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EDITOR'S NOTE

The members of the Editorial Board would like to extend their special thanks to Captain Anthony J. Siano, former Articles Editor, who recently assumed a judicial clerkship in the Southern District of New York. Tasked with the overall responsibility for each published article, Tony was largely responsible for each bi-monthly issue. The Editorial Board extends its best wishes to Captain Siano in his new position.

UPDATE - EXTRAORDINARY RELIEF

The January-February 1976 issue of The Advocate contained a brief overview of extraordinary relief and the implementation of extraordinary writs by trial practitioners. During the course of the article, the scope of the military appellate courts' power to issue extraordinary writs was examined. The pertinent case law was considered and the author concluded:

Thus, CMA's power to entertain petitions for extraordinary relief is limited to those cases which it would ultimately have the power to review, pursuant to Article 67 of the Code. The Courts of Review are bound by the limitations imposed by Articles 66 and 69, but trial defense counsel should remember that, as a result of Article 69, the Courts of Review have the potential power to review any case tried by general court-martial. 1/

The Advocate, Vol. 8 No. 1, at 19-20.

A recent decision emanating from the United States Court of Military Appeals has made it clear that the jurisdiction of that Court encompasses much more than the appellate jurisdiction provided for in Article 67 of the Code. In McPhail v. United States, 24USCMA 304, 52 CMR 15 (1976), the accused was tried by a special court-martial empowered to adjudge a punitive discharge. At an Article 39(a) session, the military judge granted the defense motion to dismiss for lack of jurisdiction. The trial counsel petitioned the convening authority to review the judge's ruling (See Article 62(a), UCMJ). The convening authority returned the record to the judge, noted his disagreement with the judge's ruling and directed reconsideration. The judge thought obliged to accede to the convening authority's decision and, hence, trial proceeded. 2/ The accused was found guilty and sentenced to

1/ See United States v. Snyder, 18 USCMA 480, 40 CMR 192 (1969); United States v. Thomas, 19 USCMA 639 (1969).

2/ It should be noted that the trial in McPhail predated the Court's decision in United States v. Ware, 24 USCMA 102, 51 CMR 275 (1976). In Ware, the Court held that Article 62(a) of the Code authorizes the convening authority to return the record of trial to the military judge for reconsideration of a legal ruling, but does not authorize him to reverse the military judge's ruling. The military judge is required only to reexamine his prior ruling. He is not required to accede to the convening authority's judgment.

restriction for one month and hard labor without confinement for three months. The sentence was approved and ordered executed. After filing an unsuccessful petition for relief under Article 69, UCMJ, McPhail petitioned the Court of Military Appeals for relief.

The government, *inter alia*, argued that the Court's authority was limited to those cases which could potentially reach the Court by way of appeal, pursuant to Article 67. Hence the government argued that, since McPhail was not sentenced severely enough to invoke Article 67 jurisdiction, the Court had no power to grant extraordinary relief.

The Court of Military Appeals disagreed with the government argument. The Court traced both the supervisory power of the United States Supreme Court over the federal system and the intent of both Congress and the United States Supreme Court that the Court of Military Appeals exercise such supervisory authority over the military criminal system. The Court concluded that its previous opinion in United States v. Snyder, 18 USCMA 480, 40 CMR 192 (1969) was "too narrowly focused." 52 CMR 21 and held that it did have power to issue relief. The Court ordered The Judge Advocate General of the Air Force to vacate the conviction for lack of jurisdiction.

McPhail makes it clear that the Court of Military Appeals' power to issue extraordinary relief is not limited to the jurisdiction defined in Article 67 of the Code and that it will exercise its supervisory power over the military justice system in necessary situations. Counsel should be aware of the extraordinary relief power of the Court of Military Appeals and its expanding utility in the representation of their clients.

* * *

JURISDICTION-SERVICE CONNECTION

In O'Callahan v. Parker, 395 U.S. 258 (1969), the United States Supreme Court decided that in order for the military to exert jurisdiction over a service member who committed an offense

off-post, the offense must be "service connected". In so saying, the Court directed that the issue of service connection be approached on an ad hoc basis, but did not delineate any of the specific criteria to be used for determining whether or not service connection is present in a particular case.

This void was filled by Relford v. Commandant, 401 U.S. 355 (1971), in which the Supreme Court, in applying the O'Callahan standard of service connection to the facts of that case, enumerated the following twelve criteria by which that standard was to be measured:

1. The serviceman's proper absence from the base.
 2. The crime's commission away from the base.
 3. Its commission at a place not under military control.
 4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
 5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
 6. The absence of any connection between the defendant's military duties and the crime.
 7. The victim's not being engaged in the performance of any duty relating to the military.
 8. The presence and availability of a civilian court in which the case can be prosecuted.
 9. The absence of any flouting of military authority.
 10. The absence of any threat to a military post.
 11. The absence of any violation of military property.
- One might add still another factor implicit in the others.
12. The offense's being among those traditionally prosecuted in civilian courts.

A detailed, thorough analysis of the criteria was to be made and applied to the facts of each case tried by court-martial. However, after an initial flurry of activity in the Court of Military Appeals [COMA] following O'Callahan (see generally, 40 and 41 CMR), the Court's analysis became somewhat doctrinaire

and inflexible. Soon, basic rules were being adopted which provided short-cuts to a finding of service connection. For example, where the victim was a service member, service connection was invariably found. Similarly, in the area of drug offenses, the dangers inherent in drug distribution and usage soon gave such offenses a special military significance leading inevitably to a finding of service connection.

