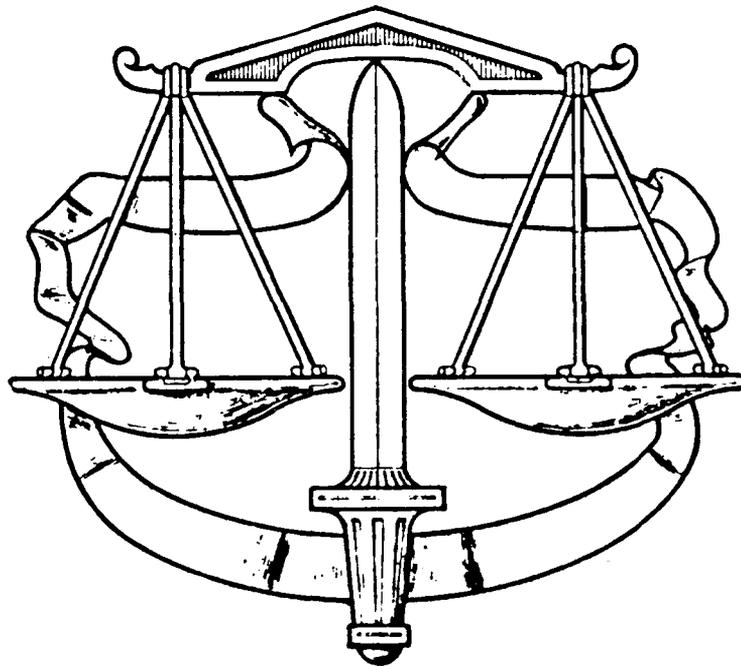


THE ADVOCATE

A Journal For Military Defense Counsel

Volume 15, Number 5

Sep - Oct 1983



JOINDER AND SEVERANCE OF OFFENSES: FAIR TRIAL CONSIDERATIONS

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THE ADVOCATE (USPS 435370) is published by-monthly by the Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, Virginia 22041. Second class postage paid at Falls Church, Virginia 22041 and at additional mailing offices. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATTN: Order Editing Section/SSCM, Washington, D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATTN: Change of Address Unit/SSCM, Washington, D.C. 20402. The yearly subscriptions prices are \$15.00 (domestic) and \$18.75 (foreign). The single issue prices are \$5.00 (domestic) and \$6.25 (foreign).

Claims for nonreceipt of Advocate issues should be made as follows: Depository designees: Depository Copies (Receiving) U.S. Gov't Printing Office, Public Documents Warehouse, 5236 Eisenhower Ave., Alexandria, VA 22304; Private subscribers: U.S. Gov't Printing Office, Public Documents Warehouse, ATTN: Subscription Stock, 8610 Cherry Lane, Laurel, MD 20310; All others: THE ADVOCATE, USALSA/DAD, 5611 Columbia Pike, Falls Church, Virginia 22041

The Advocate is published under the provisions of AR 310-1 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. Use of funds for printing this publication has been approved by the Secretary of the Army on 1 December 1983 in accordance with the provisions of AR 310-1, paragraph 5-11a. Articles represent the opinions of the authors or the Editorial Board and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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OPENING STATEMENTS

In our lead article, CPT Guy Ferrante discusses the joinder and severance of offenses in military practice. Many counsel may be unaware that the longstanding practice of charging multiple unrelated offenses at one trial is not followed in federal criminal practice. Captain Ferrante's article is designed to provide counsel with new insight into particular situations in which they may wish to challenge the joinder of unrelated offenses.

* * *

With this issue, the format of The Advocate undergoes some major changes. Most notable is the elimination of Case Notes, COMA Watch and On the Record. The functions served by Case Notes and COMA Watch have been incorporated, in part, into an enhanced version of Side Bar. Significant court decisions and Court of Military Appeals grants will be discussed in detail and not merely synopsisized. Side Bar will continue to provide other, hopefully useful, information about trial tactics and resource materials for counsel.

On the Record, a longtime favorite of subscribers, has been eliminated because of various administrative requirements.

* * *

Due to the extraordinary press of cases before the U.S. Army Judiciary, The Advocate remains behind schedule. We apologize to our readers for this inconvenience.

* * *

We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.

* * *

Staff Changes

With this issue, Captain Marcus C. McCarty replaces Captain Richard W. Vitaris as Editor-in-Chief of The Advocate. Captain Vitaris has left the Defense Appellate Division to assume new responsibilities as a trial counsel with V Corps in Frankfurt. The Editorial Board thanks Captain Vitaris for his 20 months of hard work and dedication and wishes him continued success.

JOINER AND SEVERANCE OF OFFENSES: FAIR TRIAL CONSIDERATIONS

by Guy J. Ferrante*

I. Introduction

Although a sad commentary on the military and civilian communities, it is frequently true that individuals who commit crimes commit more than one. It is common that a servicemember, through callousness or criminal propensity, will violate the societal norm in a variety of ways and be charged with a corresponding number of offenses which are often dissimilar or unrelated.

At other times, an accused may find himself in the same predicament through no apparent fault of his own. Either unfortunate coincidence, fate, or ingenious prosecutors can force a servicemember to defend against a variety of charges which have been amassed against him. This may result even though the accused is innocent of some, or even all, of those unrelated allegations.

It is generally recognized that such joinder of offenses, whether related or not, can in certain situations be prejudicial to an accused. This prejudice usually appears in one or more of the following three forms:

- 1) The trier of fact may have a tendency to accumulate the evidence against the accused and convict on the belief that he or she is simply a bad person who must have done everything charged;
- 2) the trier of fact may confuse the evidence presented as to all of the charges and use that which is relevant only to one as the basis for a conviction of another;

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- 3) the accused may become frustrated and confused in the presentation of his defense if he or she desires to testify as to one or some, but not all, of the charges pending.

This article will provide guidance and suggestions to trial defense counsel on how such prejudice to their clients can be avoided, or at least how viable and justiciable issues can be preserved for appellate litigation. While military law in this area has been sparse and relatively inconclusive, litigation of this area in the federal courts has been extensive and provides the defense with ample precedent. Furthermore, the Court of Military Appeals recent interest in the issue of multiplicity, indicates a renewed interest of that Court in the broader implications of how the government's charging decisions affect an accused's ability to defend at trial. Many of the "fair trial considerations" justifying the prohibition against unreasonable multiplication of charges, are relevant to the question of the propriety of joining numerous offenses at trial.

The Court of Military Appeals has indicated a clear preference over the last decade to adopt the procedural safeguards utilized in the federal courts to military practice unless reasons of military necessity make adaptation of the federal precedent impractical or the Manual for Courts-Martial specifically dictates another procedure. The protection afforded to a civilian criminal defendant against prejudicial joinder of offenses can be critical to the accused's ability to defend at trial. These considerations are no less important to the military accused. This article will enable military counsel to recognize factual situations in which the joinder of unrelated offenses in a single trial is most likely to prejudice an accused and to properly articulate a motion for severance of charges at trial.

II. The Military Preference for Joinder

It is hardly an uncommon sight at a court-martial for an accused to stand charged with a multitude of charges, both related and unrelated, spanning a considerable length of time. The reason for this phenomenon is the Manual for Courts-Martial direction that:

Subject to jurisdictional limitations and at the discretion of the convening authority, charges against an accused, if tried at all, ordinarily should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment.¹

1. Para. 30g, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

As a result of this language, and for expediency, it is customary to try all known charges against an accused at the same time.²

This Manual provision, however, is not mandatory.³ Instead, the convening authority has very broad discretion to reach a fair result for all concerned.⁴ On the rare occasion that an improper joinder of offenses issue has reached the appellate military courts, no prejudice has been found because of the broad discretion of the convening authority, the simplicity and separability of the evidence as to each of the charges, the likelihood that the fact finders did not confuse that evidence, and the existence of a cautionary instruction by the military judge.⁵ As a result, military prosecutors have virtually had free rein in joining both related and unrelated charges for a single trial. At the same time, trial defense counsel seem to have succumbed to this trend and accepted such free joinder of offenses. The purpose of this article is to provide suggestions on how this customary and prejudicial charging system can be tempered and regulated to the benefit of certain accused servicemembers.

III. Federal Practice

In the federal arena, the issue of offense joinder has been much more comprehensively legislated, as in the Federal Rules of Criminal Procedure [hereinafter cited as Fed. R. Crim. P.], and litigated. Ostensibly, this is due to the fact that the civilian jurisdictions have more fully recognized that the joinder issue concerns "two conflicting consti-

2. United States v. Lockwood, 15 M.J. 1, 8 (CMA 1983); United States v. Keith, 1 USCMA 442, 448, 4 CMR 34, 40 (1952).

3. United States v. Thomas, 17 USCMA 22, 37 CMR 286 (1967); United States v. Garcia, 12 M.J. 703 (NMCMR 1981); United States v. Gettz, 49 CMR 79 (ACMR 1974); United States v. Rose, 40 CMR 591 (ABR 1969), pet. denied, 40 CMR 327 (CMA 1969); United States v. Martin, 39 CMR 621 (ABR 1968). These cases concern the converse situation of an accused objecting to the conducting of two separate trials instead of a single consolidated one.

