

**52ND MILITARY JUDGE COURSE  
PRETRIAL RESTRAINT AND SPEEDY TRIAL**

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**LTC Kwasi Hawks  
March 2009**

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# 52ND MILITARY JUDGES COURSE

## PRETRIAL RESTRAINT

### Outline of Instruction

#### I. PRETRIAL RESTRAINT. UCMJ ART. 9(A); R.C.M. 304.

##### A. Types of Pretrial Restraint. R.C.M. 304(a).

1. **Conditions on liberty.** “[O]rders directing a person to do or refrain from doing specified acts.”
2. **Restriction in lieu of arrest.** “[O]rders directing the person to remain within specified limits.” Restricted person normally performs full military duties.

*United States v. Blye*, 37 M.J. 92 (C.M.A. 1993). Service member may be lawfully ordered to abstain from alcohol as a condition of pretrial restriction

3. **Arrest.** “[R]estraint ... directing the person to remain within specified limits.... [P]erson in status of arrest may not be required to perform full military duties....”
4. **Pretrial Confinement.** “Pretrial confinement is physical restraint . . . .”

##### B. When A Person May Be Restrained

1. A soldier may be placed under pretrial restraint when there is a reasonable belief that:
  - a. An offense triable by court-martial has been committed;

- b. The person to be restrained committed it; and
- c. The restraint ordered is “required by the circumstances.” R.C.M. 304(c); Article 9(d) (probable cause); Article 10 (“as circumstances may require”). Note that the person ordering restraint should consider the provisions of R.C.M. 305(h)(2)(B), before ordering restraint. These provisions further elaborate on when restraint is “required by the circumstances” because it is foreseeable that:
  - (1) The soldier will not appear at trial, pretrial hearing, or investigation, or;
  - (2) The soldier will engage in serious criminal misconduct, and;
  - (3) Lesser forms of restraint are inadequate.

2. **BUT:** “An accused pending charges should ordinarily continue the performance of normal duties within the accused’s organization while awaiting trial.” AR 27-10, para. 5-13a (20 Aug 99).

C. Who May Order Pretrial Restraint? Article 9(b) and; R.C.M. 304(b).

- 1. Of officers. “Only a commander to whose authority” they are subject. This authority may not be delegated.
- 2. Of enlisted personnel. “Any commissioned officer.” Authority may be delegated by a commanding officer to warrant, petty, and noncommissioned officers of his/her command.
- 3. Authority for subordinates to order restraint may be withheld by a superior competent authority.

D. Procedures for Ordering Pretrial Restraint. Article 9(b) and (c); R.C.M. 304(d).

1. Confinement is “imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.”
  2. Other types of pretrial restraint are “imposed by notifying the person orally or in writing of the restraint, including its terms or limits.”
- E. Notice. A person placed under restraint “shall be informed of the nature of the offense which is the basis for such restraint.” R.C.M. 304(e).
- F. **Restraint is Not Punishment.** Article 13; R.C.M. 304(f). Persons restrained pending trial may not be punished for the offense that is the basis of the restraint. Prohibitions include “punitive duty hours or training,” “punitive labor,” or “special uniforms prescribed only for post-trial prisoners.”

## II. PRETRIAL CONFINEMENT. UCMJ ART. 9-13; R.C.M. 305.

- A. Basis for Pretrial Confinement. R.C.M. 305(d). Probable cause (reasonable belief) that:
1. An offense triable by a court-martial has been committed;
  2. The person confined committed it; and
  3. Confinement is *required by the circumstances*. Again, consider R.C.M. 305(h)(2)(B), that it is reasonably foreseeable that the soldier:
    - a. Will not appear at trial, pretrial hearing, or investigation, or
    - b. Will engage in serious criminal misconduct, **and**

c. Lesser forms of restraint are inadequate.

B. Regulatory Requirements. “In any case of pretrial confinement, the **SJA** concerned, or that officer’s designee, **will be notified** prior to the accused’s entry into confinement or as soon as practicable afterwards.” AR 27-10, paragraph 5-13a. Also consider requirements of local policies / regulations (for example, no PTC without the concurrence of the SJA).

C. Advice to Accused Upon Confinement. Article 10; R.C.M. 305(e).

“Each person confined shall be promptly informed of:

- (1) The nature of the offenses for which held;
- (2) The right to remain silent and that any statement may be used against the person;
- (3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
- (4) The procedures by which pretrial confinement will be reviewed.”

D. Military Counsel. R.C.M. 305(f); AR 27-10, para. 5-13.

1. Prisoner must request military counsel and request must be known to military authorities. Counsel is to be made available prior to R.C.M. 305(i) review, or within 72 hours of request, whichever occurs earlier. R.C.M. 305. **BUT:** AR 27-10, para. 5-13 imposes duty on SJA to request TDS appointment of counsel. If no TDS counsel available within 72 hours the SJA may appoint government counsel for this limited purpose.
2. “Consultation between the accused and counsel *preferably* will be accomplished *before the accused’s entry into confinement.*” If not possible, every effort will be made to have consultation within 72 hours of accused’s entry into confinement. AR 27-10.

3. No right to military counsel of the prisoner's own selection. Counsel "may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred." R.C.M. 305(f).

E. R.C.M. 305(i)(1) 48-hour Review:

1. Embodiment of the Constitutional review from *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991) and *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).
2. History:
  - a. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Fourth Amendment ("right of the people to be secure in their persons . . . against unreasonable . . . seizures") requires a "**prompt**" judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein* is binding upon the military. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).
  - b. What is "prompt?" *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."
  - c. *County of Riverside v. McLaughlin* applies to the military. *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).
3. Review must be by a "neutral and detached officer," e.g. an "independent" commander/officer, a military magistrate, or a military judge. The accused's commander may do the review under either R.C.M. 305(d) or R.C.M. 305(h) **if truly neutral and detached**.

- a. *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994). Both the brigade commander's and SJA's review of company commander's initial decision to impose pretrial confinement were neutral and detached. Neither was directly or particularly involved in command's law enforcement function.
- b. *United States v. Bell*, 44 M.J. 677 (N.M. Ct. Crim. App. 1996). A ship's command duty officer can be neutral and detached, and constitutionally qualified to make a judicial probable cause determination which satisfies *United States v. Rexroat*.

4. Substance of the review. Probable cause review by a neutral and detached officer. Is there a reasonable belief that:

- a. An offense triable by a court-martial has been committed;
- b. The prisoner committed it; and
- c. Confinement is necessary because it is foreseeable that:
  - (1) The prisoner will not appear at a trial, pretrial hearing, or investigation, or
  - (2) The prisoner will engage in serious criminal misconduct; **and**
- d. Less severe forms of restraint are inadequate.