Recently, COMA began to recognize its own "analytical short-comings" in this area. In a line of decisions, the Court has once again begun to perform a serious application of the 12 Relford factors on a case-by-case basis:

U.S. v. McCarthy, 25 USCMA 30, 54 CMR 30 (1976)
U.S. v. Hedlund, 25 USCMA 1, 54 CMR 1 (1976)
U.S. v. Tucker, 24 USCMA 311, 52 CMR 22 (1976)
U.S. v. Moore, 24 USCMA 293, 52 CMR 4 (1976)
U.S. v. Uhlman, 24 USCMA 256, 51 CMR 635 (1976)
U.S. v. Black, 24 USCMA 162, 51 CMR 381 (1976)

Dicta in those decisions set forth several general guidelines applicable to all service connection issues, and include factual guidelines which may prove extremely helpful to trial defense counsel in formulating an argument in a particular case. Broad generalizations culled from dicta, of course, are dangerous. However, some analysis is appropriate.

General Guidelines

COMA made it very apparent that jurisdiction is a matter to be affirmatively proven by the government, and not presumed. Of course, the appropriate forum for such proof is the trial court. McCarthy 54 CMR at 33; Tucker, 52 CMR at 23. It appears that COMA was impressing upon everyone concerned that military jurisdiction is an absolute prerequisite to trial by court-martial, and an evaluation of the presence or absence of service connection must be made in every case involving off-post offenses. It must be made on the record at every level of the appellate process. COMA recognized that the perfunctory view of service connection jurisdiction over a given offense taken by the military was fostered by the prior decision of the Court, but warned that such cursory treatment no longer would be tolerated. Defense counsel at all levels can consider this as an admonition to perform an evaluation of the facts in each case handled, and to affirmatively raise the issue of jurisdiction when appropriate. Of course, once the issue is raised, the burden of establishing jurisdiction lies with the government.

It is clear that the standards and criteria established in O'Callahan and Relford remain applicable and that a detailed ad hoc analysis of the criteria must be made. As COMA stated in Moore, 52 CMR at 6, "A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test."

Although it formulated no easy method of establishing or refuting service connection, COMA, quoting from Schlesinger v. Councilman, 420 U.S. 738, 760 (1975), did provide a general synopsis: The issue requires careful balancing of the Relford factors to determine "whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and whether the distinct military interest can be vindicated adequately in civilian courts." McCarthy, 54 CMR at 33; Moore, 52 CMR at 7. If, under the circumstances of a particular case, the military community has the overriding interest in prosecuting an offense, then jurisdiction lies in the military. If, however, the civilian community has the overriding interest, jurisdiction lies in civilian courts. However, the fact that the civilian community will not prosecute for a particular crime is of no moment. In McCarthy, 54 CMR at 35, COMA, speaking specifically of marijuana, stated that the mere fact that a given civilian community takes a "hands-off" approach to the offense is an insufficient basis upon which to predicate jurisdiction in the military. Thus, COMA appears to be stressing that jurisdiction will be determined by the overt facts of a case, not by any extraneous circumstances.

Perhaps the most significant insight which can be gleaned from the line of recent COMA decisions is that the factual situation in a particular case should be examined to determine whether or not the accused committed the offense "while blended into the general civilian populace." McCarthy, 54 CMR at 35. If so, then the offense probably does not have the requisite service connection to render it subject to military jurisdiction. That particular phrase seems to sum up the feeling which COMA conveys in the recent decisions. If the offense was committed while the accused was acting as a civilian, then the balancing of interests test falls on the side of civilian jurisdiction. Some of the recent decisions provide some factual guidelines which may aid defense counsel in insuring that the scale falls in favor of the client.

Factual Guidelines

The decisions rendered by COMA have provided a variety of factual situations. Considering the case-by-case approach which must be taken in this area, the more decisions that are rendered,

the more helpful it is for defense counsel. Present in every decision, however, are several generic facts, the examination of which may illuminate the path which can be taken to a successful jurisdictional defense. Those facts include: where the offense occurred, what offense was perpetrated, and who was involved. What is evident from a careful reading of the recent decisions is that no one of these facts is solely determinative of whether or not service connection exists. What is required is a careful analysis of the facts and a screening of the twelve Relford criteria. By examining what is no longer determinative, however, by negative inference defense counsel may learn some things which may be enlightening.

Where the offense occurred is the most logical starting point, since if the offense occurred completely on-post the task of showing an absence of service connection is practically insurmountable. If part of the offense occurred on-post and part occurred off-post, however, the task is easier. Certain of the Relford factors will weigh in favor of court-martial jurisdiction and certain against. The issue becomes whether the former, taken together, rise to the level of service connection. COMA made the above analysis in Black, the first in the recent line of decisions. Black involved an exception to O'Callahan, which holds that the constitutional restriction to the exercise of military jurisdiction does not apply where a service member commits an offense in a foreign country. The Court found that a conspiracy offense, with the agreement being reached in a foreign country, but the overt act occurring after the accused returned to the United States, did not come under the exception. Since the overt act is an essential element of the offense, no conspiracy occurred until that act. Thus, the offense occurred in the United States. Distinguishing the above-cited on-post/off-post analysis, COMA stated that in the overseas exception area there is no weighing of the Relford factors, at least not until it is determined that the exception does not apply. In Hedlund, another recent COMA decision, the Court had no trouble finding jurisdiction over a conspiracy offense where the agreement and the overt act occurred on-post. Thus, it is apparent that an on-post offense is normally service connected.

What about an offense occurring at or near the boundary of a post? Relford, 401 U.S. at 369, did hold that in certain cases, those in which "a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there," jurisdiction is always present. Of course, the other facts involved in the offense, such as who the accused and victim were, are important. But, as COMA has stated in Tucker, 52 CMR at 23, Relford "made clear that, in resolving questions of military jurisdiction, the situs of the offense is far more significant than the status of the accused or the victim."

When an offense occurs entirely off-post, the task of showing a lack of service connection is made easier still. Barring the presence of other facts which clearly relate the offense to the military, an off-post offense is the clearest indication that the accused was committing the offense while blended into the civilian community. What is clear from these decisions, at the very least, is that the location off-post at which the offense occurred will not be the sole basis for determining service connection, nor will the fact that some of the elements of the offense occurred on post.