4. United States v. Partridge, 41 CMR 548 (ACMR 1969), pet. denied, 19 USCMA 603, 41 CMR 403 (1970).

5. Id.; United States v. Smith, 4 M.J. 809 (AFCMR 1978), pet. denied, 5 M.J. 306 (CMA 1978).

tutional considerations: a defendant's due process right to a fair trial before an impartial jury (uninfluenced by evidence of other offenses) may be served best by separate trial, while the double jeopardy prohibition against multiple prosecutions may be served best by a single trial."⁶

Fed. R. Crim. P. 8(a)⁷ and 14⁸ are primarily responsible for the actual joinder practice in federal courts. The former broadly permits the joinder of offenses if certain prerequisites are met. The latter provides for the severance of otherwise properly joined offenses if prejudice is apparent. Each of these legislative enactments must be analyzed separately in order to fully understand the overall joinder practice.

A. Joinder of Offenses

The underlying purpose behind Fed. R. Crim. P. 8(a) and 14 is to promote economy and efficiency in the criminal justice system by avoiding unnecessary multiple trials without substantially depriving defendants of their right to a fair trial.⁹ Exactly how this balance between economy and a fair trial¹⁰ is struck can have profound repercussions

6. Standards for Criminal Justice, Chapter 13, Introduction (2d Ed., 1980) [hereinafter cited as Standards].

7. Fed. R. Crim. P. 8: Joinder of Offenses and Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
8. Fed. R. Crim. P. 14: Relief from Prejudicial Joinder.
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires.
9. *Bruton v. United States*, 391 U.S. 123 (1968).
10. *Cataneo v. United States*, 167 F.2d 820, 823 (4th Cir. 1948).

for an accused. The issue of whether one of the three requirements of Fed. R. Crim. P. 8(a) has been met, thus justifying joinder, "is a question of law, subject to full appellate review; if the joinder was not permitted by Rule 8, a conviction must be reversed unless the error was harmless."¹¹ The three criteria which must be examined in order to determine whether offenses may be joined in a single trial are whether the offenses arise from the same act or transaction, whether they are so related as to constitute a common scheme or plan, and whether the offenses are of the same or similar character.

1. Same Act or Transaction Offenses

This type of joinder is the most predictable and understandable. In addition, it is usually the most beneficial and desirable to both the prosecution and the defense.¹² By trying all offenses which arise from the same act or transaction at the same time, the government is benefitted by not having to prove the same facts at separate trials.¹³ Coincidentally, an accused is protected from the harassment of multiple prosecutions, the probability that successive trials will result in at least one conviction, and the likelihood that an aggregate sentence will exceed that from a single trial.¹⁴ Finally, the defendant will not be prejudiced by the introduction of otherwise inadmissible evidence since testimony concerning the entire act or transaction would be proper in each separate trial on an offense stemming from that incident.¹⁵

11. United States v. Werner, 620 F.2d 922, 926 (2nd Cir. 1980) (footnote omitted). Most courts will generally permit broad joinder of offenses in anticipation of and reliance upon the fact that a prejudiced party to the trial can secure a severance under the provisions of Fed. R. Crim. P. 14. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1972), cert. denied, sub nom, Jacobs v. United States, 404 U.S. 958 (1972); Haggard v. United States, 369 F.2d 968 (8th Cir. 1966), cert. denied, sub nom, Alley v. United States, 368 U.S. 1023 (1966).

12. See generally, Petite v. United States, 361 U.S. 529 (1960).

13. Tillman v. United States, 406 F.2d 930, 934 (5th Cir. 1969), vacated in part on other grounds, 395 U.S. 830 (1969).

14. See Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553, 562 (1965) [hereinafter cited as Note, Joint and Single Trials].

15. See McCormick, Evidence § 185 (1972).

The application of this standard depends solely upon the interpretation of the term "transaction." While it does not have a technical or legalistic definition,¹⁶ courts have consistently found the term to "comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."¹⁷ In addition, one crime which is committed in order to effectuate the commission of another crime may, in some situations, also be considered part of the same transaction.¹⁸ Based upon these principles, offenses of conspiracy to distribute heroin and tax evasion based upon the income from the heroin business,¹⁹ perjury and a substantive offense,²⁰ the manufacturing of drugs and the possession of a firearm discovered during a search of the accused's home for drugs,²¹ extortion and false declarations before the grand jury which was investigating the extortion,²² possession of a sawed-off shotgun and the interstate transportation of a firearm by a felon,²³ false statements on a selective service deferment form and false statements to a local draft board,²⁴ transportation of

16. *Cataneo v. United States*, 167 F.2d 820 (4th Cir. 1948).

17. *United States v. Pietras*, 501 F.2d 182, 185 (8th Cir. 1974), cert. denied, 419 U.S. 1071 (1974). See also, *United States v. Park*, 531 F.2d 754 (5th Cir. 1976); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

18. *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), cert. denied subnom, *Jacobs v. United States*, 404 U.S. 958 (1971). Cf., *United States v. Kelley*, 635 F.2d 778 (10th Cir. 1980) (receipt of a gun by a felon and armed robbery were joined because the gun was acquired to rob the bank).

19. *United States v. Anderson*, 642 F.2d 281 (9th Cir. 1981).

20. *United States v. Isacs*, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

21. *United States v. Park*, 531 F.2d 754 (5th Cir. 1976).

22. *United States v. Pacente*, 503 F.2d 543 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974).

23. *United States v. Roe*, 495 F.2d 600 (10th Cir), cert. denied, 419 U.S. 858 (1974).

24. *Cataneo v. United States*, 167 F.2d 820 (4th Cir. 1948).

a-stolen vehicle and transportation of a firearm by a felon,²⁵ and breaking into a post office and theft from the post office²⁶ have been found to be part of the same act or transaction, justifying joinder under Fed. R. Crim. P. 8(a).

2. Acts or Transactions Connected Together or Constituting a Common Scheme or Plan.

Similar to the first criterion in many respects, the primary objective of this form of joinder is the judicial economy of only having to prove a transaction once.²⁷ In many respects, the test for such connected acts is indistinguishable from that for "same transaction" offenses -- the court will focus on the logical relationship between the offenses.²⁸

Three additional factors frequently relied upon in this type of analysis are the time relationship between the offenses, any overlapping of evidence, and the existence of a common scheme or plan. These factors have apparently been derived from a United States Supreme Court opinion where, in approving the joinder of two murder charges, it was observed that "[t]here was such close connection between the two killings, in respect of time, place and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other."²⁹ Either together or individually, these three conditions can result in a determination that two or more acts or transactions are connected or constitute a part of a common plan.

In one case, joinder of the offenses of possession of a firearm and distribution of heroin was approved because both were committed on

25. United States v. Abshire, 471 F.2d 116 (5th Cir. 1972).

26. United States v. Doss, 66 F.Supp. 243 (D.C. La.), aff'd, 158 F.2d 95 (5th Cir. 1946).

27. Tillman v. United States, 406 F.2d 930 (5th Cir. 1969), vacated in part on other grounds, 395 U.S. 830 (1969); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970).

28. See United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

29. Pointer v. United States, 151 U.S. 396, 404 (1894).

the same day and observed by the same detectives.³⁰ Similarly, two identical charges of stolen mail possession were joined because, in part, they occurred only two days apart.³¹ A charge of personal income tax evasion was also joined with a charge of corporate income tax evasion partly because both charges stemmed from the same tax year.³²

In United States v. Wilson,³³ the defendant robbed a store, crashed the stolen car he was using for his escape, and tried to run away on foot before he was finally caught by the police. He was charged with robbery, assault with a dangerous weapon, carrying a dangerous weapon, assault upon a law enforcement officer, and unauthorized use of a vehicle. A motion to sever under Fed. R. Crim. P. 8(a) was denied because the court found all of the charges to have stemmed from connected acts which were part of a common scheme. In another case, six fraud offenses were joined where all six were part of a common scheme to defraud the same victim.³⁴ Finally, two bank robberies within 30 minutes of each other in August and one bank robbery in July, all in Sacramento, California, were considered to be parts of a common scheme or plan and were joined for trial.³⁵ Probably the most extreme finding of such connection arose in United States v. Quinones.³⁶ The accused in that case moved to sever an escape from custody charge from charges of rape, assault, and entering military property for an unlawful purpose which arose from an incident three days earlier. Interestingly, the escape from custody followed an arrest for other offenses which were later dismissed. Despite this, the Court upheld the joinder of the offenses on the grounds that the arrest was somehow the result of the accused's conduct three days earlier.

