Rule for Courts-Martial 305 Issues in Unauthorized Absence Cases Involving Civilian and Military Pretrial Confinement

Commander James P. Winthrop, U.S. Navy
Military Judge, Tidewater Judicial Circuit
Navy-Marine Corps Trial Judiciary
Norfolk, Virginia

Private Frist Class Demon Outlaw, United States Marine Corps (USMC), began a period of unauthorized absence on 20 August 1999, two weeks before his Camp Lejeune-based unit was to deploy for a six-month Mediterranean "float." On 29 May 2000, a Virginia state trooper arrested Outlaw for reckless driving in Tazewell County, Virginia. While running Outlaw's license plate through his computer system, the trooper discovered a warrant for his arrest issued by the Marine Corps. Marine Corps authorities were notified of his incarceration in Tazewell County. Outlaw remained in the county jail until 15 June, when he was convicted of reckless driving and sentenced to time served and a hefty fine. That same day, the Tazewell County deputy sheriff notified Marine Corps authorities that Outlaw's civilian proceedings were completed and sought advice on what to do with him. He was advised to keep Outlaw incarcerated until Marine escorts arrived. Those escorts arrived on 19 June, took Outlaw into custody, and returned him to Camp Lejeune on 20 June where he was placed into pretrial confinement in the base confinement facility on the orders of his commanding officer, in accordance with Rule for Courts-Martial (RCM) 305(d). On 23 June, the commanding officer wrote and forwarded his seventy-two hour memorandum recommending continued confinement. The seven-day reviewing officer held a hearing on 27 June and kept PFC Outlaw in pretrial confinement.

Violations of Article 85 and 86 of the Uniform Code of Military Justice (UCMJ) involving desertion and other extended absences, like the PFC Outlaw hypothetical, continue to be a staple of our military justice practice. Such absences are frequently terminated by apprehension on the part of civilian law enforcement authorities and involve various periods of pretrial confinement by civilian authorities. In such circumstances, both trial and defense counsel should be alert to potential issues stemming from the various requirements of RCM 305 for the review of that confinement. These requirements, particularly those in RCM 305(i)(1), are a fairly constant source of confusion at trial. These issues surface in courts-martial when the defense counsel files a motion for appropriate relief seeking administrative credit under RCM 305(k) for non-compliance with these review requirements.[1] This article briefly surveys[2] the confinement review requirements of RCM 305, and then examines some of the issues associated with these requirements and provides suggestions on how judge advocates should handle them.[3]

The first review that must be undertaken is the forty-eight hour review by a neutral and detached officer of the probable cause to continue pretrial confinement. This requirement is contained in RCM 305(i)(1), which was added in the 1998 Amendments to the *Manual for Courts-Martial*.[4] It incorporates the Supreme Court's *Gerstein v. Pugh*[5] and *County of Riverside v. McLaughlin*[6] Fourth Amendment probable cause review requirements that the Court of Appeals for the Armed Force (CAAF) made applicable to the armed forces in *United States v. Rexroat*.[7] The next review is the seventy-two hour

1. *See* United States v. McCants, 39 M.J. 91, 93 (C.M.A. 1994) (citing RCM 305(j) for the proposition that RCM 305(k) issues are raised in this manner). Defense counsel should be aware that "an accused who fails to affirmatively assert entitlement to RCM 305(k) . . . credit at trial waives the issue on appeal." United States v. Chapa, 53 M.J. 769, 772 (Army Ct. Crim. App. 2000).

2. *See* Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13 (discussing in-depth these review requirements).

3. This article does not discuss the issue of credit for civilian pretrial confinement under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Judge advocates should be aware, however, that, although the Court of Appeals for the Armed Forces has not ruled on this issue, two of the service courts have. United States v. Murray, 43 M.J. 507, 513-14 (A.F. Ct. Crim. App. 1995); United States v. Chaney, 53 M.J. 621, 622-24 (N-M. Ct. Crim. App. 2000). Both of those opinions cite federal sentence computation procedures, specifically 18 U.S.C. § 3585(b) (2000), which are applicable to courts-martial via U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (28 Sept. 1999).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(i)(1) (2000) [hereinafter MCM]. The current MCM incorporates all executive orders (1984 MCM, changes 1-7, and the 1995, 1998 and 1999 amendments). *Id.* app. 25. The 1998 amendments are discussed in Criminal Law Division Note, *Explanation of the 1998 Amendments to the Manual for Courts-Martial*, ARMY LAW., Aug. 1998, at 38.