One fact which appears to be the least significant is the nature of the offense. As is apparent from the decisions, the threshold question of service connection must be answered in every type of case: robbery, larceny, forgery, kidnapping, conspiracy, receiving stolen property, and even drug offenses. The McCarthy decision may be the most important of the recent decisions in this area, for it involved a significant departure from prior holdings on the issue of service connection in the context of drug offenses. The Court in McCarthy found service connection present, but stressed that the facts therein were materially different under Relford than those in which off-duty servicemen commit a drug offense while blended into the general civilian populace. The Court went on to overrule United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969), stating that to the extent that case suggests a different approach in resolving drug offense jurisdictional questions, it no longer should be considered a viable precedent. Thus, in one fell swoop, COMA laid to rest the notion that jurisdiction automatically existed over drug offenses, regardless of where committed by service members, because of the potential for deleterious effects on the health, morale and general well-being of the nation's fighting force. COMA appears to be saying that the type of offense will be considered with the other facts present, but the question of service connection will not be answered based only on the type of offense involved.

Finally, COMA made it eminently obvious that the status of the victim as a member of the military will not be dispositive of the service connection issue. A brief statement to that effect is found at page 6 in Moore, where COMA, citing the Relford holding that offenses committed by a service member within or at the geographical boundary of a military post and violative of the post's security were always service connected, noted that the language in Relford "by omission suggests that there may be instances in which a crime committed off-post against a fellow service member or the service itself is not triable by court-martial applying the more detailed criteria [of Relford]." In Hedlund, COMA built upon its statement in Moore. Analyzing

the approach which the United States Supreme Court took to the issue in Relford, COMA quoted key passages from that decision and arrived at the conclusion that there is no support in the Relford opinion for concluding, simply because the Supreme Court held as always service connected an offense committed by a member of the military community against a person (military or civilian) within or at the geographical boundary of a post or against property on the base, that the Court implicitly sanctioned jurisdiction predicated solely upon the military status of both the wrongdoer and the victim. In McCarthy, in the context of an offense of transfer of marijuana, COMA cited Hedlund and Moore, and determined that merely because the recipient of the contraband was a soldier is insufficient, in and of itself, to establish service connection. Interestingly, however, COMA did provide a slight caveat to this aspect of the issue when it stated in Hedlund, 54 CMR at 7, that "under certain unusual circumstances, [the factor of the military status of the victim] alone might be enough to cause such a high degree of military interest and concern as to compel jurisdiction in the military to try the accused."

In each of these decisions, of course, there were other facts which required consideration by COMA. In Moore, the Court held that military jurisdiction was present since the accused's military status, and the status alone, enabled him to devise and implement his scheme to steal SGLI funds by faking his death. The abuse of the accused's military status triggered numerous Relford factors which tipped the scales in favor of military jurisdiction. In Hedlund, COMA held that the mere fact that the victim of the off-post robbery and kidnapping was an AWOL Marine did not rise to the level of military interest necessary for service connection. In McCarthy, the accused transferred a substantial quantity of marijuana to another service member who was known to deal drugs to other soldiers. COMA clearly based its finding of jurisdiction primarily on the fact that the accused knew exactly who he was dealing with when he committed the offense and that a very strong likelihood existed that the recipient would merely redistribute the marijuana to other soldiers when he returned to post. It also appeared that the accused and the recipient made the agreement on post, although the actual agreement occurred off-post.

Summary

COMA's renewed interest in service connection questions, as a practical matter, should result in fewer off-post cases (particularly drug offenses) coming to trial. However, many jurisdictions will continue to explore the depths of the Court's dedication to an ad hoc approach by continuing to prosecute arguable cases. The burden of proof will still be on the

government, but trial defense counsel should insure that it is a heavy burden by utilizing and urging a detailed analysis of the service connection factors. It should also be recognized that the government will be reluctant to bring out any facts which might support a finding of no service connection. Accordingly, defense counsel should be prepared to put on their own evidence in this area, giving particular emphasis to facts which invite favorable application of the Relford factors.

Finally, defense counsel should be aware that there will be times when a motion for a finding of lack of jurisdiction will not be appropriate, despite the arguable state of the facts. Defense counsel must determine the likelihood of the client being prosecuted in the civilian courts, and must compare the severity of the potential sentence there with the severity of the likely sentence at a court-martial. If it appears that the civilian courts will prosecute, and that the likely sentence is more severe than the likely sentence at a court-martial, it is probably advantageous to the client not to raise the motion. If the military judge raises the motion on his own, defense counsel may in some cases find it necessary to go so far as to argue that jurisdiction lies in the military court. Of course, defense counsel must be extremely careful not to admit any facts during the motion hearing which will later be contested on the merits.

By carefully analyzing the facts of a particular case, applying to those facts the law as set forth by COMA, and considering the practical aspects of being tried in the civilian versus military courts, defense counsel will have ensured that the welfare of the client has been preserved.

* * *

SPEEDY TRIAL UNDER UNITED STATES V. BURTON

INTRODUCTION

Five years ago, in the face of repeated and serious abuses of the then-extant law, the Court of Military Appeals decided that a strict, nondiscretionary rule was necessary to preserve the right of speedy trial to military accused. Article 10, Uniform Code of Military Justice, directs that when an accused "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."

In reviewing cases in which denial of speedy trial was an issue, the Court had, since its inception, examined the record of trial for an "oppressive design" on the part of the government, and for prejudice to the accused. United States v. Mohr, 21 USCMA 360, 45 CMR 134 (1972); United States v. Mladjen, 19 USCMA 159, 41 CMR 159 (1969). It finally became apparent that many accused were in fact being denied speedy trial not through any oppressive design on the part of the government, but more as the result of a complacent attitude regarding speedy trial rights. The Court of Military Appeals therefore promulgated what is probably one of the most widely-felt rule changes in modern military jurisprudence. In the cases of United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971) and United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973), the Court set forth the standards which must be met in order for the government to be in compliance with Article 10. In Burton the Court declared in the now familiar language:

For offenses occurring after the date of this opinion, however, we adopt the suggestion of appellate defense counsel that in the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.