30. United States v. Jines, 536 F.2d 1255, 1257 (8th Cir. 1976).

31. United States v. Jordan, 602 F.2d 171 (8th Cir.), cert. denied, 444 U.S. 878 (1979).

32. United States v. Mack, 249 F.2d 321 (7th Cir.), cert. denied, 356 U.S. 920 (1957).

33. 434 F.2d 494, 140 U.S. App. D.C. 220 (1970).

34. United States v. Dennis, 645 F.2d 517 (5th Cir. 1981).

35. United States v. Armstrong, 621 F.2d 951 (9th Cir. 1980). In addition, the Court ruled that the two robberies in August were part of the same transaction.

36. 516 F.2d 1309 (1st Cir.), cert. denied, 423 U.S. 852 (1975).

When evidence as to the several offenses overlaps, courts are inclined to join them because the interests of economy and efficiency are greatly advanced by relieving the government of the obligation to prove the same facts and present the same evidence at successive trials.³⁷ Thus, where "[v]irtually every overt act alleged in the conspiracy count formed the subject matter of" the other counts,³⁸ or where extortion had to be proven in order to show that income had not been reported for tax purposes,³⁹ the evidence overlapped and joinder was permitted. However, where "[c]ommission of one of the offenses neither depended upon nor necessarily led to the commission of the other [and] proof of the one act neither constituted nor depended upon proof of the other,"⁴⁰ the transactions were not considered sufficiently connected to warrant joinder under Fed. R. Crim. P. 8(a).

One final consideration which must be kept in mind when dealing with this form of joinder is that there must exist a connection between each and every one of the joined offenses. Nine offenses were involved in United States v. Baker.⁴¹ It was conceded that four tax evasion charges were properly joined. The issue was whether those four joined charges could be joined with the other five charges. The Court ruled that Fed. R. Crim. P. 8(a) required that the joinder between each count and each other count be proper. The permissible joinder of one of the four tax evasion offense with four of the five other charges was held insufficient to support the joinder of all nine, even though various groupings of those nine were proper.

37. See United States v. Halper, 590 F.2d 422 (2d Cir. 1978).

38. United States v. Swieg, 441 F.2d 114, 118 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

39. United States v. McGrath, 558 F.2d 1102 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). See also United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

40. United States v. Halper, 590 F.2d 422, 429 (2d Cir. 1978).

41. 401 F.2d 958 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970). But see United States v. Ajlouny, 629 F.2d 830 (2d Cir 1980) (The defendant defrauded the telephone company by making 136 telephone calls with the use of a "blue box." The fact that one of those telephone calls arranged for the transportation of stolen property was found sufficient, by the trial court, to justify the joinder of the transportation and fraud offenses.).

3. Offenses of the Same or Similar Character

The joinder of offenses of the same or similar character has traditionally been the most troublesome in its definition and application because it results in the least actual benefit to the government and the greatest potential for prejudice to the defendant.⁴² There has also been a tremendous amount of inconsistency among the courts in the operation of this aspect of Fed. R. Crim. P. 8(a) because of the differing degrees of emphasis different courts place on the myriad competing interests involved.

The primary source of prejudice to an accused, when offenses of the same or similar character are joined, is centered upon the evidence which is admissible.⁴³ In separate trials evidence of other crimes is admissible only if it meets the requirements and conditions of Federal Rule of Evidence 404. When same or similar character offenses are joined, however, the evidence as to each of those offenses is necessarily admissible in a single trial. This situation creates the very real danger

that the jury may use evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition.⁴⁴

42. See 8 W. Moore, Moore's Federal Practice § 8.05[2] (2d Ed. 1981); 1 C. Wright, Federal Practice and Procedure § 143 (1969).

43. See Note, Joint and Single Trials, *supra* note 14, at 556-60.

44. United States v. Lotsch, 102 F.2d 35, 36 (2d Cir.), cert. denied, 307 U.S. 622 (1939). The Court of Military Appeals has also recognized that the sheer number of charges against an accused may create the prejudicial impression that he is simply a "bad person." United States v. Middleton, 12 USCMA 54, 58-59, 30 CMR 54, 58-59 (1960). See also United States v. Sturdivant, 13 M.J. 323, 330 (CMA 1982).

In the landmark case of Drew v. United States,⁴⁵ it was emphasized that when same or similar character offenses are joined, a

defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.⁴⁶

Against these substantial sources of prejudice to an accused must be balanced the advantages to the government which would flow from the joinder of same or similar character offenses. The only two instances of economy which will consistently flow from this type of joinder are the savings of time from only having to empanel a single jury and the single introduction of background and character evidence.⁴⁷ The way the courts resolve this balancing frequently depends upon whether greater emphasis is placed upon the avoidance of potential prejudice or the efficiency of the criminal justice system. It has been held that "[w]hen all that can be said of two separate offenses is that they are of the 'same or similar character,' the customary justifications for joinder (efficiency and economy) largely disappear. . . . At the same time, the risk to the defendant in such circumstances is considerable."⁴⁸ On the other hand, other courts have interpreted the word "similar" very broadly, as a matter of statutory construction,⁴⁹ and have been more impressed by the "mandate to expedite criminal trials" imposed by the policy underlying Fed. R. Crim. P. 8(a).⁵⁰

45. 331 F.2d 85 (D.C. Cir. 1964).

46. Id. 331 F.2d at 88.

47. United States v. Halper, 590 F.2d 422, 430 (2d Cir. 1978); 8 Moore, supra note 42; Note, Joint and Single Trials, supra note 14, at 560.

48. United States v. Halper, 590 F.2d 422, 430 (2d Cir. 1978).

49. Edwards v. Squire, 178 F.2d 758 (9th Cir. 1949).

50. United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980).

Aside from these general considerations, several specific factors have been relied upon in determining the permissibility of the joinder. To that end, it has consistently been recognized that an accused is not prejudiced by the joinder of offenses if the evidence as to each would have been admissible in a separate trial of the others.⁵¹ In these situations, the benefit to the government takes clear priority because the joinder would impose no additional prejudice upon the defendant which he or she would not have confronted in separate trials. Unfortunately, few, if any, cases have been decided on this fundamental basis.

"Where offenses are similar in character and occurred over a relatively short period of time and the evidence overlaps, joinder is ordinarily appropriate."⁵² This partial reliance on the time frame involved has resulted in the joinder of two robbery charges which occurred in the same building but on different nights during one month,⁵³ three larceny and three housebreaking offenses on three different days within one month,⁵⁴ two charges of robbery within one week of each other,⁵⁵ and two bank robberies which occurred six days apart.⁵⁶

Other cases have involved findings of "same or similar character" offenses simply from an examination of the relevant facts. Similar modi operandi were considered in joining bank robberies⁵⁷ and burglaries.⁵⁸

51. United States v. Drew, 331 F.2d 85, 90 (D.C. Cir. 1964). See also United States v Halper, 590 F.2d 422, 431 (2d Cir. 1978). Blunt v. United States, 404 F.2d 1283 (D.C. Cir. 1968), cert. denied, 394 U.S. 909 (1969).

52. United States v. McClintic, 570 F.2d 685, 689 (8th Cir. 1978). See also United States v. Riebold, 557 F.2d 697, 707 (10th Cir.), cert. denied, 434 U.S. 860 (1977); Johnson v. United States, 356 F.2d 680, 682 (8th Cir.), cert. denied, 385 U.S. 857 (1966).

53. Gray v. United States, 356 F.2d 792 (D.C. Cir. 1966).

54. Chambers v. United States, 301 F.2d 564 (D.C. Cir. 1962).

55. Langford v. United States, 268 F.2d 896 (D.C. Cir. 1959).

56. United States v. DiGiovanni, 544 F.2d 642 (2d Cir. 1976).

57. Id.

58. United States v. Leonard, 445 F.2d 234 (D.C. Cir. 1971).

The fact that the same victim or parties were involved has also been relied upon in affirming the joinder of offenses.⁵⁹ Finally, the elements of the offenses concerned have also been compared in determining that charges of distributing one drug and possession of another at a different time were of a similar character and could properly be joined.⁶⁰

Despite this plethora of case law, there are virtually no established guidelines for deciding whether offenses are of the "same or similar character." The most that can be gleaned is that courts generally interpret the word "similar" very broadly. In accordance with its traditional meaning, offenses which are somewhat alike and resemble each other⁶¹ are freely joined. Clearly, Fed. R. Crim. P. 8(a) has been interpreted as primarily intended to foster the smooth operation of the criminal justice system.