F. Commander's 72-hour Review. Article 11; R.C.M. 305(h).

- 1. Report of confinement to prisoner's commander within 24 hours, if ordered by someone other than the commander.
- 2. Commander shall review confinement not later than 72 hours after ordering confinement, or receiving notice of confinement, and shall order release "unless the commander believes upon ... reasonable grounds, that:

- (i) An offense triable by a court-martial has been committed;
  - (ii) The prisoner committed it; and
  - (iii) Confinement is necessary because it is foreseeable that:
    - (a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or
    - (b) The prisoner will engage in serious criminal misconduct; and
  - (iv) Less severe forms of restraint are inadequate.”
3. Can be completed immediately after ordering PTC. R.C.M. 305(h)(2)(A).
4. *What Constitutes Serious Criminal Misconduct?*

Serious criminal misconduct: “includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command....” R.C.M. 305(h)(2)(B)(iv).

“[T]he **‘quitter’** who disobeys orders and refuses to perform duties” can have an “immensely adverse effect on morale and discipline.” “[A]lthough the ‘pain in the neck’ [soldier]... may not be confined ... solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is ... an **infection** in the unit may be ... confined.” Analysis of Rules for Courts-Martial, MCM, p. A21-16.

*United States v. Rosato*, 29 M.J. 1052 (A.F.C.M.R. 1990), *rev’d in part*, 32 M.J. 93 (C.M.A. 1991). Accused who was willfully disobedient and disrespectful to superiors in the presence of 10-15 members of a student squadron was properly placed in pretrial confinement “to protect the unit’s discipline and morale from the accused’s disruptive behavior.” Unit consisted of new, junior personnel, accused had a history of disciplinary problems, student representatives complained about him, and the accused ignored first sergeant’s admonitions.

*United States v. Savoy*, 65 M.J. 854 (A.F. Ct. Crim. App. 2008)  
While suicide prevention is an improper basis for continued pretrial confinement, a detainee's status as a suicide risk may be considered in evaluating the detainees likelihood to be a flight risk or commit other serious misconduct.

5. Commander shall prepare written memorandum stating the reasons for conclusion that requirements for confinement have been met. (Need not be done if such a memo written PRIOR to ordering PTC). Memorandum is forwarded to reviewing officer (military magistrate). (See AR 27-10, para. 9-5b(2): DA Form 5112-R, Checklist for Pretrial Confinement, will be completed and serves as "memorandum.")

*United States v. Shelton*, 27 M.J. 540 (A.C.M.R. 1988). The only timeliness requirement attached to this memorandum is that it must be available for the military magistrate's review.

G. R.C.M. 305(i)(2) 7-day Review. AR 27-10, chapter 9 (Military Magistrate Program); Trial Judiciary SOP 24 Feb 93.

1. Review of "probable cause determination and necessity for continued pretrial confinement" by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" within 7 days of imposition of confinement. (Time can be extended by the reviewing officer to 10 days for good cause).
2. Reviewing officer reviews commander's memorandum and any additional written matters, including any submitted by accused. Prisoner and counsel "shall be allowed to appear before the reviewing officer and make a statement, if practicable." Representative of command may appear to make a statement.
  - a. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988). Ex parte discussion by magistrate with prisoner's commander and trial counsel held not prohibited, at least when defense

counsel was given access to all the information and an opportunity to respond.

- b. *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993). Magistrate (and commander) should utilize a “totality-of-the-circumstances” test in determining whether pretrial confinement is warranted.
3. Military Rules of Evidence do not apply. Requirements for confinement must be shown by preponderance.
4. Reviewing officer “shall approve continued confinement or order immediate release.” Magistrate must decide within 7 days of imposition of confinement. *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994). Method for calculating total number of days of pretrial confinement: count both the initial date of confinement and date of magistrate review. R.C.M. 305(i)(1).
5. Reviewing officer shall make written memorandum of factual findings and conclusions. Memorandum, and all documents considered must be available to parties on request. R.C.M. 305(i)(6). **Note** that AR 27-10, para. 9-5b(1)(a), requires the magistrate to serve a copy of the memorandum upon the SJA and the accused.
  - a. Failure to serve copy of reviewing officer’s memo after defense request violates RCM 305(i). *See United States v. McCants*, 39 M.J. 91 (C.M.A. 1994).
  - b. *United States v. Williams*, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied*, 30 M.J. 106 (C.M.A. 1990). “[T]here is no specified format for the contents [of the reviewing officer’s memorandum] other than it must state the reviewing officer’s conclusions and the factual findings on which they are based.” Failure to precisely state the reasons for continued pretrial confinement is not an abuse of discretion requiring additional credit.

6. Reviewing officer shall, after notice to parties, reconsider the decision to approve continued confinement, upon request based upon any significant information not previously considered. R.C.M. 305(i)(2)(E).
7. AR 27-10 provides a procedure by which the government can request that the supervising judge review a magistrate's decision to release a prisoner. AR 27-10, para. 9-5b (20 Aug 99). **BUT:** This procedure (unless based on new evidence) has been declared invalid by the Army Court of Criminal Appeals in *Keaton v. Marsh*, 43 M.J. 757 (A.C.C.A. 1996) [the procedure contravenes R.C.M. 305(l)].

H. Review by Military Judge. R.C.M. 305(j).

1. Once charges are referred, military judge may review propriety of confinement on motion for appropriate relief.
2. Military judge may order release only if:
  - a. Reviewing officer's decision was abuse of discretion and no information presented to military judge justifying confinement; **or**
  - b. Information not presented to reviewing officer establishes that prisoner should be released; **or**
  - c. There has been no initial review and the military judge determines that the requirements for confinement have not been met.

3. The military judge can order day-for-day administrative credit for any pretrial confinement served as a result of failure to comply with subsection (f), (h), (i) or (j) of R.C.M. 305. The MJ may order additional credit for any pretrial confinement that involves the abuse of discretion or unusually harsh circumstances. When simultaneous noncompliance with multiple provisions occurs, only day-for-day credit will be applied. In other words, a pretrial confinee is not entitled to extra additional days of credit when multiple provisions of R.C.M. 305 are violated on one day or over the same period. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000). See also, *United states v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002), for the proposition that once the case is referred, the military judge has the authority to review the propriety of pretrial confinement regardless of whether the IRO has conducted his review

I. Who May Direct Release. R.C.M. 305(g).

1. Any commander of the prisoner.

*United States v. Shelton*, 27 M.J. 540 (A.C.M.R. 1988). The following commanders may review pretrial confinement and direct the accused's release: the accused's unit commander, the confinement facility commander, the commander of the unit to which the accused is attached while serving confinement, or the commander of the installation on which the confinement facility is located.

2. Officer appointed to review confinement (military magistrate).
3. The detailed military judge, once charges have been referred.

J. Reconfinement After Release. R.C.M. 305(1).

Once release from confinement is directed by a commander, a reviewing officer, or a military judge, the accused may not be confined again before completion of trial except upon discovery, after release, of evidence or misconduct which either alone or in conjunction with all other evidence, justifies confinement.