Similarly, when the defense requests a speedy disposition of the charges, the Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief. 21 USCMA at 118, 44 CMR at 172.

Then, in Marshall, the Court elaborated on and refined the above rule by stating:

[T]he point of the Burton ruling . . . was to establish a standard that included allowances for the several necessary pretrial stages through which a proceeding must progress. Under Burton, the Government may still show diligence, despite pretrial confinement of more than three months, in such cases as those involving problems found in a war zone

or in a foreign country, [citations omitted] or those involving serious or complex offenses in which due care requires more than a normal time in marshaling the evidence, or those in which for reasons beyond the control of the prosecution the processing was necessarily delayed. . . .

At the risk of redundancy we iterate that when a Burton violation has been raised by the defense, the government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay. Operational demands, a combat environment, or a convoluted offense are examples that might justify a departure from the norm. Absent these or similar circumstances, the delay beyond 90 days cannot be justified by a showing that it was caused by difficulties usually encountered in the processing of charges for trial. 22 USCMA at 434, 435, 47 CMR at 412, 413.

It is on the Burton foundation and within the Marshall framework that the current military law with respect to speedy trial has developed. It is the purpose of this article to catalogue and explain those developments by breaking down the Burton/Marshall requirements element by element.

I. Burton Is Applicable Only To Offenses Committed After The Date of That Decision.

This is significant in AWOL and desertion cases with inception dates prior to 17 December 1971. Regardless of the termination date or the date of trial, a pre-Burton inception date removes the case from the ambit of the rule. United States v. Rodgers, 23 USCMA 389, 50 CMR 271 (1975); United States v. Harmash, 48 CMR 809 (ACMR 1974). If a defense counsel is defending such a case and it appears that the government is not proceeding expeditiously, the government will have to justify the delay only under the old "oppressive design" standard. Consideration should be given to filing a demand for speedy trial in these circumstances.

II. Continuances At The Request Of The Defense Are Explicitly Excluded:

A. Defense stipulations:

If the defense stipulates that part of the delay will not be considered when pretrial confinement is over ninety days,

thereby reducing government accountable confinement to less than ninety days, the Burton rule will not apply. United States v. Montague, 22 USCMA 495, 47 CMR 796 (1973).

B. Concurrence in trial dates:

It has been fairly well settled that mere concurrence in a trial date proposed by the trial counsel will not be held to be defense delay, especially when defense counsel is informed of the trial date and does not participate in the decision making process. United States v. Reitz, 22 USCMA 584, 48 CMR 178 (1974); United States v. Ellison, 48 CMR 858 (ACMR 1974). However, if counsel is overly cooperative or complacent, his concurrence could be taken as a delay chargeable to the defense. See United States v. O'Neal, 48 CMR 89 (ACMR 1973).

C. Special attention to joint trials of multiple charges or accused.

If there are several sets of charges with different accountability periods and counsel requests a joint trial of all charges, he should be careful to tailor the request to leave the ultimate responsibility for the trial date with the government. United States v. Ward, 23 USCMA 391, 50 CMR 273 (1975). (In Ward, defense counsel expressed to trial counsel the accused's desire that all charges be tried at one trial, but "the choice of how to proceed [was left] up to the government.") If there is a joint trial of co-accused, defense counsel should make certain (and a part of the record) that delays requested by any other of the accused are not charged to his client. United States v. Johnson, 24 USCMA 147, 51 CMR 337 (1976)

D. Administrative discharges:

The processing time for application for administrative discharges will not be charged to the defense unless (1) there was a request that the government's pretrial procedures be delayed, or (2) the pretrial processing was, in fact, delayed because of the request for an administrative discharge. United States v. O'Brien, 22 USCMA 57, 48 CMR 42 (1973); United States v. Walker, 50 CMR 213 (ACMR 1975); United States v. Battie, 48 CMR 317 (ACMR 1973); United States v. Parker, 48 CMR 241 (ACMR 1973); cf. United States v. Bush, 49 CMR 97 (ACMR 1974).

E. Leave taken by defense counsel:

Care should be taken by defense counsel when taking leave so as not to delay the accused's trial in a way which is chargeable to the defense. If the defense counsel's leave does contribute to delay

of the trial, it is defense delay and deductible from the period for which the government is accountable. United States v. O'Neal, 48 CMR 89 (ACMR 1973). But, if the government could not have gone to trial during the period when defense counsel was on leave, that period of time is not chargeable to the defense. United States v. Perkins, 51 CMR 7 (ACMR 1975). Also, defense counsel can take leave without having that time charged to the defense by stating that he is willing to return from leave for the trial, if necessary, and by staying in contact with his office to see if the case is set for trial. United States v. Johnson, 24 USCMA 147, 51 CMR 337 (1976).

III. Delays Requested For The Benefit Of The Accused.

A. The general rule:

In United States v. Driver, 23 USCMA 243, 49 CMR 376 (1974), the Court of Military Appeals held that once the total period of confinement is calculated, the government's period of accountability is determined by subtracting therefrom "continuances or delays granted only because of a request of the defense and for its convenience." 23 USCMA at 245, 49 CMR 378.

B. Examples:

1. A requested delay in the Article 32 Investigation by the defense at trial was held to be deductible in Driver, supra.

2. A defense request for a sanity board has been held to be deductible in United States v. Hensley, 50 CMR 677 (ACMR 1975); United States v. Lyons, 50 CMR 804 (ACMR 1975); and United States v. Beach, 49 CMR 124 (NCOMR 1974). But see the Court of Military Appeals' decision in United States v. Beach at 23 USCMA 480, 50 CMR 560 (1975), and Judge Cook's dissent therein where the Court apparently charged this type of delay to the government.