B. Relief From Prejudicial Joinder

The broad, joinder-preferred application of Fed. R. Crim. P. 8(a) is neither surprising nor unexpected. The consensus is that such free joinder was intended by the drafters of Fed. R. Crim. P. 8(a) to favor the interest of judicial economy. If an accused feels prejudiced by the resulting joinder, his recourse is under Fed. R. Crim. P. 14.⁶² Pursuant to that provision, the trial judge is given the power to grant relief to defendants who are prejudiced by a joinder of offenses which is otherwise proper under Fed. R. Crim. P. 8(a).⁶³ Unlike the question of whether joinder is proper under Fed. R. Crim. P. 8(a), which is a legal issue, the decision of whether to grant relief under Fed. R. Crim. P. 14 is within the discretion of the trial judge. Only by showing an abuse of that discretion will an accused be entitled to appellate reversal of a trial judge's ruling.⁶⁴ Consequently, the amount and type of prejudice

59. *United States v. Kelleman*, 432 F.2d 371 (10th Cir. 1970); *Hill v. United States*, 135 U.S. App. D.C. 23, 418 F.2d 449 (1968).

60. *United States v. Lewis*, 626 F.2d 940 (D.C. Cir. 1980).

61. *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980).

62. See Note 8, supra.

63. 8 W. Moore, supra note 42, at § 14.02[1]; 1 C. Wright, supra note 42, at § 222.

64. *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980).

a defendant is able to demonstrate will have a tremendous impact upon whether or not a severance will be granted.

For the reasons stated in Sections 1 and 2, supra, Fed. R. Crim. P. 14-based litigation usually does not arise when several charges arise from the same act or series of acts. The defendant is usually benefitted by the joinder and no showing of prejudice is possible, while the government and the courts are definitely saved time and expense by having only a single trial. Because this type of joinder provides the most likely prejudice to an accused and the least tangible benefit to the government,⁶⁵ instances of "same or similar character" offense joinder have resulted in the bulk of the litigation concerning severance under Fed. R. Crim. P. 14.

Despite the opinion that Fed. R. Crim. P. 14 is designed to relieve defendants of prejudice created by an otherwise proper joinder of offenses under Fed. R. Crim. P. 8(a), few, if any, courts have so liberally construed that provision. In reliance upon the Supreme Court's holding that Rule 14 was intended to foster efficiency "without substantial prejudice to the right of the defendants to a fair trial,"⁶⁶ courts have been inclined to deny motions to sever joined offenses. This inclination is clear from the considerable burden imposed upon accuseds -- to demonstrate that the prejudice was so substantial that it outweighed the interest in economy and rendered the trial unfair.⁶⁷ As a result, movants are typically required to make strong showings of prejudice before severance will be appropriate.⁶⁸ More than claims of a better chance of acquittal in separate trials⁶⁹ or of an adverse reaction

64. United States v. Werner, 620 F.2d 922, 926 (2d Cir. 1980).

65. See text accompanying notes 42-47, supra.

66. Bruton v. United States, 391 U.S. 123, 131, n. 6 (1968) (emphasis added).

67. See United States v. Tanner, 471 F.2d 128, 137 (7th Cir.), cert. denied, 409 U.S. 949 (1972).

68. United States v. Kopel, 552 F.2d 1265 (7th Cir.), cert. denied, 434 U.S. 970 (1977); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), cert. denied, 429 U.S. 111 (1977).

69. United States v. Dennis, 645 F.2d 517 (5th Cir. 1981); United States v. Alpern, 564 F.2d 755 (7th Cir. 1977); Tillman v. United States, 406 F.2d 930 (5th Cir. 1969), vacated in part on other grounds, 395 U.S. 830 (1969).

from the jury due to the multitude of charges⁷⁰ are needed to justify a severance. To require less "would reject the balance struck in Rule 8(a), since this type of 'prejudice' will exist in any Rule 8(a) case."⁷¹

The three types of prejudice most frequently relied upon in motions for the severance of "same or similar character" offenses in federal courts are that a defendant may become embarrassed or confounded in presenting separate defenses, or a jury may use the evidence of one of the crimes charged to infer a criminal disposition as to the other charge or charges, or a jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.⁷² Although these three types of prejudice frequently overlap, each will be considered individually.

1. Confusion of Defenses

Three cases from the District of Columbia Court of Appeals are very illustrative of the status of this type of prejudice. In Dunaway v. United States,⁷³ three housebreaking and two larceny charges were joined. The two larcenies were removed from the jury's consideration by the judge. After testifying "without limitation," the accused was acquitted of the first housebreaking charge but convicted of the other two. On appeal, it was argued that the defendant only wanted to testify as to the housebreaking charge of which he was acquitted. The Court declined to find that his decision to testify was influenced by the joinder of the offenses. Instead, it was noted that the accused "had a fair choice to take the stand or not uninfluenced to any significant degree by the consolidation."⁷⁴

A contrary result was reached in the factually similar case of Cross v. United States⁷⁵ wherein two robbery charges were joined. The accused presented a viable alibi defense to one charge which was believed by the

70. United States v. Werner, 620 F.2d 922, 929 (2d Cir. 1980).

71. Id.

72. Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

73. 205 F.2d 23 (D.C. Cir. 1953).

74. Id. at 26.

75. 335 F.2d 987 (D.C. Cir. 1964).

jury. His denial of the other offense, however, was not very convincing and he was convicted.⁷⁶ The Court recognized that

[p]rejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.⁷⁷

Contrary to the conclusion in Dunaway, the Court ruled that the accused "had no such 'fair choice' and that the resulting prejudice on Count I was not cured by the acquittal on Count II."⁷⁸ A new trial was ordered.

Finally, in Baker v. United States,⁷⁹ the District of Columbia Court of Appeals was confronted with a defendant who asserted that he had wanted to testify as to only seven of the nine charges against him because he felt that he had a valid legal defense to the other two. The Court took that opportunity to severely restrict the application of the Cross rationale by stating that

76. Id. at 990.

77. Id. at 989 (footnotes omitted).

78. Id. at 991.

79. 401 F.2d 958 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970).

[t]he essence of our ruling in Cross was that, because of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemma: whether by remaining silent, to lose the testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying on the other. Obviously no such dilemma exists where the balance of risk and advantage in respect of testifying is substantially the same as to each count. Thus unless the "election" referred to by appellant is to be regarded as conclusive -- and we think it should not be -- no need for a severance exists -- until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information -- regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other -- to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.⁸⁰

Despite the fact that it has been stated that the "prime consideration in determining whether or not to grant a severance is the possibility of prejudice to the defendant in conducting his defense,"⁸¹ most courts have adopted the Baker rationale and require strong showings of prejudice.⁸² Not only must the prejudice shown be substantial, but it

80. Id.; 401 F.2d at 976-77 (footnotes omitted) (emphasis added).

81. Johnson v. United States, 356 F.2d 680, 682 (8th Cir.), cert. denied, 385 U.S. 857 (1966).

82. United States v. Armstrong, 621 F.2d 951 (9th Cir. 1980); United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976); United States v. Williamson, 482 F.2d 508 (5th Cir. 1973); United States v. Weber, 437 F.2d 327 (3rd Cir.) cert. denied, 402 U.S. 932 (1971).

must also be actual.⁸³ Unless an accused is capable of meeting the mandates of Baker v. United States and virtually demonstrating that he "is placed in the untenable position of either offering no defense or seeing his defense to one court prove the Government's case on another,"⁸⁴ relief from the prejudicial confusion of his defenses will be unavailable.

2. Inference of Criminal Disposition

One of the most fundamental evidentiary rules, in the federal and military courts, is that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."⁸⁵ In Drew v. United States, it was held that this prejudice would justify the severance of joined offenses unless the evidence as to each offense would be admissible in trials of the other charges⁸⁶ or, even if not so admissible, the evidence as to each of the charges was sufficiently separate and distinct as to preclude the possibility that the jury used some to support or corroborate the rest.⁸⁷

In Bradley v. United States, the rationale underlying the assertion that mutually admissible evidence would negate any additional prejudice occasioned by the joinder of offenses was reexamined.⁸⁸ Further, the Court elaborated upon the theories under which a finding of mutual admissibility can be based, especially proof of motive and identity.⁸⁹ It

83. Cf. Blunt v. United States, 404 F.2d 1283 (D.C. Cir. 1968), cert. denied, 394 U.S. 909 (1969) (claim of prejudice rejected because defendant testified without stating that he desired to limit his testimony).

84. United States v. Eason, 434 F.Supp. 1217 (D.C. La. 1977).

85. Rule 404(b), Federal Rules of Evidence. See supra text accompanying note 44. The standard in military practice is the same because Rule 404(b), Military Rules of Evidence, is taken, verbatim, from the Federal Rule.

86. Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964).

87. Id. at 91-92. See also United States v. Halper, 590 F.2d 422, 431 (2d Cir. 1978).

88. 433 F.2d 1113, 1118 (D.C. Cir. 1969).