### III. SENTENCE CREDIT FOR PRETRIAL CONFINEMENT.

- A. Allen Credit. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Day for day credit for any military pretrial confinement. “[A]ny part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit . . . except where a day of pretrial confinement is also the day the sentence is imposed.” *United States v. DeLeon*, 53 M.J. 658, 660 (Army Ct. Crim. App. 2000) (abrogating the court’s decision in *United States v. New*, 23 M.J. 889 (A.C.M.R. 1987)).
1. What about civilian confinement? The CAAF has never squarely addressed the issue of *Allen* credit for time spent in civilian confinement. While the Army Court intimated that such credit “must be given ... for time spent in pretrial confinement in state or federal civilian confinement facilities,” *United States v. Ballesteros*, 25 M.J. 891 (A.C.M.R. 1988), *aff’d*, 29 M.J. 14 (C.M.A. 1989), the Court of Military Appeals decided the case on other grounds.
  2. *United States v. Chaney*, 53 M.J. 621 (N.M. Ct. Crim. App. 2000). Appellant was apprehended by civilian police based on information that he was a deserter from the Marine Corps. Marijuana was found on him during the apprehension. The appellant was placed in confinement based on offenses for which he later received a sentence at a court-martial (marijuana possession and unauthorized absence). The pending state charges against him were dismissed and he was then transferred to military authorities. He was not given credit under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) at trial for the 40 days he spent in pretrial confinement imposed by civilian authorities. Ultimately, the accused never received any credit for the 40 days (civilian or military credit). The appellate court concluded that he was entitled to 40 days credit because “[h]e was placed in official detention prior to the date his court-martial sentence commenced as a result of the offense for which the sentence was imposed and due to another charge for which he was arrested after the commission of the offense for which the sentence was imposed.”

3. *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim App. 1995). Relying on a DoDD 1325.4 and 18 U.S.C. Section 3585(b), the Air Force Court determined that an accused who had been arrested and held by civilian authorities prior to his court-martial was entitled to administrative credit for the time spent in civilian confinement.

NOTE: Clearly, additional R.C.M. 305(k) credit does not apply to a soldier in civilian confinement unless the soldier is in that confinement solely for a military offense and with notice and approval of military authorities. *United States v. Lamb*, 47 M.J. 384 (1998).

- B. Mason Credit - *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). Day for day credit given for “pretrial restriction equivalent to confinement.” The calculation for Mason credit includes any partial day of restriction tantamount to confinement. *United States v. Chapa*, 53 M.J. 769 (Army Ct. Crim. App. 2000).

1. The test: *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985). “The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed.”

**Some factors:** limits of the restricted area; physical restraints; escort requirements; sign-in requirements; circumstances of duty; assigned duties; access to visitors, telephones, recreation facilities, entertainment, civilian clothing, personal property, etc.

2. Restriction tantamount to confinement.

*United States v. Smith, infra.* 56 days of “restriction” found tantamount to confinement and credit given; accused was restricted to barracks building and was prohibited, among other things, from performing normal duties and leaving the building without permission and an escort; required to sign in every 30 minutes during non-duty hours and to remain in room after 2200 hours.

*United States v. Regan*, 62 M.J. 299 (2006). Officer who repeatedly tested positive for cocaine was offered inpatient drug treatment or pretrial confinement. She opted for inpatient treatment. The court awarded 21 days of Mason credit because the conditions of inpatient treatment constituted significant restriction and it was suffered upon threat of being confined.

3. Restriction **not** tantamount to confinement.

*Washington v. Greenwald*, 20 M.J. 699 (A.C.M.R. 1985) *pet. denied* 20 M.J. 324 (C.M.A. 1985). 88 days of pretrial restriction found not tantamount to confinement; credit denied. Washington was restricted to company area, place of duty, dining facility, and chaplain's office; he performed normal duties; was restricted to room after 2200 hours; signed in every hour at CQ's office when not at work; could travel to any place on post he needed to go during duty hours without an escort if he obtained permission and during non-duty hours with an escort.

4. Waiver.

*U.S. v. King*, 58 MJ 110 (C.A.A.F. 2003). If the issue is not raised at trial, it is waived and cannot be raised at the appellate level. Note particularly Judge Baker's concurrence in which he advises MJ's to ask on the record whether the accused seeks any pretrial confinement credit beyond simple *Allen* credit.

C. R.C.M. 305(k) Credit. Remedy for noncompliance with subsection (f), (h), (i) or (j), is administrative credit (day-for-day) against the sentence adjudged. Military judge may also award additional credit (not limited to day-for-day) if the pretrial confinement involves abuse of discretion or unusually harsh circumstances. Applies in addition to *Allen* or *Mason* credit. R.C.M. 305(k), analysis. However, when simultaneous non-compliance with multiple provisions of R.C.M. 305 occurs, only day-for-day credit will be applied. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000).

1. Restriction tantamount to confinement.

- a. *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). When restriction is tantamount to confinement, the procedures for pretrial confinement in R.C.M. 305 apply, and when they are not complied with, day-for-day credit under 305(k) is required in addition to *Allen-Mason* credit.
  - b. *U.S. v. Rendon*, 58 M.J. 221 (2003). CAAF “clarified” *Gregory* in that RCM 305 is only implicated by RTC in which actual physical restraint is imposed. The court did not offer a definition of give many useful examples.
  - c. But: 48-hour review does not apply to simple restriction. *United States v. Perez*, 45 M.J. 323 (1996) (Court refuses to “[e]xtend the requirement for a probable cause hearing to pretrial restriction,” noting a “world of difference between restriction and confinement”). However, if restriction is tantamount to confinement it **would** trigger *Rexroat* and R.C.M. 305 review requirements.
2. *Rexroat* Violations. *United States v. Stuart*, 36 M.J. 747 (A.C.M.R. 1993). Accused entitled to day-for-day credit under R.C.M. 305(k) for lack of 48-hour probable cause review.
  3. Civilian Confinement.
    - a. “If the prisoner was 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” R.C.M. 305(i)(1).
    - b. R.C.M. 305(k) credit provisions only apply to a soldier in civilian confinement if the soldier is in confinement a) solely for a military offense and b) his confinement is with notice and approval of military authorities. Burden is on the accused to allege that R.C.M. 305 applies and that the civilian authorities did not conduct the required 48-hour probable cause review. *United States v. Lamb*, 47 M.J. 384 (1998).

4. Reconfinement after release. *United States v. Williams*, 47 M.J. 621 (Army Ct. Crim. App. 1997). Even though a violation of R.C.M. 305(l) is not listed as a basis for awarding R.C.M. 305(k) credit, a violation of R.C.M. 305(l) and *Keaton v. Marsh*, 43 M.J. 757 (A.C.C.A. 1996), results in additional credit under R.C.M. 305(k).
  
5. Waiver.
  - a. *United States v. Chapa III*, 57 M.J. 140 (2002). At trial, was awarded 136 days sentence credit in violation of Article 13, UCMJ. On appeal, appellant alleged for the first time an entitlement to additional credit for the Government's failure to comply with R.C.M. 305(h) and (i) (i.e., the 72-hour and 48-hour pretrial confinement review requirements respectively). The ACCA held that the appellant failed to properly raise the issue at trial and therefore waived any entitlement to credit. 53 M.J. 769 (Army Ct. Crim. App. 2000). The CAAF held that appellant waived any issue regarding credit and no plain error by the MJ for failing, sua sponte, to award R.C.M. 305(k) credit.