3. The defense has been charged with the delay where shortly before the date of trial, the accused offers to plead guilty in exchange for a pretrial agreement and some time is necessary to conduct negotiations, United States v. Perkins, 51 CMR 7 (ACMR 1975); United States v. Buskirk, 49 CMR 788 (ACMR 1975).

4. Finally, delay has been charged to the defense where time is taken to check the availability of requested counsel and to appeal a decision of non-availability. United States v. Rivera, 49 CMR 259 (ACMR 1974).

IV. Specific Elements Of The Burton Rule.

A. "A presumption of Article 10 will exist. . ."

The government must serve the charges on the accused by the eighty-fifth day in order to comply with the five day waiting period established by Article 35 of the Code and to avoid giving rise to the Burton presumption. The Court of Military Review has stated that the charges "must be served seasonably." United States v. Howell, 49 CMR 394 (ACMR 1974). However, this is not an ironclad rule. The Court of Military Appeals has held that though the accused is absolutely entitled to the five day waiting period, his refusal to waive it may be considered in determining the reasonableness of the delay. United States v. Ward, 23 USCMA 391, 50 CMR 273 (1975).

B. ". . .When pretrial confinement. . ."

1. Burton requires that there must have been confinement.

2. Generally, restriction will not be considered the equivalent of confinement. See United States v. Dunnings, 51 CMR 115 (ACMR 1975); United States v. King and Wright, 49 CMR 297 (ACMR 1974); United States v. Scaife, 48 CMR 290 (ACMR 1975). But see, United States v. Schilf, 24 USCMA 67, 51 CMR 196 (1976), in which the Court of Military Appeals found certain conditions of restriction to be the functional equivalent of confinement for Burton purposes and dismissed the charges. See also United States v. Powell, 24 USCMA 267, 50 CMR 719 (1976), where a 161 day delay prior to trial was held to violate Article 10, even without confinement. A 110 day period of restriction "was not so onerous as to be considered the equivalent of confinement [, but] the course of conduct throughout the entire period [including a 40 day delay to complete the three page Article 32 investigation report] reflect[ed] a lack of concern for the Codal commands of prosecution." 24 USCMA at 268, 269, 51 CMR at 720, 721. Powell can conceivably be cited in non-Burton cases for the proposition that the Court has adopted a new standard -- "lack of concern" -- to replace the old oppressive design standard.

3. Tolling the running of Burton: the entry of a plea of guilty at an Article 39(a) session where the trial followed at a later date in United States v. Marell, 23 USCMA 240, 49 CMR 373 (1974), tolled the running of the ninety days.

4. The rule at rehearings: Burton applies when a rehearing is ordered, and the government is responsible for confinement time beginning from the date the convening authority is officially notified that the rehearing has been

authorized. United States v. Flint, 24 USCMA 270, 51 CMR 722 (1976); United States v. Morrow, 49 CMR 866 (ACMR 1974).

5. Offenses committed while the accused is a sentenced prisoner: The Navy Court of Military Review has held that when an accused is confined as a sentenced prisoner, that does not constitute pretrial confinement for any other pending charges. United States v. Gettz, 49 CMR 79 (NCOMR 1974). (Note: This situation is not to be confused with that in Flint, supra, involving rehearing on the same charges).

6. Interrupted pretrial confinement: Finally, it should be kept in mind that the government is responsible for pretrial confinement of more than ninety days even if it is not continuous and even though subsequent confinement was the product of later misconduct by the accused. United States v. Brooks, 23 USCMA 1, 48 CMR 257 (1974); United States v. Howell, 49 CMR 394 (ACMR 1974).

C. ". . .Exceeds three months. . ."

1. For purposes of Burton, three months means 90 days. United States v. Driver, 23 USCMA 243, 49 CMR 376 (1974).

2. Beginning of accountability: Where an accused is already in confinement and commits new offenses or newly discovered evidence indicates that he had committed offenses other than those for which he is already confined, the government's accountability for the various charges commences ". . . when the government has in its possession substantial information on which to base the preference of charges." See United States v. Johnson, 22 USCMA 91, 48 CMR 599 (1974); United States v. Ward, 23 USCMA 391, 50 CMR 273 (1975); United States v. Smith, 51 CMR 10 (ACMR 1975); United States v. Craft, 50 CMR 334 (ACMR 1975); United States v. Shavers, 50 CMR 298 (ACMR 1975); United States v. Anderson, 49 CMR 37 (ACMR 1974).

3. Accountability where military pretrial confinement is proceeded by civilian pretrial confinement: The first case to deal with this issue arose before the Navy Court of Military Review in United States v. Halderman, 47 CMR 871 (NCOMR 1973). There, the Court held that an accused who was held a total of 97 days was not denied his right to a speedy trial when twelve days of the total time were taken to transport the accused from the civilian jail to military confinement. The Army Court of Military Review has cited Halderman favorably and followed its rationale in two cases, but adopted a different one in a third. In both United States v. Smith, 50 CMR 237 (ACMR 1975), and United States v. Murrell, 50 CMR

793 (ACMR 1975), the Court held that the military was entitled to a "reasonable time" to retrieve an accused apprehended and confined by civilian authorities, and the government's period of accountability began running on the date the accused was confined by the military. However, the contra result obtained in the case of United States v. Lyons, 50 CMR 804 (ACMR 1975). There, the Court held that where an accused was apprehended by civilian authorities for an unauthorized absence and returned to military control within six days, the government's period of accountability began on the date of the civilian apprehension.

D. "In such cases, this presumption will place a heavy burden on the government to show diligence."

1. Normal administrative pretrial processing will not suffice to justify delays in excess of 90 days: Overcoming normal pretrial processing problems is clearly not what the Court had in mind when it declared that the government could rebut the Burton presumption by showing diligence. United States v. Smith, 22 USCMA 474, 47 CMR 564 (1973); United States v. Kaffenberger, 22 USCMA 478, 47 CMR 646 (1973).