5. 420 U.S. 103 (1975).

6. 500 U.S. 44 (1991).

7. 38 M.J. 292 (C.M.A. 1993); *see* Hargis, *supra* note 2, at 13 (discussing briefly *Gerstein* and *County of Riverside*).

probable cause review by the commanding officer of the accused that is set forth in RCM 305(h)(2)(A). The commanding officer is required to conduct the review within seventy-two hours and to reduce that decision to a memorandum, which must be forwarded to the seven-day reviewing officer by the time of that officer's review.[8] This brings us to the seven-day probable cause review of RCM 305(i)(2).[9] This review is also one that is accomplished by a neutral and detached officer, although this officer is one appointed by service regulations.[10] Counsel should also be aware that if either the seven-day review[11] or the seventy-two hour review[12] is done within forty-eight hours of confinement, it may serve as the forty-eight hour review as long as, in the case of the seventy-two hour review, the commander qualifies as a "neutral and detached officer."

The threshold issue defense counsel face in these cases is determining when the clock starts for these review requirements. Rule for Courts-Martial 305(i)(1) states that the forty-eight hour review must occur within "48 hours of imposition of confinement under military control." That rule goes on to state that "[i]f the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion." In the context of a civilian apprehension, the question then becomes what is meant by the term "military control," that is, does it refer to the moment when the accused is actually placed in a military confinement facility or sometime earlier, such as the time when the accused is placed in civilian confinement or when the accused is actually picked up by military escorts. The language of RCM 305(i)(1), and even more explicitly the language of the analysis of RCM 305(i),[13] seem to indicate that it is the former, that is, placement in a military confinement facility. The Air Force Court of Criminal Appeals (Air Force Court) reached the same conclusion on this issue in *United States v. Scheffer.*[14] In *United States v. Stuart*,[15] an earlier Army Court of Military Review opinion, the court employed the standard set forth by the then Court of Military Appeals in *United States v. Ballesteros.*[16] In *Ballesteros*, the court held that the clock began when the accused was detained "with the notice and approval of military authorities."[17] In *United States v. Lamb*, a case decided after both of these opinions, CAAF reaffirmed its holding in *United States. v. Ballesteros*, stating that "the [RCM 305] must be followed if a military member is confined by civilian authorities for a military offense and with notice and approval of military authorities."[18] Thus, *Lamb* establishes that the clock may start

8. Nothing in RCM 305(h)(2)(C) requires that the commander actually prepare the memorandum within seventy-two hours. That rule, however, does mandate the forwarding of the memorandum to the seven-day reviewing officer prior to that officer's review. United States v. Shelton, 27 M.J. 540, 542 n.3 (A.C.M.R. 1988) (stating that the "only timeliness requirement attached to this [seventy-two hour] memorandum is that it must be available for the military magistrate's review, that is, by the seventh day of pretrial confinement"). Trial counsel should note, however, that having a seventy-two hour memorandum dated within seventy-two hours of confinement is the easiest way to establish the timeliness of that review. Failing that, counsel will have to introduce other evidence, such as the testimony (or stipulation of expected testimony) of the commander.

9. Note that in counting the seven days, both the initial date of confinement and the date of the review are included. MCM, *supra* note 4, R.C.M. 305(i)(2).

10. Of course, a military judge also has the ability to review pretrial confinement. MCM, *supra* note 4, R.C.M. 305(j).

11. Criminal Law Division Note, *supra* note 4, at 38.

12. MCM, *supra* note 4, R.C.M. 305(h)(2)(A).

13. *Id.* at A21-18 to A21-19. This RCM analysis section states that, in a case in which civilian authorities have apprehended a deserter and it takes several days to transfer the prisoner to a military confinement facility, the clock does not "begin to run until the prisoner's transfer to military authorities." *Id.* This section of the analysis, however, must be read with caution for two reasons. First, counsel should realize that it is discussing RCM 305(i) as it existed *before* the 1998 amendment; that is, it is only analyzing the seven-day review. Furthermore, although the analysis does acknowledge the contrasting view of the Court Military Appeals in *United States v. Ballesteros*, 29 M.J. 14 (C.M.A. 1989), it does not reflect the apparent ripening of the *Ballesteros* holding in *United States v. Lamb*, 47 M.J. 384 (1998).