89. Id. at 1119.

was emphasized that even when evidence is introduced for these reasons, its probative value must outweigh its prejudicial effect -- it "must promise a real contribution in the process of proof . . . , for otherwise its help will be surpassed by its hurt."⁹⁰ However, it is not necessary for the "other crime" to be factually identical to the central one. Instead, it is sufficient if the common details are appreciably probative to outweigh the potential harm to the defendant.⁹¹ The Court concluded that if, within these guidelines, evidence of the individual offenses would be admissible in trials of the others, the prejudice from an inference of "criminal propensity" is not aggravated by the joinder of the offenses and severance under Fed. R. Crim. P. 14 is unnecessary.⁹²

In United States v. Foutz,⁹³ the accused had been charged with the robbery of the same bank two times, two and one half months apart. He asserted that he was prejudiced, under Fed. R. Crim. P. 14, by the fact that the jury was presented with evidence of both robberies. It was recognized, as in Drew and Bradley, that when "same or similar character" offenses are joined an accused may be prejudiced by the resulting inference of criminal propensity in the minds of the jurors. The prosecution had argued that the evidence of one robbery would have been admissible to show the identity of the accused because of a distinctive modus operandi, especially the use of the defendant's automobile at one of the incidents. The court, however, found no compelling similarities between the offenses, determined that the evidence of one would not have been admissible in a trial of the other, ruled that the trial judge had abused his discretion in denying the severance motion, reversed the convictions and remanded the case for separate trials.⁹⁴

Despite the recognition that "even when cautioned, juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one,"⁹⁵ courts have liberally found that evidence was

90. Id. (footnote omitted).

91. Id. at 1120-21.

92. Id. at 1121.

93. 540 F.2d 733 (4th Cir. 1976).

94. Id. at 736-39.

95. United States v. Smith, 112 F.2d 83, 85 (2d Cir. 1940).

mutually admissible, thus effectively countering claims of prejudice caused by the joinder of offenses.⁹⁶

3. Cumulation of Evidence

Prejudice from the cumulation of evidence arises when a jury is unable to properly restrict evidence to the crime or charge to which it is relevant.⁹⁷ This type of prejudice is critical to a thorough Fed. R. Crim. P. 14 analysis in two respects. First, the cumulation of evidence has been identified as one of the prejudices which can stem from even the proper joinder of offenses under Fed. R. Crim. P. 8(a).⁹⁸ Secondly, the absence of such a likelihood of cumulation, because the evidence as to each charge is simple, distinct, and separate from the evidence as to the other charges, is a factor upon which courts will rely in finding no prejudice from the inference of criminal disposition as discussed in Section B 2, above.⁹⁹ Thus, even when criminal predisposition prejudice exists because the evidence was not mutually admissible, relief under Rule 14 will be denied if the evidence as to each offense is sufficiently separate and distinct to belie the possibility that the jury considered it cumulatively.¹⁰⁰ On the other hand, an assertion of prejudicial cumulation of evidence must be supported by a showing of a "clear likelihood of confusion on the part of the jury"101

96. See United States v. Dennis, 645 F.2d 517 (5th Cir. 1981); United States v. Jordan, 602 F.2d 171 (8th Cir.), cert. denied, 444 U.S. 878 (1979); United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977); United States v. Park, 531 F.2d 754 (5th Cir. 1976); United States v. Roe, 495 F.2d 600 (10th Cir.), cert. denied, 419 U.S. 858 (1974); Hill v. United States, 418 F.2d 449 (D.C. Cir. 1968). But see United States v. Raghianti, 527 F.2d 586 (9th Cir. 1975) (The fact that one of the charges was supported by very weak evidence was considered important in determining that there was a great risk of criminal predisposition prejudice).

97. See supra text accompanying note 44.

98. See Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

99. See United States v. Lotsch, 102 F.2d 35, 36 (2d Cir.), cert. denied, 307 U.S. 622 (1939).

100. Drew v. United States, 331 F.2d 85, 91-92 (D.C. Cir. 1964).

101. United States v. McGruder, 514 F.2d 1288, 1290 (5th Cir. 1975).

In practice, a claim of this form of prejudice is rarely found sufficient to justify or require relief under Rule 14.¹⁰² In addition to an examination of the evidence, some of the criteria focused upon in finding no "reasonable ground for thinking that the jury could not keep separate what was relevant to each"¹⁰³ have included the instructions to keep the evidence separate given to the jury,¹⁰⁴ and acquittals of some of the charges.¹⁰⁵ One court even went so far as to find that there was no danger of cumulation of evidence because all of the evidence was mutually admissible.¹⁰⁶

IV. Comments and Criticisms

Various aspects of the operation of joinder law have been subjected to considerable criticism from the academic and judicial communities. Predictably, much of this commentary has concerned the joinder of "same or similar character" offenses in the contexts of both Rules 8(a) and 14.

In the former case, most of the disagreement revolves around whether the savings to the government are substantial enough to outweigh the prejudice necessarily suffered by the accused. Even the underlying concept of balancing prejudice against economy has come under attack. As one noted commentator has stated:

It is novel doctrine that the right of an accused to a fair trial can be balanced against competing considerations of efficiency. The insistence on fairness to criminal defendants has led, in recent years, to a number of rules that may permit guilty persons to go free, rather than risk injustice to an innocent person. It seems strange indeed that one presumably innocent may be made to undergo

102. 1 C. Wright, supra note 42, at § 222.

103. *United States v. Claytor*, 52 F.R.D. 360, 363 (S.D.N.Y. 1971).

104. *United States v. Pacente*, 503 F.2d 543 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974); *Hill v. United States*, 418 F.2d 449 (D.C. Cir. 1968).

105. *United States v. McClintic*, 570 F.2d 685 (8th Cir. 1978); *United States v. Lewis*, 547 F.2d 1030 (8th Cir. 1976).

106. *United States v. Jamar*, 561 F.2d 1103 (4th Cir. 1977).

something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not "substantial," merely to serve the convenience of the prosecution.¹⁰⁷

Just as most of the litigation in this area has been in reference to Rule 14, so has much of the scholarship. One of the principle criticisms of this rule concerns the way it has been interpreted by the courts. The judicial inclination has been

to presume that if joinder is properly pleaded under Rule 8 then joint trials should follow. This places a heavy burden on a defendant moving under Rule 14 If the criteria for joinder under Rule 8 contained some minimum guarantees of fairness, then the way the courts administer Rule 14 might be justifiable. But there is no indication that the draftsmen of Rule 8 . . . went much beyond considerations of trial convenience.¹⁰⁸

Similarly, "[g]iven the evident reluctance of trial and appellate courts to grant separate trials under Rule 14, a broad interpretation of Rule 8 means broad joinder, whether or not this is just or fair."¹⁰⁹

Some of the judicially created exceptions which have been relied upon to uphold the joinder of offenses have also been questioned and rejected by some courts. For example, the "simple and distinct evidence" exception which has been applied when evidence as to several offenses is not mutually admissible¹¹⁰ was found inapplicable in United States v. Foutz on the grounds that distinctiveness of evidence in no way reduces the danger that the jury will believe the accused to be an habitual criminal.¹¹¹ Similarly, the theory that a judge's instructions were

107. 1 C. Wright, supra note 42, at § 141. See also United States v. Halper, 590 F.2d 422, 430 (2d Cir. 1978).

108. 8 W. Moore, supra n.42, at § 14.02[1] (footnotes omitted).

109. 1 C. Wright, supra n.42, at § 141.

110. See Section B II c, supra.

111. United States v. Foutz, 540 F.2d 733, 738 n.5 (4th Cir. 1976).

sufficient to negate the possibility that the jury did not cumulate evidence has been criticized.¹¹²

Given these inequities in the practical operation of Fed. R. Crim. P. 8(a) and 14, it is not surprising that the total abolition of "same or similar character" offense joinder has been advocated on more than one occasion.¹¹³ In reaching this conclusion, one leading authority opined:

Abandonment of similar offense joinder will not greatly expand expenditures of time and money by either the parties or the courts. The historical development of similar offense joinder indicates that it was not designed to produce savings. Moreover, since the offenses on trial are distinct, trial of each is likely to require its own evidence and witnesses. The time spent where similar offenses are joined may not be as long as two trials, but the time saved by impanelling only one jury and by setting the defendant's background only once seems minimal. Finally, the lack of utility in similar offense joinder may be indicated by state practice. At present two thirds of the states make no provision for this type of joinder, and it seems reasonable to assume that they either have found its savings to be negligible or have determined that any savings are outweighed by the prejudice caused by joinder.¹¹⁴

It is significant that the American Bar Association has apparently adopted the approach of the various commentators.¹¹⁵ In an attempt to eliminate the "unguided discretion and unarticulated premises" which are prevalent in today's joinder practice, the ABA seeks to provide

112. *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959).