D. Credit for Violations of Article 13. Two parts: "Unduly harsh circumstances" and pretrial punishment.

1. Unduly harsh circumstances of pretrial confinement (was under *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983), but is now incorporated into R.C.M. 305(k)).

2. *United States v. Avila*, 53 M.J. 99 (2000). By brig policy, based solely on the serious nature of his pending charges, appellant was housed in windowless cell; not allowed to communicate with other pretrial confinees; given only one hour of daily recreation; made to wear shackles outside of his cell, and; only allowed to see visitors separated by a window. The court agreed with the lower court's holding that the brig policy of assigning all pretrial confinees facing a possible sentence of 5 or more years to maximum (solitary) confinement was unreasonable. Appellant was given an additional 140 days credit for the period of pretrial confinement he already served. However, the court found that these conditions did not amount to cruel and unusual punishment under the Eighth Amendment. *But see United States v. James*, 28 M.J. 214 (C.M.A. 1989) (finding no Article 13 violation for accused who was confined with sentenced prisoners, wore an orange jumpsuit instead of uniform and rank, enjoyed limited recreational facilities, and had visitation privileges narrower than those required by AR 190-47).
  
3. *United States v. Gilchrist*, ARMY20020342 (ACCA 2005). Gilchrist was placed in pretrial confinement (PTC) prior to his plea of guilty for various offenses. The government transported Gilchrist from Fort Knox where he was in PTC to his Article 32 at Fort Bliss. The detention cell was full at Fort Bliss so the command shackled him to a cot in "The Ice House" overnight to prevent him from fleeing. Article 13 credit was denied at trial for the cot incident. ACCA determined the shackling of Gilchrist was not per se unduly harsh. However, they awarded Article 13 credit because other methods could have been used to insure Gilchrist's presence at trial.

*United States v. Yunk*, 53 M.J. 145 (2000). Reviewing the same unreasonable brig policy in *Avila*, the court commented that the appropriate time to raise matters of illegal pretrial confinement is with the magistrate considering the imposition of pretrial confinement. However, the court refused to find waiver of the issue when it is raised for the first time on appeal. Citing *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994).

*United States v. King*, 61 M.J. 225 (2005). King was placed in pretrial confinement and classified as a “maximum security” prisoner. He was placed in a double occupancy cell with another pretrial confinee. The following conditions governed King’s pretrial confinement: remain in the cell with the exception of appointments or emergencies; eat all meals in the cell (meals were delivered to the cell); no library or gym privileges (books & gym equipment were delivered to the cell); no sleeping during duty hours; must wear a yellow jumpsuit and shackles when released for appointments; must have two escorts, one of whom was armed, when King was moved to appointments; and may only watch a TV placed outside the cell. King’s cellmate was subsequently convicted at a court-martial and for some time, the two continued to reside in the same cell. For administration purposes (overcrowding and prohibition on mixing pre- and post-trial confinees), King spent fifteen days by himself in a windowless segregation cell. At trial, the military judge denied Article 13 relief, finding that “[t]he conditions were based on legitimate non-punitive reasons. The conditions of [King’s] confinement were not more rigorous than necessary.” The CAAF awarded Article 13 credit for his time spent in the segregated cell. However, no credit was given for the conditions of his pretrial confinement prior to being segregated. The CAAF stated it was “reluctant to second-guess the security determinations of confinement officials.”

*United States v. Adcock*, 65 M.J. 18 (2007). 1LT Adcock received credit under R.C.M. 305(k) for “abuse of discretion” when she was housed in a civilian confinement facility that did not conform to USAF Regulations (AFI 31-205 forbid pretrial detainees from being commingled with post-trial inmates and mandated that detainees would retain rank insignia conditions violated by the Solano County, CA jail.)

*U.S. v. Gomez*, 66 M.J. 663 (C.G. Ct. Crim. App. 2008). The CG court declined to give relief to an accused who wasn’t visited regularly by his chain of command, despite Coast Guard regulation requiring regular visits.

4. Pretrial punishment.

- a. Does NOT depend upon the soldier being in pretrial confinement. *United States v. Combs*, 47 M.J. 330 (1997). Air Force E-6, whose conviction for homicide is overturned on appeal, was required to serve 20 months on active duty as an E-1. CAAF holds that reduction is a punishment and rejects the Government argument that Article 13 only applies in pretrial confinement situations.
- b. *United States v. Smith*, 53 M.J. 168 (2000) (citing Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* sect. 4-900.00 at 136-37 (2d ed. 1999)). Reviewing previous cases dealing with pretrial punishment, the court identified the following factors to assist in determining whether pretrial restraint amounts to pretrial punishment:
- (1) Similarities between sentenced persons and those awaiting disciplinary disposition in daily routine, work assignments, clothing attire, and other restraints and control conditions;
  - (2) relevance of those similarities to customary and traditional military command and control measures;
  - (3) the relation of requirements and procedures to command and control needs, and;
  - (4) if there was an intent to punish or stigmatize the person pending disciplinary action.
- c. *United States v. Mosby*, 56 M.J. 309 (2002). Appellant was convicted of involuntary manslaughter of his five-week old son and sentenced to reduction to E-1, nine years confinement and a BCD. Prior to trial, the appellant was placed in solitary confinement at the Marine Corps Base Brig at Camp Lejeune, North Carolina. At trial, the Military Judge denied a Defense Article 13 motion for additional sentence credit based on illegal pretrial punishment finding that: there was no intent to punish appellant by placing him in solitary confinement; the conditions were not “unduly rigorous” or “so excessive as

to constitute punishment”; and the conditions were “reasonably related to legitimate governmental objectives.”

Held – The military judge’s findings of no intent to punish were not clearly erroneous; appellant was NOT entitled to additional sentence credit. See also *United States v. Fulton*, 55 M.J. 88 (2001) and *United States v. Coreteguera, Jr.*, 56 M.J. 330 (2002).

- d. *United States v. Fischer*, 61 M.J. 415 (2005). Fischer was placed in pretrial confinement on 4 May 2001. On 29 June 2001 his pay and benefits were terminated based on him reaching his end of obligated service (ETS or EAS). The defense counsel tried unsuccessfully to have his pay continued past his ETS date. This attempt was unsuccessful. On appeal, Fischer argued that the government violated Article 13, UCMJ, when it refused to pay him past his ETS. The CAAF disagreed. In refusing to award Article 13 credit, the CAAF stated there was a neutral non-punitive policy that allowed for refusing to pay a pretrial confine that has reached his ETS and is not performing duties.

4. Public humiliation or degradation.

- a. *United States v. Starr*, 53 M.J. 380 (2000). While under investigation, appellant, a member of the Security Forces (SF) Squadron, was ordered by his First Sergeant to surrender his SF beret. The First Sergeant also assigned appellant to “X Flight,” a group of other SF personnel who, for a variety of reasons, were not authorized to bear arms or to perform other normal SF duties. Members of X Flight could not wear berets but those members assigned there for medical reasons could wear their berets to other squadron functions. According to the First Sergeant, custom in the SF career field prohibits one unable to perform SF work from wearing the beret. For 275 days the appellant wore no beret and remained in X Flight. The court found no intent to punish or stigmatize him while disciplinary action was pending and that the limitations were imposed for legitimate, operational and military purposes.