14. 41 M.J. 683 (A.F. Ct. Crim. App. 1995). Scheffer was initially apprehended by civilian authorities for a civilian traffic offense. Air Force authorities requested that he be detained until he could be picked up. Military escorts picked him up two days later, and he was ordered into pretrial confinement three days later. The Air Force Court of Criminal Appeals held that the forty-eight hour clock did not start until the accused was actually ordered into pretrial confinement by a military commander. *Id.*

15. 36 M.J. 746 (A.C.M.R. 1993). Stuart was incarcerated by civilian authorities solely for desertion and was turned over to military authorities one day later. The court held that the forty-eight hour clock began the day Stuart was incarcerated by the civilians, not the following day when he was turned over. *Id. See* Amy M. Frisk, *New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 26 (analyzing in detail *Scheffer* and *Stuart*).

16. 29 M.J. 14 (C.M.A. 1989). Ballesteros was arrested by civilian authorities solely on the military deserter warrant. He was incarcerated from the outset with the notice and approval of military authorities. The Court of Military Appeals held that the seven-day clock (this was a pre-*Rexroat* case) began the first day of incarceration by civilian authorities. *Id.*

17. *Id.* at 16.

18. *Lamb*, 47 M.J. 384, 385 (1998). Lamb, who was an unauthorized absentee, was initially arrested and confined by civilian authorities for driving with a suspended license. Navy authorities were notified of his arrest. Ten days later those charges were resolved and he was turned over to Navy authorities that same day. Although the defense sought to start the clock the day Lamb was arrested, CAAF held that the defense had not established that he was being confined solely for a military offense and ruled that the forty-eight hour clock began when he was turned over to the Navy escorts. *Id.*

earlier than indicated by the language of RCM 305(i) and its analysis. In doing so, however, CAAF clearly placed the burden on defense counsel to establish the point at which the accused is being held for military purposes. In *Lamb*, CAAF held that the defense "failed to show that [the accused] was confined [by civilian authorities] solely for a military offense."[19]

Defense counsel must thus examine the circumstances surrounding the accused's arrest by civilian authorities. The critical factor, of course, is whether the accused was picked up by civilian authorities *solely* on the basis of a deserter warrant. If that is the case, *Lamb* seems to indicate that the clock will start at the time of civilian confinement. On the other hand, if the accused is initially arrested and detained on a civilian charge and civilian authorities subsequently discover the accused is wanted by the military, *Lamb* indicates that defense counsel has the burden to prove, by a preponderance of the evidence, that at some time during his civilian incarceration he was being held solely for the military offense.[20] In this situation, CAAF also requires the defense to show that the accused was not given a *Gerstein* hearing while in civilian confinement.[21] Defense counsel should be able to meet their burden in such cases through various means such as a stipulation of fact, testimony of the accused, or documentary evidence, for example, civilian court documents or message traffic. In PFC Outlaw's case, defense counsel should attempt to prove that the clock started on 15 June, the day the civilian charges were disposed of, because as of that date he was confined solely for the unauthorized absence with the notice and approval of Marine Corps authorities.

Trial counsel may argue for a delay in the clock's start by claiming lack of military control or military exigencies. At least in a case where the accused was initially confined for a civilian offense, trial counsel could argue for a strict interpretation of the *Lamb* holding in order to delay the clock's start. Thus, the *Lamb* timing rule would only apply if the accused was arrested solely for a military offense, that is, no civilian offense was involved. Such an interpretation finds support in the holding of the Air Force Court in *Scheffer*, in the language of RCM 305(i)(1), and in the analysis of RCM 305(i). Additionally, trial counsel could cite as authority CAAF's language discussing the defense counsel's burden in the *Lamb* holding in which the court stated that "he [the accused] failed to show that he was confined *solely* for a military offense."[22] Finally, although this argument may appear to be a strained reading of *Lamb*, it is worth noting that Navy appellate government counsel recently made a similar argument in an unpublished decision in which the Navy Court of Criminal Appeals did not ultimately address this specific issue.[23]

Trial counsel could also make a "military exigency" argument in seeking to delay the start of the clock. *Rexroat* emphasized that the *Mclaughlin* forty-eight hour limit is only a presumption, which may be rebutted by evidence of a military exigency preventing a timely review.[24] In *Scheffer*, the Air Force Court believed that the time spent in retrieving the accused from civilian confinement and incarcerating him in a military facility constituted such military exigencies.[25] Trial counsel could thus make this claim in a case where military escorts must travel to a distant location and return as in the hypothetical. No cases subsequent to *Scheffer* have addressed the issue of military exigencies under *Rexroat.*

Finally, even if the trial counsel does not attempt one of these arguments, they still have the responsibility of holding defense counsel to their burden imposed by *Lamb. Lamb* was clear in placing the burden on the defense to establish that the accused was being held for a military offense with the notice and approval of military authorities, and that the civilian jurisdiction had not held a *Gerstein* hearing. Obviously, these are factual issues, but trial counsel should verify the defense's version of events with both civilian and military authorities.