113. 1 C. Wright, *supra* note 42, at § 143; Note, Joint and Single Trials, *supra* note 14, at 566.

114. Note, Joint and Single Trials, *supra* note 14, at 560.

115. Standards, *supra* note 6.

"identifiable standards" which can uniformly and fairly be applied.¹¹⁶ In so doing, all offenses are defined as either "related" or "unrelated." The former are those "based upon the same conduct, upon a single criminal episode, or upon a common plan."¹¹⁷ This type of offense corresponds directly to those defined as being based "on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan" under Fed. R. Crim. P. 8(a).¹¹⁸ All other offenses, including those of the same or similar character, are "unrelated."¹¹⁹

The initial joinder of all offenses against a single defendant, both related and unrelated, is encouraged.¹²⁰ However, the ABA recognizes that the joinder of unrelated offenses results in minimal benefit to the government and maximum potential prejudice to the accused from an inference of criminal predisposition, the cumulation of evidence, and the confusion of defenses.¹²¹ Therefore, following this unlimited initial joinder, both the defendant and the prosecution have an absolute right to the severance of unrelated offenses.¹²² This position was taken in direct response to the fact that the authorization of "same or similar character" offense joinder resulted in a severely restricted right to severance when the equities of the situation would have warranted it.¹²³

Similar to the provisions of Fed. R. Crim. P. 14, the ABA would also grant the severance of related offenses if necessary or appropriate to reach "a fair determination of the defendant's guilt or innocence of each

116. Id. at Implementation Suggestions.

117. Id. at Standard 13-1.2.

118. Id. at Standard 13-1.2, Commentary.

119. Id. at Standard 13-1.3, Commentary.

120. Id. at Standard 13-2.1.

121. Id. at Standard 13-2.1, Commentary. At the same time, it was recognized that in certain situations an accused might actually prefer the joinder of unrelated offenses.

122. Id. at Standard 13-3.1(a).

123. Id. at Standard 13-3.1(a), Commentary.

offense."¹²⁴ By placing this emphasis on fairness, the ABA "establishes the priority of fairness over other arguably relevant considerations (such as expense, efficiency, or convenience)."¹²⁵ In addition, the trial judge's unbridled discretion under Fed. R. Crim. P. 14, which can only be reviewed for abuse of discretion at the appellate level, has been replaced by the mandate to "consider among other factors whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense" in ruling whether a fair determination of guilt or innocence is possible.¹²⁶ The importance of this provision is that it subjugates the interest of economy to "the fact finder's ability to separate the facts and the law applicable to each count" ¹²⁷

In sum, the ABA's proposal would track the present federal joinder practice in all but two respects. First, it would grant an absolute and unlimited right to sever unrelated ("same or similar character") offenses. Second, it would shift the emphasis on the severance of related (same, connected, and common scheme) offenses to the "fair determination" of guilt or innocence, rather than requiring a showing of substantial prejudice which outweighs the economic benefits to the prosecution. In this way, an accused's fundamental and constitutional right to due process is guaranteed by insuring that his guilt to a charged offense is proven beyond a reasonable doubt by facts and evidence rather than by conjecture, inference, presumption, or confusion.¹²⁸

V. Military Application

Military courts have held that the Federal Rules of Criminal Procedure are not applicable in courts-martial.¹²⁹ However, federal courts

124. Id. at Standard 13-3.1(b).

125. Id. at Standard 13-3.1(b), Commentary.

126. Id. at Standard 13-3.1(c).

127. Id. at Standard 13-3.1(c), Commentary.

128. See *United States v. Jones*, 2 USCMA 80, 85, 6 CMR 80, 85 (1952).

129. *United States v. Keith*, 1 USCMA 442, 448, 4 CMR 34, 40 (1952); *United States v. Carter*, 4 M.J. 758, 760 (ACMR 1977), pet. denied, 5 M.J. 115 (CMA 1978).

have recognized the prejudice analysis under Fed. R. Crim. P. 14 is fraught with inherent due process and fundamental fairness considerations.¹³⁰ The United States Court of Appeals for the Sixth Circuit has specifically determined that the three types of potential prejudice discussed above -- the confusion of defenses, the inference of criminal disposition, and the cumulation of evidence -- have direct due process implications.¹³¹ In effect, the Federal Rules of Criminal Procedure are designed and intended to protect the fundamental fairness of a criminal proceeding.¹³² If the guidance of Fed. R. Crim. P. 8(a) and 14 is adhered to, an accused's due process rights will be granted.¹³³ In military practice, therefore, motions for the severance of offenses should be couched in terms of due process and fundamental fairness. Trial defense counsel should extract applicable concepts and principals from the Fed. R. Crim. P. 8(a) and 14 practice to demonstrate how their clients will be denied a fair trial by the joinder of offenses.

Indeed, military precedent in related areas parallels federal law and provides a basis for argument by defense counsel. It is generally recognized that uncharged misconduct admitted against an accused may, if not relevant to an issue at trial, unfairly prejudice an accused by implying general criminal character.¹³⁴ Additionally, charging one transaction in multiple charges may prejudice an accused by making him seem a "bad person" and deprive him of due process.¹³⁵ Logically, it is neither more fair nor less prejudicial to an accused, in relation to a particular offense, to have unrelated misconduct charged.

130. Alvarez v. Wairwright, 607 F.2d 683, 685 (5th Cir. 1979).

131. Corbett v. Bordenkirsher, 615 F.2d 722, 724-26 (6th Cir. 1980), cert. denied, 449 U.S. 853 (1980).

132. See United States v. Ciancuilli, 476 F.Supp. 845, 846-47 (E.D. Pa. 1979) (due process is an inherent part of Fed. R. Crim. P. 14 analysis and is usurped when jurors are unable to sort out the evidence and impartially determine guilt or innocence).

133. See Brandenburg v. Steele, 177 F.2d 279, 280 (8th Cir. 1949). Cf. Moore v. Knowles, 482 F.2d 1069, 1075 (5th Cir. 1973) (under the Federal Rules of Civil Procedure, "joinder must be accomplished with the requirements of due process in mind").

134. Mil. R. Evid. 404(b). See United States v. Barus, 16 M.J. 624 (AFQMR 1983).

135. United States v. Sturdivant, 13 M.J. 323 (CMA 1982).

VI. Conclusion

In striking the initial balance between judicial economy and a fair trial, it is important to keep in mind that the joinder of offenses is equally prejudicial to military and civilian accuseds. However, the burden on the prosecution in the military is far less onerous than in federal practice because not as much additional time or expense is required to empanel multiple juries. Most active general court-martial jurisdictions maintain several standing court panels -- thus obviating much of the impediment to conducting separate trials. In the case of what the ABA characterizes as "unrelated" offenses, an accused would be afforded a fairer trial through the severance of offenses while the prosecution would merely be put to the task of re-introducing background and character evidence. Trial defense counsel should also not hesitate to object to the joinder of offenses on due process grounds in cases which present the type of prejudice which would arguably result in severance under Fed. R. Crim. P. 14. In select cases, strong and convincing arguments can be made by relying on the guidelines and standards which have developed in federal forums.

Trial defense counsel can provide a valuable service to their clients by insuring that their constitutional right to a fair trial is not rendered subservient to the simple convenience of the prosecution. By tailoring arguments in selected cases to fundamental due process criteria and considerations developed in the federal courts as well as by legal scholars and the American Bar Association, a far less sensitive multiple charging military criminal law system driven by the rigid application of Paragraph 30g, of the Manual for Courts-Martial can be replaced by the fairer and more individualized consideration of isolated and unrelated criminal allegations.

SIDEBAR

Introduction

This segment of Sidebar opens with a discussion by Captain DiGiammarino on the procedure for laying a foundation prior to presenting character evidence under Mil. R. Evid. 405. The discussion contains sample questions and citations to relevant authority.

Captain Yee notes two recent Supreme Court decisions, Michigan v. Long, ___ U.S. ___, 1035 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), which ruled that a "Terry frisk" can extend to the interior of a car, and Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), where the Court altered the traditional application of the Aguilar/Spinelli reliability test. Captain Yee suggests approaches for minimizing the impact of those cases.

The wording of the convening authority's action can alter the intended effect of a negotiated sentence limitation which includes a suspension of punishment. Captain Yee discusses the necessity for careful draftsmanship to avoid unintended results for our clients.

Finally, this installment of Sidebar concludes with a discussion by Captain Liebross of the issues surrounding administrative credit for pretrial confinement.

Laying a Foundation for Character Evidence

A logically organized presentation of defense evidence during a court-martial promotes believability in the defense's theory of the case. An organized presentation is especially important in trials before court members because many members are familiar with and expect the meticulous organization of their service school training and command presentations. A disorganized presentation of defense evidence may prevent the court members from readily grasping and understanding critical defense testimony.