- b. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Cruz and about 40 other soldiers suspected of drug offenses were called out of a mass formation, escorted before the DIVARTY commander who did not return their salute, called “criminals” by the commander, searched and handcuffed, billeted separately pending trial, and assembled into what become known as the “Peyote Platoon.” Held: the “public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[d] unlawful pretrial punishment prohibited by Article 13.”
- c. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Company commander’s disparaging remarks to accused such as “don’t go out stealing car stereos this weekend” and “getting any five-finger discounts lately, Stamper?” constituted pretrial punishment.

5. Other examples.

- a. "Incorrecive" training.

*United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987), *petition denied*, 25 M.J. 437 (C.M.A. 1987). After damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours. Held: Art 13 violation; “corrective or extra training” must be “directly related to the deficiency” and “oriented to improve . . . performance in the problem area.” *See also United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991). Court set aside BCD as a consequence of “pup tent” pretrial punishment.

- b. Violating the Order of the Military Judge.

*United States v. Tilghman*, 44 M.J. 493 (1996). Accused convicted at end of day; government desires to put him in confinement until sentencing hearing next day. MJ determines insufficient basis for confinement. Commander nevertheless orders accused into pretrial confinement. MJ

orders additional 10 day credit for each day of illegal pretrial confinement. At post-trial 39a session Chief Judge awards additional 18 months credit.

6. Waiver

- a. In *United States v. Inong*, 58 M.J. 460 (2003), CAAF held that an accused must raise illegal pretrial punishment at trial, or the issue will be waived for appellate purposes, absent plain error. In doing so it specifically overruled *United States v. Huffman*, 40 M.J. 11 (C.M.A. 1994, as well as the “tantamount to affirmative waiver” rule established by *United States v. Tanksley*, 54 M.J. 169 (2000) and *United States v. Southwick*, 53 M.J. 412 (2000).

E. Applying credits.

1. Adjudged v. Approved sentence. Pretrial confinement credit applies to the approved sentence.

- a. *United States v. Rock*, 52 M.J. 154 (1999). CAAF holds that pretrial confinement credit applies to adjudged sentence, unless there is a PTA that provides for lesser sentence, in which case it applies to lesser sentence. In *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002), the court confirmed its ruling in *Rock* and clarified it by stating: “this court will require the convening authority to direct application of all confinement credits for violation of Article 13 or RCM 305 and all Allen credit against the approved sentence; i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement.” See also *U.S. v. King*, 58 M.J. 110 (C.A.A.F. 2003), Judge Baker’s concurrence, for a succinct discussion of the state of this issue.

F. Litigating Issues Related to Pretrial Restraint.

1. Pretrial.

- a. Violation of Article 13:

*United States v. McFayden*, 51 M.J. 289 (1999). Court of Appeals for the Armed Forces specified the issue of whether a pretrial agreement requiring the accused to waive his right to challenge a violation of Article 13 violates public policy. The court held that R.C.M. 705(c)(1)(B) does not specifically prohibit an accused from waiving his right to make such a deal. However, as this can be done only with the accused's full knowledge of the implications of the waiver, the military judge should inquire into the facts and circumstances of the pretrial confinement as well as the voluntariness and understanding of the accused of the waiver before accepting the plea.

b. Judicial Review:

Whenever reviewing the legality of confinement *already served*, the military judge should apply an abuse of discretion standard & limit the examination to the evidence previously considered by the magistrate at the R.C.M. 305(i) hearing. R.C.M. 305(j)(1)(A). When determining whether to release the prisoner, the military judge should hold a *de novo* hearing. R.C.M. 305(j)(1)(B). *See United States v. Gaither*, 45 M.J. 349 (1996).

c. Other Violations:

Article 12 (which forbids American soldiers from being confined in "immediate association" with Enemy prisoners) should be interpreted to forbid placement of EPW's and Americans in the same cell. *United States v. Wise*, 64 M.J. 468 (2007)

2. At Trial.

"Trial counsel shall inform the court-martial of the data on the charge sheet relating to . . . the duration and nature of any pretrial restraint. . . . If the defense objects to the data as being materially inaccurate or incomplete . . . the military judge shall determine the issue. Objections not asserted are **waived**." R.C.M. 1001(b)(1).

a. *Mason* credit:

*United States v. Ecoffey*, 23 M.J. 629 (A.C.M.R. 1986). Failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial concerning the nature of such restraint will waive consideration of the issue on appeal. *But see United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989). Court considered request for *Mason* credit made for first time on appeal, but rejected claim.

b. R.C.M. 305(k)/*Rexroat* credit.

*United States v. Rollins*, 36 M.J. 795 (A.C.M.R. 1993). Failure to raise *Rexroat*/48 hour review issue at trial constitutes waiver. *Accord, United States v. Sanders*, 36 M.J. 1013 (A.C.M.R. 1993).

## SPEEDY TRIAL

### IV. INTRODUCTION. SOURCES OF THE RIGHT TO A SPEEDY TRIAL IN THE MILITARY INCLUDE:

- A. R.C.M. 707: **120 day** rule.
- B. UCMJ articles 10 & 33.
- C. Sixth Amendment.
- D. Fifth Amendment / Statute of Limitations.

### V. R.C.M. 707: THE 120 DAY RULE.

A. The Rule. “The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges under R.C.M. 307/ 308; or (2) The imposition of restraint under R.C.M. 304(a) (2)-(4) [**restriction, arrest, confinement**]; or (3) Entry on active duty under R.C.M. 204.” R.C.M. 707(a).

- 1. “Conditions on liberty” (a “moral” restraint) is **not** a type of restraint which triggers R.C.M. 707.
- 2. “Specified Limits” - An individual must be required to remain within specified limits to constitute pretrial **restriction**. R.C.M. 304.

*United States v. Wilkinson*, 27 M.J. 645 (A.C.M.R. 1988), *petition denied*, 28 M.J. 230 (C.M.A. 1989). Denial of off-post pass that left the accused free access to the entire installation with all its support and recreational facilities was at most a condition on liberty that did not affect speedy trial clock. “[The lack of pass privileges] will, in the usual case, have no impact on rules relating to speedy trial.”

*But see United States v. Wagner*, 39 M.J. 832 (A.C.M.R. 1994). In dicta, court seriously questioned *Wilkinson's* application to married soldier living off post, especially in foreign country. Court should consider extent and duration of disruption of spousal and parental responsibilities.

3. Administrative restraint imposed under R.C.M. 304(h) “for operational or other military purposes independent of military justice, including administrative hold or medical reasons” does not start the speedy trial clock.

“Primary Purpose” Test - If the primary purpose of restraint is administrative and not for military justice, the speedy trial clock is not triggered.

*United States v. Bradford*, 25 M.J. 181 (C.M.A. 1987). Denial of sailor’s port liberty while sailor was a suspect of offense found to be “administrative restraint” under R.C.M. 304(h). “[We] believe the test is . . . the primary purpose. . . .” “Where the evidence supports a conclusion that the primary purpose of the command . . . is related to an upcoming court-martial, R.C.M. 707 applies.”