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19. *Id.* at 385. The Court of Appeals for the Armed Forces also held that the defense had not shown noncompliance with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (the forty-eight hour hearing rule), stating that there was a presumption of compliance by civilian authorities absent evidence to the contrary.

20. *Id.*; *see* United States v. Gable, No. 9701533 (Army Ct. Crim. App. Aug. 10, 1999) (unpublished opinion) (holding that defense counsel had not met its burden under *Lamb* to show that the accused, who was arrested for civilian charges, was being held solely for a military offense). Gable was initially arrested solely on civilian traffic charges. Civilian authorities immediately notified the Army of the situation and the Army requested that they continue to detain Gable and that they drop the civilian charges. On the day charges were dropped, the accused was picked up by Army escorts and confined in an Army facility. The Army court held that the clock did not start until Gable was confined in the Army facility because defense counsel had not met its burden under *Lamb.* The court ruled that "[g]iven the circumstances of this case, appellant has failed to carry his burden to show that he was confined by civilian authorities solely for a military offense." *Id.*

21. *See supra* note 19.

22. *Lamb*, 47 M.J. at 385 (emphasis added).

23. United States v. Alaniz, No. 9901370 (N-M. Ct. Crim. App. 28 Apr. 2000) (unpublished opinion). Alaniz was made available to the Navy on 19 January 1999, but was not picked up and incarcerated in a Navy facility until 26 January 1999. The military judge held that the government's RCM 305 responsibilities began on 19 January 1999 and the Navy Court declined to disturb that determination as it considered it the "law of the case." It should be noted that the accused was apparently arrested solely for a military offense. Navy appellate government counsel's argument may thus reflect a view that the *Lamb* holding imposes an overly harsh timetable on the government.

24. United States v. Rexroat, 38 M.J. 292, 295-96 (C.M.A. 1993).

25. United States v. Scheffer, 41 M.J. 683, 693 (A.F. Ct. Crim. App. 1995).

Occasionally an issue may also arise regarding who may conduct the forty-eight hour review, that is, who qualifies as a "neutral and detached officer" for purposes of RCM 305(i)(1). This issue does not arise in the case of the other two reviews because the Rules for Courts-Martial are explicit in that regard.[26] Judicial debate about this issue swirled in the service courts after the Supreme Court opinion in *County of Riverside v. McLaughlin*, particularly regarding whether the accused's commanding officer could perform this function by virtue of ordering confinement.[27] The Court of Military Appeals resolved this issue in *Rexroat*, which in addition to holding that the forty-eight hour *County of Riverside v. Mclaughlin* requirement applied to the military, also held that the commanding officer's ordering of confinement under RCM 305(d) or his seventy-two hour determination pursuant to RCM 305(h)(2)(c) could satisfy the requirement as long as the commander was "neutral and detached."[28] Courts have also held that a command duty officer in the Navy and an Army staff judge advocate also would qualify, in most cases, as a neutral and detached officer for purposes of the forty-eight hour review.[29] In addition, of course, the review must be conducted within forty-eight hours of confinement.

In the typical civilian confinement scenario, it would be the rare case where the commanding officer could conduct this review in a timely manner. For example, in the PFC Outlaw hypothetical, the commanding officer did not order him into pretrial confinement until 20 June. Assuming the commanding officer was not involved in the command's law enforcement function, the act of ordering Outlaw into confinement satisfies the need for a determination of probable cause for confinement. With the clock starting on 15 June (assuming the defense counsel was successful in that regard), however, the order could not satisfy the timing portion of *Rexroat* because it was not accomplished by 17 June, that is, within forty-eight hours.