2. Peculiar circumstances, standing alone, will not justify delay: The Court of Military Appeals has held that peculiar occurrences alone will not justify delay unless the government can show that it was diligent in overcoming them and in getting the accused to trial as soon as possible in the face of these obstacles. In United States v. Young, 23 USCMA 471, 50 CMR 490 (1975), the Court held that though there was a jurisdictional question which had to be resolved before the military could go to trial, the government was not precluded from preparing for trial while the jurisdictional issue was pending. And in a case with facts peculiar to the Navy, the Court held that just because a trial team, including the trial counsel, was dispatched to the aircraft carrier Kitty Hawk, the government could not successfully assert diligence because when the trial counsel returned, the assistant trial counsel had assembled the evidence. United States v. Toliver, 23 USCMA 197, 48 CMR 949 (1974). Put in the vernacular, just because some event out of the ordinary occurs, the government cannot "dilly dally" and then assert diligence if trial preparations were not, in fact, impeded by the occurrence.

3. Examples where diligence was demonstrated: Two cases where the government did successfully show diligence are United States v. Larner, 50 CMR 521 (NCOMR 1975), and United States v. Lowery, 46 CMR 547 (AFCMR 1972). In Larner, a government witness would not cooperate because of threats from the accused.

In Lowery, the government did not exactly show diligence, but the Court held that where the original charges and additional charges were tried together, and confinement on the original charges was over ninety days, they need not be dismissed. The reason offered by the Air Force Court of Review for this result was that since the additional charges were serious, the accused would have remained in con-finement regardless of the result of the trial on the original charges. Thus, a joint trial was reasonable and no Burton violation occurred.

V. Specific Elements Of Marshall And Their Impact On The Burton Rule (Extraordinary Circumstances):

- A. ". . .Problems found in a war zone, operational demands, or a combat environment."

Obviously, since application of the Burton/Marshall rule has occurred almost exclusively in a peacetime environment, case law on this aspect of the rule is limited. There are two cases which do appear to properly apply this exception to the general ninety-day rule. The Navy Court of Military Review has held that where the accused, his victim, and the witnesses were all members of a submarine crew, the accused was confined, and the sub received orders to proceed to a combat theatre (with the victim and witnesses), there would be no violation of the Burton rule. United States v. Cahandig, 47 CMR 933 (NCFR 1973). See also United States v. Rowel, 50 CMR 752 (ACMR 1975). There, an accused was confronted with a German rape charge, went AWOL and was captured in Holland, and was returned to his unit. The Court of Review held that an eight day delay incurred while the unit was on a Field Training Exercise was an extraordinary circumstance which could rebut the Burton presumption.

- B. "Problems. . .found in a foreign country."

Rowel, supra, is also illustrative of how factors deriving from the foreign situs of the offense may properly explain confinement over ninety days (98 days in Rowel). In addition to the eight day delay during the unit FTX, there was a six day delay while the accused was extradited from Holland, and there was a further eighteen day delay which was necessary to locate a reluctant German prosecutrix. The Court held that these were extraordinary circumstances and that the government had been diligent in getting the accused to trial in spite of them. Therefore, the government explained the delay and carried its heavy burden.

However, Rowel is the exception. The government cannot come into court and merely state that the offense occurred in a foreign country and thereby successfully rebut the Burton presumption. On the contrary, several cases have held that the government must show that its pretrial processing of the case was actually impeded by virtue of the fact that the case arose in the foreign country; i.e., that there was a causal relationship between the fact that the case arose in a foreign country and the fact that pretrial confinement was over ninety days. United States v. Henderson, 24 USCMA 259, 51 CMR 711 (1976); United States v. Stevenson, 22 USCMA 454, 47 CMR 495 (1973); United States v. McElvane, 50 CMR 732 (ACMR 1975); United States v. Shavers, 50 CMR 298 (ACMR 1975); United States v. Eaton, 49 CMR 426 (ACMR 1974); United States v. O'Neal, 48 CMR 89 (ACMR 1973).

Even where there are some problems which grow out of the fact that the case arose in a foreign country, these will not necessarily excuse lengthy pretrial confinement. In United States v. Young, 23 USCMA 47, 50 CMR 490 (1975), the Court of Military Appeals held that three months taken to determine jurisdiction between the United States and Japan was excessive, primarily because the treaty between the two nations provided for the question to be resolved within thirty days. But the Court held that the government's position was also weakened because it did not prepare for trial while the jurisdictional question was being resolved.

- C. "Those [cases] involving serious or complex offenses in which due care requires more than a normal time in marshaling the evidence."

United States v. Henderson, 24 USCMA 259, 51 CMR 711 (1976), must be considered the leading case on this particular aspect of the Burton/Marshall rule. Henderson was convicted of conspiracy to murder and of premeditated murder. Senior Judge Ferguson explicitly held therein that the mere fact that an offense is "serious" does not constitute an extraordinary circumstance within Burton. "Rather, the facts in the record must support a determination that because of the serious or complex nature of the charges, due care required more than a normal time to gather the evidence." (Emphasis included) 24 USCMA at 262, 51 CMR at 714. The same conclusion is also expressed in the cases of United States v. Stevenson, supra, and United States v. O'Neal, supra.

In the area of "complex" cases, the same rationale has also been applied. In United States v. Brooks, 23 USCMA 1, 48 CMR 257 (1974), the Court held that the theft of numerous

items was not, standing alone, an extraordinary or exigent circumstance. Likewise, where the charged offenses involve only exertions or threats of force, and the witnesses are all available, the offenses cannot be said to be complex for purposes of excusing excessive delay. United States v. Holmes and Huff, 23 USCMA 24, 48 CMR 316 (1974). Nor can it be said that a "riot" in a confinement facility is necessarily complex or convoluted. United States v. Presley, 48 CMR 467 (NCOMR 1974).