4. Starting the count: Include the day of arraignment; do not include the day of preferral or imposition of restraint or entry on active duty. R.C.M. 707(b)(1).
5. Termination: At arraignment under R.C.M. 904. *See United States v. Doty*, 51 M.J. 464, wherein the CAAF holds that arraignment at day 119 was not a “sham” to toll the speedy trial clock. For sentence rehearings, the clock stops when the accused is first brought to the “bar” for resentencing, typically at the initial UCMJ art. 39(a) session. R.C.M. 707(a) and (b)(1). *United States v. Becker*, 53 M.J. 229, 232 (A.F. Ct. Crim. App. 2000).

- B. Restarting the clock at zero. R.C.M. 707(b)(3).

1. First restart. If charges are dismissed or a mistrial is granted, speedy trial clock is reset to begin on; date of dismissal in cases where the accused remains in pretrial restraint; date of mistrial, or; earlier of re-preferred or imposition of restraint for all other cases. R.C.M. 707(b)(3)(A).

Dismissal (R.C.M. 401) or withdrawal (R.C.M. 604)? General Rule: Withdrawal does not toll running of speedy trial clock. *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994). Dismissal of charges does. *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991); *aff'd*, 36 M.J. 2 (C.M.A. 1992). A commander can dismiss charges even if there is an intent to re-institute charges at a later date. Convening authority ordered charges dismissed since two NIS witnesses were deployed on Operation Desert Shield/Storm for an uncertain time period. Charges lined through, dismissal document executed, accused informed and allowed to go on leave, although not allowed to work in MOS. Charges were re-preferred 9 months later following return of the witnesses. See also *United States v. Tippit*, 65 M.J. 69, Upon the SJA's advice the Special Court-Martial Convening Authority signed a withdrawal of charges (which were not referred). The Court honored the SPCMCA intent to dismiss the charges despite the misnomer and found no violation of R.C.M. 707.

*United States v. Young*, ARMY 20000358 (ACCA 2005). Young deserted his unit after he was found guilty of various offenses but prior to sentencing. The court sentenced him, *in absentia*, to confinement for life. After his initial trial, his command preferred a new charge for desertion in 1995. Young was apprehended six months later and began serving his life sentence. The desertion charge was not acted upon until the Chief of Staff at the USBD signed a DA form 4833 stating, "the [prior] command and the USBD have declined prosecution of the desertion offense." The command decided to go forward on the desertion charge when the sentence from Young's initial trial was set aside on appeal. Believing the initial desertion charge had been dismissed, the command preferred the desertion charge anew in 1999. Young moved the trial court to dismiss the desertion charge because there had been no dismissal of the original desertion charge and therefore the speedy trial clock had run continuously since 1995. The trial court disagreed and found the DA form 4833 equaled a dismissal. ACCA reversed the case finding that the government

had violated Young's right to a speedy trial. The court noted that the DA form 4833 was NOT a dismissal but rather a decision to take "no action".

*United States v. Robinson*, 47 MJ 506 (NMCCA 1997). Dismissal of charges on day 115 and repreferment of substantially identical charges one week later, without any significant change in A's status held to be a **subterfuge** to avoid the 120 day speedy trial clock. Distinguishes *Bolado*, which held convening authority need not explain reasons for dismissal. Any other solution would allow CA to routinely violate spirit of RCM 707.

Factors courts will consider to decide if subterfuge: Convening Authority intent, notice and documentation of action, restoration of rights and privileges of accused, prejudice to accused, amended or additional charges. *See also United States v. Anderson*, 50 M.J. 447 (1999), wherein CAAF finds no subterfuge under the facts of the case and declares, contrary to the Government's concession, that the restart occurred on the date of dismissal.

2. Second restart provision. If the accused is released from pretrial restraint for a significant period, the time under this rule shall run from the earliest date on which charges are preferred, or restraint is re-instituted, or entry on active duty. R.C.M. 707(b)(3)(B).

What is a significant period?

*United States v. Hulsey*, 21 M.J. 717 (A.F.C.M.R. 1985), *petition denied*, 22 M.J. 353 (C.M.A. 1986). 5 day release from pretrial restraint held a "significant period" and not a "subterfuge designed to circumvent R.C.M. 707," clock restarted with reinstatement of restraint.

*United States v. Miller*, 26 M.J. 959 (A.C.M.R. 1988), *petition denied*, 28 M.J. 164 (C.M.A. 1989). 5 day release from pretrial restriction tantamount to confinement held to be a "significant period" even though accused was held in administrative restraint in the hospital for the 5 days. Factors: (1) hospitalization for suicide attempt, (2) hospital, not command, imposed restraint, and (3) no showing of improper gamesmanship.

*United States v. Campbell*, 32 M.J. 564 (A.C.M.R. 1991). Thirteen day period of restriction imposed as punishment under Article 15 was a “significant period” of “release” from ongoing restriction that restarted the speedy trial clock. Article 15 was for offenses that were unrelated to the court-martial charges and was not a subterfuge to avoid speedy trial issues.

*United States v. Reynolds*, 36 M.J. 1128 (A.C.M.R. 1993). 19 day period of conditions on liberty between release from 5 weeks of restriction and preferral of charges was a significant period. Speedy trial clock commenced running upon preferral.

**Note:** Time between release from pretrial restraint and preferral of charges need not be a “significant period” to stop the speedy trial clock. *United States v. Ruffin*, 48 M.J. 211 (1998). Charges preferred one day after two month restriction was lifted. Restriction never reimposed. The requirement to wait a “significant period” of time only applies to cases involving re-imposition of restraint; it does not require the government to wait a “significant period” before preferring charges once released from confinement. Purpose of rule is to avoid sham releases to stop and start the speedy trial clock. Here, because restriction was never reimposed, release was for a “significant period” which restarted the speedy trial clock at preferral.

3. Third restart provision. Government appeal under R.C.M. 908 - begin on date of notice to the parties of final action on the appeal. R.C.M. 707(b)(3)(C).
4. Fourth restart provision. Rehearings--begin on date “responsible convening authority receives record of trial and opinion authorizing or directing a rehearing.” R.C.M. 707(b)(3)(D). *See United States v. Becker*, 53 M.J. 229 (2000) (applying R.C.M. 707 timing requirements to a *sentence* rehearing but finding that remedy of dismissal of charges too severe).
5. Fifth restart provision. Return of accused from the custody of the Attorney General. R.C.M. 707 (b)(3)(E).

6. Multiple charges: When charges are preferred at different times each charge may have a separate starting date based on date of preferral, restraint, or entry on active duty related to particular charge. R.C.M. 707(b)(2). *United State v. Bray*, 52 M.J. 659 (A.F. Ct. Crim. App. 2000). Speedy trial clock begins to run when accused is placed into pretrial confinement for all offenses the government knows (or reasonably should know) are part of the misconduct (rape charge was dismissed with prejudice).