Character evidence will lack coherence if it is constantly interrupted by an opponent's objections. Laying a proper foundation for the admission of character evidence should preclude most objections relating to the admissibility of character evidence. Furthermore, by properly laying an adequate foundation, counsel will be able to present this testimony in an organized and more persuasive manner to the trier of fact.

Military Rule of Evidence 405 establishes how character testimony may be offered at trial. The Rule provides three techniques: (A) reputation evidence; (B) opinion evidence; and (C) evidence of specific instances of conduct.

A. Reputation Evidence

To establish a foundation for the admission of reputation character evidence, the following facts generally must be established:

1. The witness is a member of the same community where the accused works, resides, or socializes. See Mil. R. Evid. 405(d).
2. The witness has resided there long enough to have learned the accused's reputation in the community.
3. The accused has a reputation for a relevant character trait. See, e.g., United States v. Clemons, 16 M.J. 44 (CMA 1983).
4. The witness knows the reputation of the accused.

This foundation demonstrates that the witness is familiar with the accused's reputation and is competent to speak for the community. The substance of the testimony should relate both to a time contemporaneous with the charged offenses and to relevant character traits. United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981) (drafters of Federal Rules of Evidence did not intend to preclude proof of such a general trait as lawfulness; only restriction is that character trait must be relevant). See generally 2 J. Weinstein and M. Berger, Weinstein's Evidence Para. 405[02] (1982).

Consider the following factual situation involving an assault prosecution against Private Apple as an example. During the presentation of its evidence, the defense has Sergeant Wilson testify as a character witness for the accused. The number within the parentheses indicates the element of the foundation to which the question corresponds.

Q: Do you know Private (PVT) Apple? (1)

A: Yes, he is seated there at the counsel table and is a member of my squad.

Q: Do you supervise PVT Apple? (1)

A: Yes.

Q: How long have you supervised PVT Apple? (2)

A: For 16 months.

Q: Where do you live? (1)

A: In room 318, Alpha Company billets, Building 1346, Fort Swampy.

Q: Where does Private Apple live? (1)

A: In the same billets in room 312.

Q: How long have you and Private Apple lived in the same billets? (2)

A: Nine months.

Q: Have you ever socialized in a group with Private Apple? (1)

A: Yes, we bowl on the same team in the Post Bowling League.

Q: Does Private Apple have a reputation for violence or peacefulness at Fort Swampy? (3)
(or "Does Private Apple have a reputation as a law-breaking or law-abiding person at Fort Swampy?")

A: Yes.

Q: Do you know that reputation? (4)

A: Yes.

Q: What is that reputation?

A: He's known as a peaceful person. (Or "He's known as a moral, law-abiding person.")

B. Opinion Evidence

To establish a foundation for opinion character evidence the following items should be presented:

1. The witness is personally acquainted with the accused.

2. The witness knows the defendant well enough to have formed a reliable opinion of the accused's character.

3. The witness has an opinion of the accused's character.

Returning to Private Apple's assault prosecution, his trial defense counsel could ask the following questions to establish a sufficient foundation.

Q: Do you know PVT Apple? (1)

A: Yes, he is a member of my squad.

Q: Where does PVT Apple live? (1)

A: In room 318, Alpha Company billets, Building 1346, Fort Swampy.

Q: How long has he lived there? (2)

A: Nine months.

Q: Where do you live? (2)

A: In the same billets in room 312.

Q: How long have you lived there? (2)

A: For 13 months.

Q: Do you supervise PVT Apple during the duty day? (2)

A: Yes, I am his immediate supervisor.

Q: How long have you supervised him? (2)

A: For 16 months.

Q: How well do you know him? (2)

A: I consider him to be a comrade in arms and a good friend.

Q: Do you have an opinion whether he is a violent or peaceful person? (3)

(Or "Do you have an opinion whether he is a law-breaking or law-abiding person?")

A: Yes.

Q: What is your opinion?

A: In my opinion, he is a peaceful person.
(Or, in my opinion, he is a moral, law-abiding person.)

During the direct examination of a witness, the proponent of character evidence cannot inquire into specific instances of conduct of the accused upon which the witness may be basing his opinion of the accused's character. Once the defense brings forth testimony regarding an accused's good name and character, however, the trial counsel may test the credibility of such witnesses through cross-examination concerning specific instances of the accused's conduct. Mil. R. Evid. 405(a). The prosecution's cross-examination must meet the two requirements for inquiry into specific misconduct: (1) the prosecutor had a good faith factual basis for the question; and (2) the incident was inconsistent with the character traits for which the defense witnesses had vouched. See United States v. Glass, 709 F.2d 669 (11th Cir. 1983); S. Saltzburg, L. Schinasi, and D. Schleuter, Military Rules of Evidence Manual 189 (1981). When a defense counsel decides to call character witnesses he should be careful about the breadth and scope of character traits he puts into evidence so as to limit the range of government cross-examination. For instance, under the standards adopted in Glass, almost any misconduct would seem pertinent to rebut evidence that an accused is a law-abiding person.

During redirect examination, however, the trial defense counsel may rehabilitate this witness by asking a question such as:

Q: Why do you believe that PVT Apple is such a peaceful person?

A: On different occasions during the past two months, I have seen PVT Apple break up two fights in a local bar and also merely walk away from an ill-mannered, drunken G.I. after the G.I. hit PVT Apple for no reason.

The trial defense counsel could elicit further elaboration upon these examples of the accused's peacefulness during his redirect examination.

If, during the trial counsel's cross-examination of a defense character witness, the witness denies having heard or having knowledge of an adverse act as asserted by the prosecutor, the court members may believe that this witness is not being truthful. Trial defense counsel should consider requesting instructions that information contained in questions is not directed toward proving the conduct of the accused but only toward aiding the members in evaluating the credibility of the witness.

C. Specific Instances of Conduct

Military Rule of Evidence 405(b) permits the proof of character through evidence of specific instances of conduct when character or a trait of character is "an essential element of an offense or defense." For example, assume that Private Apple is charged with the sale of marijuana and asserts entrapment as his defense. His trial defense counsel seeks to offer the testimony of Sergeant Wilson concerning an occasion when a known drug dealer, PVT Load, offered to "front" marijuana to PVT Apple for resale. PVT Apple, as SGT Wilson witnessed, flatly refused. The trial defense counsel offers this evidence to establish that PVT Apple had no predisposition to sell marijuana, an essential element in the entrapment defense.

To establish a foundation to prove character through evidence of specific instances of conduct, these items should be presented:

1. Where the event occurred.
2. When the event occurred.
3. Who was involved.
4. What happened - namely, drug ring leader offered to give drugs to PVT Apple to sell for a profit.
5. The circumstances indicating that on the prior occasions, the accused acted in a law-abiding manner.

The following questions and answers provide an example of how to elicit such a foundation. The witness, SGT Wilson has already identified himself and the accused.

Q: Where were you on the evening of October 24, 1983? (1, 2)

A: I was at the Enlisted Club on post.

Q: Why were you there? (1)

A: I was attending a party.

Q: Who else was there? (3)

A: Many people who are members of the battalion, including PVT Apple and PVT Load.

Q: What happened at the party? (4)

A: While I was playing pool with PVT Apple, PVT Load walked up to the pool table and asked PVT Apple if Apple would help him sell some marijuana. PVT Load told Apple that Apple would receive \$50 for each package he would sell. Load said he could give the marijuana to Apple right then.

Q: What happened next? (5)

A: Private Apple told Load that he would do nothing like that and had no interest in helping Load or any of Load's friends.

Q: Did PVT Apple take the marijuana from PVT Load? (5)

A: No.

The final method of presenting character evidence is peculiar to military practice and does not involve the in-court testimony of a witness. Military Rule of Evidence 405(c) permits the defense to introduce "affidavits or other written statements of persons other than the accused concerning the character of the accused." Use of such statements may only be initiated by the accused, but once used by the defense, Rule 405(c) provides that the Government may use similar evidence in rebuttal. Defense counsel may wish to challenge the government's use of affidavits to rebut defense affidavits as an unconstitutional violation of an accused's right of confrontation under the Sixth Amendment. See Davis v. Alaska, 415 U.S. 308 (1974); United States v. Dorsey, 16 M.J. 1 (CMA 1983).

An affidavit or other statement admitted for the purpose of proving an accused's character must contain sufficient information to establish

the required foundation for the proof of character by either reputation, opinion, or specific instances of conduct evidence. Otherwise, Rule 405(c) does not require any other foundation to be presented for the affidavit's admission. Moreover, a government hearsay objection would not exclude this evidence. Appendix 18-62, Manual for Courts-Martial, United States, 1969 (Revised edition). This form of evidence is an alternative either to in-court testimony when the witness is not present for the trial or to a stipulation of expected testimony when government counsel resists agreeing to the substance of a proposed stipulation. See United States v. Gonzalez, 16 M.J. 58 (CMA 1983).