One case where the complexity of the case was held to be justifiable factor for 125 days of pretrial confinement was United States v. Lovins, 48 CMR 160 (ACMR 1973). There, the offenses involved the theft of materials from the mail. The "victims" were difficult to locate, subsequent offenses were discovered (requiring a second 32 investigation), and extensive laboratory analysis was required. Thus, even though the accused made a statement on the date he was apprehended for the original offenses, the complexity of the case was determined to have hindered the prosecution and justified the additional delay.

D. ". . .Or those [cases] in which for reasons beyond the control of the prosecution the processing was necessarily delayed."

1. Generally: Cases where it has been held that factors "beyond the control of the prosecution" delayed the trial of the case are definitely in the minority. The standard is a high one for the government. Generally, the government must establish that the circumstance was truly unique and unexpected and that the government had no real control over the situation.

2. Cases:

a. United States v. Johnson, 22 USCMA 91, 48 CMR 599 (1974): Key prosecution witness goes AWOL, and investigator assigned to the case was reassigned to investigate series of fires on the U.S.S. Forrestal.

b. United States v. O'Brien, 22 USCMA 557, 48 CMR 42 (1973); United States v. Bush, 49 CMR 97 (NCOMR 1974): Accused goes AWOL and time needed for administrative action.

c. United States v. Hensley, 50 CMR 677 (ACMR 1975): Accused confined to hospital during pretrial stages. This was considered as a factor beyond the control of the prosecution. But see United States v. Fuqua, 47 CMR 654 (ACMR

1973). Mere fact that accused is hospitalized does not relieve government from burden of moving forward where possible.

d. United States v. Sewell, 51 CMR 344 (ACMR 1975); United States v. Harris, 50 CMR 225 (ACMR 1975): Accused confined by civilian authorities. Accountability may depend on "compelling social interest" to be served by necessary release to civilian authorities.

e. United States v. Scaife, 48 CMR 290 (ACMR 1974): unexpected and undiscovered malfunction of recording equipment at trial.

f. United States v. Towery, 51 CMR 727 (ACMR 1975): Military judge rejected at trial two successive court panels who had heard companion cases. Under facts of this case, delay not charged to the government.

g. United States v. Pyburn, 23 USCMA 179, 48 CMR 795 (1974): delay in receiving laboratory results held to be within control of the government for speedy trial purposes.

h. United States v. Lyons, 50 CMR 804 (ACMR 1974): Time spent by defense counsel on official TDY trip held to be within control of the government.

E. "In the absence of a [showing of diligence] the charges should be dismissed."

1. Clerical and administrative support is the government's problem: General manpower, clerical and administrative problems will in no way excuse sluggish pretrial processing or a tardy trial date. United States v. Holmes and Huff, 23 USCMA 24, 48 CMR 316 (1974); United States v. Reitz, 22 USCMA 584, 48 CMR 178 (1974); United States v. Durr, 22 USCMA 562, 48 CMR 47 (1973); United States v. Johnson, 22 USCMA 524, 48 CMR 9 (1973); United States v. Parker, 48 CMR 241 (ACMR 1973). A delayed Article 32 investigation is clearly chargeable to the government and may result in dismissal. United States v. Henderson, 24 USCMA 259, 51 CMR 711 (1976); United States v. Pyburn, 23 USCMA 179, 48 CMR 795 (1975); United States v. Stevenson, 22 USCMA 454, 47 CMR 495 (1973); United States v. McElvane, 50 CMR 732 (ACMR 1975).

2. It is the joint responsibility of the convening authority and the trial counsel to set a timely trial date and to insure the presence of a military judge: United States v. Wolzok, 23 USCMA 492, 50 CMR 572 (1975); United States v.

McClain, 23 USCMA 453, 50 CMR 472 (1975); United States v. Johnson, 49 CMR 13 (ACMR 1974), affirmed, 23 USCMA 397, 50 CMR 279 (1975). In Wolzok, the Court stated that it is the convening authority who has the primary responsibility to try an accused timely, and docket delays are within the control of the prosecution and chargeable to it. "In essence, a crowded shortage which was one of a number of factors we took into account in establishing the 90-day standard." 23 USCMA at 494, 50 CMR at 574.

3. Guaranteeing presence of witnesses at trial is the responsibility of the government: The presence of witnesses at trial is clearly the responsibility of the government and delays occasioned as a result of the failure of witnesses to appear will be chargeable to the government. United States v. Dinkins, 23 USCMA 582, 50 CMR 847 (1975); United States v. Jordan, 48 CMR 841 (NCMR 1974). Problems in locating witnesses will not excuse delay unless the government was actually hindered in its preparation and this is demonstrated on the record. United States v. Henderson, 24 USCMA 259, 51 CMR 711 (1976).

4. Administrative problems presented by co-accused must be borne by the government: The fact that there are co-accused in a case will not be acceptable to explain delays. The government is responsible for trying all accused in a timely fashion and the trial of one or more accused first will not excuse delays in trying the other accused. United States v. Johnson, 24 USCMA 147, 51 CMR 337 (1976); United States v. Toliver, 23 USCMA 197, 48 CMR 949 (1974); United States v. Presley, 48 CMR 467 (NCMR 1974). And the heavy caseload of the prosecution is no justification for delays. United States v. Pyburn, 23 USCMA 179, 48 CMR 795 (1974).

VI. Litigating The Motion And Burden Of Proof.

A. The burden of proof:

Clearly, once the motion for dismissal has been made, it is up to the government to justify any and all delays. Normally, this will be done by the offering of a stipulated chronology. Counsel should be careful in stipulating to dates in the chronology and should stipulate only as to dates and not as to responsibility for the delays involved. Finally, it can be said with certainty that a stipulated chronology with no other explanation will not suffice to carry the government's burden. United States v. Jackson, 22 USCMA 481, 47 CMR 730 (1973); United States v. Perkins, 51 CMR 7 (ACMR 1975); United States v. Fulmer, 48 CMR 565 (ACMR 1974). A mere listing of the stages through which the case went prior to trial or the dates on which certain events happened is insufficient. There must be an explanation of the reason for the delay and how the government's progress in bringing the

case to trial was hindered. United States v. Ellison, 48 CMR 858 (ACMR 1974). But, just any explanation will not necessarily carry the government's burden. For example, in an early case, the Court of Military Review made clear that delays resulting from personnel being involved in summary court-martial and Article 15 processing and in a change of command ceremony will not be acceptable to explain a delay of 96 days. United States v. McNew, 47 CMR 157 (ACMR 1973).