*See United States v. Robinson*, 26 M.J. 954 (A.C.M.R. 1988) *aff'd*, 28 M.J. 481 (C.M.A. 1989). “We hold that, in order to commence the speedy trial clock, the imposition of restraint . . . must be ‘in connection with’ the specification being challenged.”

7. Post-trial Speedy Trial Clock: *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). “Every soldier deserves a fair, impartial, and timely trial, *to include the post-trial processing of his case.*” The court reduced appellant’s sentence to confinement by four months after finding ten month delay in processing too long for 519-page record of trial. *See also United States v. Griffith*, 2000 CCA LEXIS 253, No. 99-01705 (N.M. Ct. Crim. App. Nov. 17, 2000) (unpub. op.) (approving only a bad conduct discharge instead of dishonorable discharge adjudged because of significant post-trial delay constituting a *de facto* denial of clemency).

C. Excludable Delays. R.C.M. 707(c). “All periods of time during which 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 General, 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.”

1. Independent determination as to whether there is in fact good cause for a delay, and for only so long as is necessary.
2. Approval Authority: Convening Authority and the Military Judge (after referral). Discussion following R.C.M. 707(c)(1) indicates the CA’s authority can be delegated to the 32b Investigating Officer (IO).

*United States v. Lazauskas*, 62 M.J. 39 (2005). Lazauskas made a motion to dismiss the charges at his arraignment on the basis that the government had not brought him to trial within 120 days IAW RCM 707. The military judge denied the motion at trial. The AFCCA affirmed. CAAF affirmed as well. At issue were two delays in the proceedings totaling 11 days. The first delay was six days in order to secure witnesses for the Article 32. The CAAF held this time was excludable because the IO may grant reasonable delay requests (excludable IAW RCM 707(c)) if the convening authority had properly delegated delay authority. Furthermore, the delays are excludable unless there was an abuse of discretion by the person who granted the delay. The second delay was the five day statutory waiting period IAW Article 35, UCMJ. The CAAF held that Article 35 provides a shield so that the accused is not brought to trial too quickly. Therefore, Article 35 may not be used as a sword for the accused to attack the government for not bringing him to trial sooner.

3. Pretrial delays should not be granted *ex parte*. Discussion to R.C.M. 707(c)(1).
4. Approved delays subject to review on 2 grounds:
  - a. Abuse of discretion. “Granting a continuance is within the sound discretion of the military judge, and a denial will be reversed only for an abuse of discretion.” *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993).

- b. Reasonableness of the period of delay: “Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.” R.C.M. 707 discussion.
5. Attribution of delay period.
- a. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990). Defense is not entitled to request a delay until a day certain and then insist the government proceed on that very day. Defense must accommodate government’s scheduling needs and remains accountable for reasonable delays occasioned by initial request.
6. Exceptions to the Rule requiring pre-approved delay:
- a. *United States v. Dies*, 45 M.J. 376 (1996). Accused’s unauthorized absence is automatically excluded from government accountability even though government never secured a delay from competent authority to cover time. By his voluntary absence, an accused “waives” his speedy trial right as to that interim period. Further, R.C.M. 707 does not require that the government be held accountable for all periods of time not covered by stays or delays.

- b. *United States v. Thompson*, 46 M.J. 472 (1997). After the fact approval of defense requested delay by the SPCMCA held excludable delay. Although purpose of revised rule was to obtain delays as you go, CAAF focused on fact the specific text of RCM 707(c) “does not require specifically that the delay be approved in advance for it to be excluded.” But government runs risk that such post hoc determinations will be viewed with skepticism. CAAF avoided certified issue of whether quasi-judicial 32b IO has power to exclude delays.
  - c. Request for delay need not originate from either party; convening authority may initiate *sua sponte*. *United States v. Anderson*, 46 M.J. 540 (N.M.C.C.A. 1997).
- D. Remedy for violation is dismissal of charges upon timely motion. R.C.M. 707(d).
- 1. In dismissing with or without prejudice, the military judge considers these factors: “[s]eriousness of the offense . . . facts and circumstances that lead to dismissal . . . impact of re-prosecution . . . and any prejudice to the accused . . .” R.C.M. 707(d). *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000).
    - a. *United States v. Edmond*, 41 M.J. 419 (1995). Dismissal without prejudice appropriate for 41 day violation of R.C.M. 707. Sex crimes against inebriated victim were serious offenses; no government bad faith involved; dismissal with prejudice would not lead to better administration of justice; no indication accused suffered prejudice.
    - b. *United States v. Bolado*, 34 M.J. 732, 739 n.6 (N.M.C.M.R. 1991); *aff’d*, 36 M.J. 2 (C.M.A. 1992). “A commander’s decision to reassign an accused to another duty assignment is not the kind of prejudice envisioned in R.C.M. 707(d).” Court also states “backwater of suspicion” following dismissal is no different than that existing pre-preferral and constitutes minimal prejudice.

- c. *United States v. Dooley*, 61 M.J. 258 (2005). In 1998, Dooley was convicted of various child pornography related offenses. In 2004, his conviction was set aside. The convening authority decided to retry Dooley on the charges but did not bring him off appellate leave and onto active duty and arraign him until 125 days after the convening authority received the record of trial. The military judge dismissed the case with prejudice. The N-MCCA reversed the judge based on the fact the he had abused his discretion when ordering dismissal with prejudice. CAAF reversed the N-MCCA and reinstated the trial court’s dismissal with prejudice. Under the abuse of discretion standard, mere disagreement with the conclusion of the trial judge is not enough to warrant reversal. Here the N-MCCA did not find that the trial judge’s decisions were “clearly erroneous” but rather that it “did not concur” with the trial judge.
  
- d. *U.S. v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008). Mistrial is not an appropriate remedy for a violation of R.C.M. 707.

## **VI. UCMJ ART. 10: PRETRIAL CONFINEMENT AND ARREST**

### **A. UCMJ Art. 10:**

“When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.”

### **B. Historical Development.**

- 1. The rule of *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971):

Pretrial confinement over 90 days created a presumptive speedy trial violation under UCMJ, art. 10. The government could overcome the presumption by demonstrating due diligence.

2. R.C.M. 707(d) - contained 90 day rule for accused in pretrial confinement.
3. *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). The death of *Burton*. THERE IS NO LONGER A 90 DAY RULE!
  - a. “Reasonable diligence” is the standard for measuring compliance with UCMJ, art. 10.
  - b. Article 10 may be violated where accused is tried in less than 120 days, or even in less than 90 days. Many circumstances, however, may justify delays beyond these traditional periods. “The touch stone . . . is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.” *Kossman*, at 262 (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).
  - c. Article 10 motion will lie when government “could readily have gone to trial . . . but negligently or spitefully chose not to.” *Kossman*, at 261.

C. Analysis for application of Article 10

1. Compliance with R.C.M. 707 does NOT equal compliance with Article 10.
  - a. *United States v. Hatfield*, 44 M.J. 22 (1996). Overall lack of forward motion toward resolving relatively simple case. CAAF particularly concerned with 2-month delay in appointing defense counsel due to incomplete paperwork

- b. *United States v. Collins*, 39 M.J. 739 (N.M.C.M.R. 1994). 6 to 8 phone calls by non-JAG attempting to obtain evidence of forged checks from an exchange on another installation is not proceeding with due diligence. Delays in requesting copy of service record and requesting legal services do not reflect due diligence.
  
