCM, *supra* note 1, R.C.M. 305(i), (k). Rule for Courts-Martial 305(i) requires that pretrial confinement be reviewed for probable cause by a neutral and detached officer within seven days. If the required review does not comply with the provisions of R.C.M. 305(i), the accused must be awarded day-for-day credit for each day of non-compliance pursuant to R.C.M. 305(k).

99. *Coyle*, 47 M.J. at 628.

100. *Id*.

101. *Id.* at 629. Jurisdiction was denied because the accused failed to satisfy the two-part burden of proof: (1) circumstances are so unusual that ordinary appeal provides inadequate relief and (2) the accused is clearly and indisputably entitled to the relief sought. *Id*.

102. *Id.* at 630. *See* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). A related issue, which was not addressed by the Army court, was whether credit for unlawful pretrial *confinement* is to be credited against the approved sentence or the adjudged sentence. *See* MCM, *supra* note 1, R.C.M 305(k) (stating that "the remedy for non-compliance . . . of this rule shall be an administrative credit against the sentence adjudged"). The more common practice is for credit for such illegal pretrial confinement to be awarded against the sentence ultimately *approved* by the convening authority.