B. Litigating the issue:

Unless the trial defense counsel objects to the denial of his client's right to a speedy trial as secured by Article 10, this entire discussion of the issue and your time spent reading it has been wasted. A denial of speedy trial must be raised at trial. FAILURE TO DO SO WILL WAIVE THE ISSUE. United States v. Sloan, 22 USCMA 587, 48 CMR 211 (1974); United States v. Craft, 50 CMR 334 (ACMR 1975); United States v. Abner, 48 CMR 557 (ACMR 1974). Furthermore, though the government does have the obligation of going forward with the evidence and showing relevant facts to carry its heavy burden, defense counsel, in appropriate cases, need not rely on simply attempting to discredit the government's evidence. Occasionally, it may be good practice to offer defense evidence as well, e.g., having your client, or even one of his guards, detail the nature and severity of pretrial restriction so as to qualify his case for the Burton rule. Similarly, in appropriate cases where the defense is ready for trial, the trial defense counsel can improve his odds by filing written demands for speedy trial (even in non-Burton cases). See United States v. Powell, 24 USCMA 267, 51 CMR 719 (1976); United States v. Johnson, 23 USCMA 397, 50 CMR 289 (1975); United States v. Ellison, 48 CMR 858 (ACMR 1974); United States v. Amundson, 48 CMR 914 (NCMR 1974); and United States v. Brewer, 47 CMR 511 (ACMR 1973). But see United States v. Murrell, 50 CMR 793 (ACMR 1975). In any event, the remedy provided by United States v. Burton is as good as an acquittal, and all practicing defense counsel should be prepared to make the most of it in an appropriate case.

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RECENT OPINIONS OF INTEREST

COMA OPINIONS

SEARCH AND SEIZURE - SHAKEDOWN
INSPECTIONS - MARIJUANA DOGS

United States v. Roberts, 25 USCMA 39, 34 CMR 39 (1976).

A shakedown inspection was conducted with the aid of a marijuana dog for the specific purpose of discovering marijuana and prosecuting those found to be in possession of the contraband.

Judge Perry writing for the majority, held this to be nothing more than a dragnet-type search and fishing expedition which is constitutionally impermissible, taking Chief Judge Fletcher's concurring opinion in United States v. Thomas, 24 USCMA 228, 51 CMR 607 (1976) one step further. The Court held that a soldier does have a reasonable expectation of privacy in his barracks and the shakedown inspection in this case was impermissible. However, a traditional military inspection "which looks at the overall fitness of a unit to perform its military mission apparently continues to be permissible.

Judge Cook, in dissent, viewed shakedown inspections to be analogous to 'area code' enforcement inspections approved in Camara v. Municipal Court, 387 U.S. 523 (1967).

POST-TRIAL DELAY - DEFERMENT OF SENTENCE -
ARTICLE 32 INVESTIGATION -
MILITARY JUDGE INDEPENDENCE

United States v. Ledbetter, 24 USCMA 51, 54 CMR 51 (1976).

On the eighty-eighth day of post-trial confinement the convening authority unilaterally released the appellant (after two previous requests for deferment had been denied). Reconfinement and action occurred one hundred and twenty-four days after trial. While warning of the dangers of such tactics, the Court, speaking through Chief Judge Fletcher, refused to ban such practices.

The Court held that the unilateral grant of deferment of confinement by the convening authority does not deprive the appellant of credit for confinement for the period of deferment since the accused's request had been considered and denied and another request and grant based upon that request was necessary to toll the confinement portion of the adjudged sentence.

Additionally, the Court held that the government erred in failing to produce a key witness at the 32 investigation. The Court applied a balancing test for availability: the significance of the witness' testimony versus the difficulty and expense of obtaining his presence.

Finally, the Court condemned the post-trial questioning of the trial judge's sentencing recommendation. The independence of the trial judiciary is to be protected. Official inquiries outside of the adversary process of a judge's decisions should be limited to the type of independent judicial commissions suggested by section 9.1(a) of the ABA Standards, The Function of the Trial Judge.

COURT OF MILITARY APPEALS REVIEW POWERS;
INTERROGATION - RIGHT TO COUNSEL

United States v. Lowry, 25 USCMA 85, 54 CMR 85 (November 5, 1976).

The court rejected the motion that where a constitutional right is involved it can independently examine the record, including disputed and undisputed facts. Unlike the Constitutional grant of authority (Article III, §2) given the Supreme Court, Article 67(d) of the UCMJ limits the Court of Military Appeals to review of questions of law.

Additionally, the Court held that United States v. McOmber, 24 USCMA 207, 51 CMR 452 (1976) requires notification to prior retained counsel of interrogation even where separate offenses are involved. The Court refused to follow Michigan v. Mosley, 423 U.S. 96 (1975), since McOmber was based on Article 27, UCMJ, and not the Sixth Amendment.

POWER OF MILITARY JUDGE
TO SUSPEND A SENTENCE

United States v. Occhi, 25 USCMA 93, 54 CMR 93 (1976).

The Court held that the Probation Act, 18 U.S.C. §3651 does not apply to the military and is entirely incompatible with military procedures. Chief Judge Fletcher concurs in the result stating that an advisory opinion has been issued here since the military judge did not intend to suspend the sentence at the time of imposition, nor did he indicate he would have suspended the sentence if he had possessed the power to do so.

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* NEXT ISSUE *
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* LITIGATING THE SANITY DEFENSE *
* JURY SELECTION IN THE MILITARY *
* ADVISING CLIENT OF RIGHTS TO APPEAL *
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