- c. *United States v. Laminman*, 41 M.J. 518 (C.G.Ct. Crim. App. 1994). Government failed to proceed with reasonable diligence when it brought the accused to trial 134 days after initial restraint. (21 days attributed to defense delay.) Case provides detailed analysis of Article 10 and the government's burden of proof when confronted with motion to dismiss based on Article 10. Court found government's failure to provide evidence explaining several delays supported military judge's finding of lack of diligence. (In footnote, court suggested that the best way for the military judge to proceed would be to have parties enter a stipulation of fact as to the undisputed portions of chronology and then to present evidence on those relevant matters upon which there is disagreement.)
  
- d. *United States v. Calloway*, 47 M.J. 782 (N.M.Ct.Crim.App. 1998). Accused placed in pretrial confinement for 20 days before government took any action on his case. Another 7 days passed before magistrate review. The government took another 34 days to prefer charges, another 22 days to serve charges on the accused after referral, and another 18 days to arraign the accused. TDS counsel was not provided until 66 days of pretrial confinement. Several other cases without pretrial confinement were tried before the accused. Military judge failed to make specific findings of fact and explanation for the delays, especially regarding (1) overall lack of forward motion, (2) delay in appointing DC. Judge also criticized for relying too much on RCM 707 type analysis.

e. *United States v. Mizgala*, 61 M.J. 217 (2005). Mizgala was placed in pretrial confinement (PTC) for 117 days. His initial PTC began on 28 February. Based on various factors (i.e., waiting on a police report, moving the SJA office because of a fire) the government did not prefer charges until 14 May. On 16 April, Mizgala made a demand for a speedy trial. After the Article 32 on 22 May, the charges were referred on 20 June. At the arraignment, the military judge denied Mizgala's motion to dismiss for violating Article 10, UCMJ. The military judge used a "gross negligence" standard when deciding that the government had not violated Article 10, UCMJ. The CAAF affirmed the trial court decision that the government did not violate Mizgala's speedy trial rights but pointed out several errors that the military judge made when deciding the motion. First, the RCM 707 120 day requirement is irrelevant when determining whether there was an Article 10 violation. Second, reasonable diligence, not gross negligence, is the proper standard when analyzing Article 10 claims. Finally, Article 10 is more exacting than the Sixth Amendment so the military judge should not have limited his consideration to the *Barko v. Wingo* factors (see *infra*). The CAAF also held that an unconditional guilty plea does NOT waive consideration of an Article 10 claim on appeal.

2. Factors from *Barker v. Wingo*, 407 U.S. 514 (1972). An appropriate analysis of Article 10 includes consideration of these factors. See *U.S. v. Birge*, 52 M.J. 209 (C.A.A.F. 1999), *U.S. v. Cooper*, 58 MJ 54 (C.A.A.F. 2003).
3. Arraignment does not necessarily terminate government's Article 10 speedy trial obligations. *U.S. v. Cooper*, 58 MJ 54 (C.A.A.F. 2003): "We therefore hold that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned." The court goes on to say that post arraignment, the MJ has much more control of the course of the trial, but the "affirmative obligation of reasonable diligence upon the government does not change."

D. Remedy for an Article 10 violation remains dismissal **with prejudice**.

**VII. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL.  
*BARKER V. WINGO*, 407 U.S. 514 (1972).**

- A. The Trigger: Preferral of charges. *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985).
  
- B. A Balancing Test: The *Barker* Factors.
  - 1. Length of delay.
  - 2. Reason for delay.
  - 3. Assertion of the right.
  - 4. Prejudice to accused.
  
- C. Applying *Barker v. Wingo*.
  - 1. *United States v. Edmond*, 41 M.J. 419 (1995). No Sixth Amendment violation under *Barker* test. Length of delay: 176 days from preferral to trial. Reason for delay: witnesses unavailable due to homeport change and necessity of trying co-accused shipmates before granting immunity. Assertion of right: Accused did demand speedy trial. Prejudice: only slight prejudice; accused's defense was not impaired; he was not restrained; he had not suffered abnormal anxiety because of charges. Accused had been paid and had been allowed to work in his rating, albeit only duties not requiring a security clearance. Held: balance weighed in favor of government.
  
- D. Constitutional right to a speedy trial does not arise until after an indictment is filed or charges are preferred. *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982).
  - 1. *United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992). Accused committed mail fraud while serving a prior court-martial sentence. He was placed in administrative segregation pending year-long

investigation. Held: Sixth Amendment right to a speedy trial did not apply because of accused's post-trial restraint.

## **VIII. FIFTH AMENDMENT RIGHT TO DUE PROCESS.**

- A. Applies during investigatory stage, prior to preferral.
- B. Requires a showing of:
  - 1. Egregious or intentional tactical delay by the Government and
  - 2. Actual prejudice to the accused or his case.
- C. *United States v. Reed*, 41 M.J. 449 (1995). Seventeen month delay between identification of accused as a suspect and preferral of charges did not violate due process. Appellant failed to meet his burden of proof to show an egregious or intentional tactical delay *and* actual prejudice. (The Court also noted that when the accused is not confined, the statute of limitations is the "primary protection" against pre-accusation delay.)

## **IX. LITIGATING SPEEDY TRIAL ISSUES.**

- A. Accused raises issue at trial by a motion to dismiss. R.C.M. 907.
- B. Speedy trial issue is waived if not raised before final adjournment. R.C.M. 907(b)(2). *But see United States v. Britton*, 26 M.J. 24 (C.M.A. 1988). "While it is the general rule that failure to make a timely motion at trial may estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief."
- C. Waiver by guilty plea. "Except as provided in (conditional pleas), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." R.C.M. 707(e).

- D. Once defense raises issue, government has burden of persuasion to show no denial of speedy trial. R.C.M. 905(c)(2)(B).
  
- E. The government's burden of proof on any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1). *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).
  
- F. Parties must put on evidence or agree to stipulation of fact. *See United States v. Cummings, supra; United States v. Thompson*, 29 C.M.R. 68 (C.M.A. 1960). The court is not permitted to consider matters in an offer of proof. A proffer is not evidence.
  
- G. Pretrial agreement provisions. *See United States v. McLaughlin*, 50 M.J. 217 (1999). Arising in the context of a pretrial agreement provision, the accused challenged a provision in the PTA that **required** a waiver of a speedy trial motion. Finding that such a provision is impermissible, the CAAF said the Military Judge should have set aside that provision and held the Government to the balance of the PTA, giving the defense the chance to raise or waive the motion at trial. Absent this "cleaner" waiver process, the CAAF says that the accused must make a colorable or *prima facie* claim that he would have been entitled to relief on his speedy trial motion. The CAAF said the defense failed in this case, when the accused had been in PTC for 95 days, no prejudice was claimed by the defense and no demand for immediate trial was made.