The next issue to resolve is how to ascertain the actual number of days of administrative credit that the accused should receive under RCM 305(k).[30] According to RCM 305(k), the credit is computed at a rate of one day for each day of non-compliance with RCM 305(h) and (i), specifically RCM 305(h)(2), (i)(1), and (i)(2).[31] The Army Court of Military Review addressed this issue in *United States v. Stuart*[32] in the context of a tardy magistrate hearing. In *Stuart* the court held that "[t]he credit is calculated from the day the magistrate[33] should have held the hearing until the day before the hearing was conducted."[34] This method of calculation, beginning the day the review should have been conducted and extending to the day before the review was actually completed, captures each day of noncompliance. The Navy Court of Criminal Appeals employed a similar method of counting in *United States v. Plowman*.[35] In our hypothetical, again assuming the defense counsel was successful in establishing 15 June as triggering the review clock, the first day of non-compliance was 17 June, the day the forty-eight hour review should have been conducted. The seventy-two hour review should have been completed on 18 June and the seven-day review on 22 June. Thus, the non-compliant period extended from 17 June to 26 June, the day before compliance occurred. Private First Class Outlaw would thus be entitled to ten days of RCM 305(k) credit.

Frequently these cases involve violations of all three provisions. The question then becomes whether the accused is entitled to multiple RCM 305(k) credit. Creative defense counsel could argue that their accused is entitled to what amounts to overlapping administrative credit. For example, PFC Outlaw's

26. The RCM 305(h)(2) review must be conducted by the accused's commander, while the RCM 305(i)(2) review must be conducted by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned." MCM, *supra* note 4, R.C.M. 305(h)(2), 305(i)(2).

27. Both the then Army and Navy Courts of Military Review held that the commanding officer's initial determination, pursuant to RCM 305(d), was not sufficient to meet the *Riverside* requirements. United States v. Rexroat, 36 M.J. 708 (A.C.M.R. 1992); United States v. Holloway, 36 M.J. 1078 (N.M.C.M.R. 1993).

28. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

29. United States v. Bell, 44 M.J. 677 (N-M. Ct. Crim. App. 1996) (holding that the command duty officer, who stands in the place of a ship's commanding officer during the latter's absence was not normally involved in law enforcement functions and could therefore be neutral and detached); United States v. McLeod, 39 M.J. 278 (C.M.A. 1994) (holding that the brigade commander and the staff judge advocate could conduct the forty-eight hour review because there was no evidence that they were involved in the command's law enforcement function).

30. This administrative credit is taken against the *adjudged* sentence according to RCM 305(k).

31. The credit also applies to violations of RCM 305(f), (j), and (l). For purposes of this article, however, only violations of RCM 305(h) and (i) are relevant. It is worth noting that RCM 305(k) does not expressly refer to RCM 305(l) as one of the provisions for which it serves as a remedy. Nonetheless, the Army Court of Criminal Appeals has held that RCM 305(k) affords a remedy in cases involving RCM 305(l) violations. United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997), *aff'd on other grounds*, 50 M.J. 436 (1999).

32. 36 M.J. 746 (A.C.M.R. 1993).

33. For purposes of clarity, the current MCM now employs the term "7-day reviewing officer," instead of previous terms such as magistrate or initial review officer. MCM, *supra* note 4, R.C.M. 305(i)(2).

34. *Stuart*, 36 M.J. at 748.

35. 53 M.J. 511, 514 n.12 (N-M. Ct. Crim. App. 2000).

defense counsel could argue for twelve days of RCM 305(k) credit. Counsel could arrive at that figure by counting four days for violation of RCM 305(i)(1) for the period 17 to 20 June; three days for violation of RCM 305(h)(2) for the period 20 to 22 June; and five days for violation of RCM 305(i)(2) for the period 22 to 26 June.

This issue has recently been decided by the Navy-Marine Corps Court of Criminal Appeals in *Plowman*.[36] In *Plowman*, the court was faced with a situation in which there were overlapping violations of all these provisions of RCM 305. The court held that the accused was not entitled to multiple days of RCM 305(k) credit, noting that "[n]oncompliance with separate requirements occurring simultaneously does not cause the accused to spend multiple days confined for each instance of noncompliance."[37] In fashioning this interpretation of RCM 305(k), the court believed that it adequately compensated the accused, while deterring commands from failing to comply with the requirements of RCM 305.[38] Obviously, this decision is only binding on courts in the naval service, and still leaves room for argument to the contrary by Army and Air Force defense counsel. Nonetheless, the Navy court holding is quite persuasive.

Although the stakes with respect to RCM 305 issues are relatively small in comparison to other issues in military courts-martial practice, several days of confinement credit can be significant to an accused. Furthermore, given the frequency with which these issues arise, judge advocates would also be professionally remiss in not taking the small amount of time necessary to master them.

36. *Id*.

37. *Id*.

38. *Id*.