Character evidence may be sufficient in certain defense cases to raise doubts as to the accused's guilt. Indeed, as recognized by the U.S. Supreme Court and the Court of Military Appeals, testimony concerning an accused's good character "alone, in some circumstances, may be enough to raise a reasonable doubt of guilt." Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948); United States v. Clemons, 16 M.J. 44, 49 (CMA 1983) (Everett, C.J., concurring). The lucid presentation of such evidence by the defense may prompt the court members to adopt the defense theory of the case. An excellent source for other examples of evidentiary foundations is E. Imwinkelried, Evidentiary Foundations (1980).

Protective Searches of Car Interiors

Recently, the Supreme Court established a "bright line" rule that allows law enforcement officials to look into the interior of a car when the occupants of that car could otherwise lawfully be subjected to a "Terry frisk". Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The ruling by the Court is an expansion of the rule originally announced in Terry v. Ohio, 392 U.S. 1 (1968), in which the Court first approved a limited pat-down search of a stopped subject for the protection of the police. This expansion of Terry may result in an increase in the discovery of contraband by military police personnel. Trial defense counsel should be aware that there are a number of threshold questions which must be addressed before such an interior search of a car may be lawful. First, was the stop validly made? If the car was stopped pursuant to an investigative stop, the standards for a "reasonably articulable suspicion" of criminal activity must be met. If these standards are not met, the stop is illegal and the fruits of the illegal seizure would be vulnerable to a motion to suppress. Next, does the law enforcement official have the reasonable suspicion that the subject is "armed and presently dangerous" necessary to trigger the right to conduct a "Terry frisk"? If the law enforcement official is unable to articulate a reason for suspecting that the subject was both armed and presently

dangerous. the official has no right to frisk and no right to look into the car.

If the initial stop of the automobile is "administrative" in nature. the stop must comply with the requirements of Delaware v. Prouse, 440 U.S. 648 (1979), as well as the provisions for gate searches provided for in Mil. R. Evid. 313 and 314. Prouse held that while a random stop of an automobile without reasonable suspicion for the purpose of checking a license violated the Fourth Amendment, a roadblock type stop for all traffic may be permitted. Rules 313 and 314 impose additional requirements which include that a gate search be prompted by a military necessity and a reasonable suspicion that contraband is present in the command or that such a search be previously scheduled. See generally Search and Seizure: A Primer, Part Seven-Domestic Gate Searches, 13 The Advocate 421 (1981).

Apart from gate searches, other intrusions of an automobile's interior are permitted by Michigan v. Long as protective searches. Such intrusions, however, must be grounded upon a law enforcement official's ability to articulate a reasonable suspicion that the subject is both armed and presently dangerous.

Illinois v. Gates Revisited

In the March/April 1983 issue of The Advocate we reported the abandonment of a ritualistic application of the Aguilar/Spinelli reliability test by the Supreme Court. Illinois v. Gates, U.S. ___, 103 S.Ct. 231, 76 L.Ed.2d 527 (1983). Since that decision, two military cases bearing on the application of Illinois v. Gates to the Army have been issued. In United States v. Bollerud, 16 M.J. 761 (ACMR 1983), the Army Court of Military Review held that, notwithstanding the decision of the Supreme Court in Gates, the "spirit of Aguilar lives on in the Military Rules of Evidence" because Mil. R. Evid. 315(f)(2) is a concise adaptation of Aguilar. Recently, however, in United States v. Tipton, 16 M.J. 283 (CMA 1983), the Court of Military Appeals relied on the rationale of Gates to hold that a military police investigator had probable cause to make an apprehension thus validating a subsequent search incident to that apprehension. Although at first blush it would appear that the Court of Military Appeals has adopted the Gates rationale, it may be argued that because the Tipton decision was limited to the propriety of the apprehension, reliance on Tipton in searches authorized under Mil. R. Evid. 315 is misplaced and Bollerud should be followed. Paragraph 19, Manual for Courts-Martial, United States, 1969 (Revised edition), which deals with the authority to apprehend, does not purport to define

the circumstances under which an apprehending official has a "reasonable belief" that the apprehended individual committed a criminal offense. Military Rule of Evidence 315, however, states with specificity the requirements for a validly authorized probable cause search. Counsel should not hesitate to continue litigating the legality of searches when the authorizing official relies on information which does not meet the Aguilar/Spinelli test set forth in Mil. R. Evid. 315.

Problems With the Convening Authority's Action

You have negotiated a pretrial agreement with the convening authority in which the convening authority has agreed to suspend execution of that portion of the sentence pertaining to confinement at hard labor in excess of two months for a period of six months from the date of sentencing. After a provident plea of guilty is entered, the sentencing authority announces a sentence which includes confinement at hard labor for a period of six months. Some time after trial, the convening authority approves the sentence and suspends the execution of that portion of the sentence pertaining to confinement at hard labor in excess of two months for a period of six months. Is there a problem with the action?

The answer is "yes". If the convening authority's action is worded as above, then the period of suspension will run from the date of action. The problem is that the negotiated agreement provided for the period of suspension to run from the date the sentence was adjudged. Such an error may only have a de minimus effect on shorter periods of both confinement and suspension. On the other hand, longer periods of suspension coupled with a delay in post-trial processing may subject an accused to a more extended period of uncertainty than was originally anticipated during which his suspension could be revoked and the full sentence could be executed. Such a scrivener's error may be corrected on appeal if discovered by appellate defense counsel. However, trial defense counsel should closely examine the proposed form of action submitted by the staff judge advocate with his post-trial review for correctness and direct attention to errors in the action in the Goode rebuttal to ensure that the period of suspension is properly computed.

Administrative Credit for Pretrial Confinement

The Court of Military Appeals has recently granted review on the issue of whether the convening authority must grant an accused administrative credit for the days that he spent in pretrial confinement. See United States v. Kildare-Marcano, CM 443517 (ACMR 17 Mar 1983), pet. granted, 16 M.J. 437 (CMA 1983). Kildare-Marcano joins a long list of cases from the Navy-Marine Corps Court of Military Review that have been awaiting decision on the same issue. See, e.g., United States v. Allen, NCMR 82-1285, pet. granted, 14 M.J. 437 (CMA 1982); United States v.

Ameris, NCMR 82-1686, pet. granted, 15 M.J. 321 (CMA 1983); United States v. Holbach, NCMR 82-0115, pet. granted, 15 M.J. 336 (CMA 1983).

The issue arises from a Justice Department regulation, promulgated under the Bail Reform Act of 1966, P.L. 89-465, § 4, 80 Stat. 214, 217 (1966) (Codified at 18 U.S.C. § 3568 (1976) [hereinafter cited as §3568]), which provides:

Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence; Provided, however, that any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which the sentence was imposed.

28 C.F.R. § 2.10(a) (1982) (emphasis in original) [hereinafter cited as § 2.10(a)].

Kildare-Marcano and the Navy cases all argue that because of a Department of Defense Instruction, military prisoners should enjoy the same right as federal prisoners to be given credit for time spent in pretrial confinement:

Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of the Justice Department.

Para. III.Q.6, Dept. of Defense Inst. No. 1325.4, Treatment of Military Prisoners and Administration of Military Correctional Facilities (7 Oct 1968) [hereinafter cited as DOD Inst. 1325.4]. The argument continues that it is error to give effect to individual service regulations, e.g. para. 4-5, Army Reg. 190-47, The United States Army Correctional System (1 Oct. 1978); para. 4(a), Army Reg. 633-30, Military Sentences to Confinement (6 Nov 1964), because Department of Defense Instructions override individual service regulations and any ambiguity in the rules of sentencing must be decided in favor of the accused. See United States v. Baker, 14 M.J. 361, 370 (CMA 1983).

In ruling upon Corporal Kildare-Marcano's claim, the Court of Military Appeals will have to resolve the confusion over the tie between § 3568 and § 2.10(a). Section 3568 exempts prisoners convicted in courts-martial from its mandatory pretrial confinement credit provisions. However, it is not claimed that § 3568 itself applies. Instead, the Department of Justice's published procedures should govern through their incorporation by reference in DOD Inst. 1325.4.

So far, all the Courts of Military Review that have addressed this issue have rejected these contentions. The seminal case, and the only one that appears to discuss the 1325.4 question in detail, is Hart v. Kurth, 5 M.J. 932 (NCOMR 1978).

The only Army Court of Military Review decision to address the 1325.4 issue in detail is a dissent. Judge Hanft stated, "[Q]uite apart from the technical aspects of the issue. . . credit for pretrial confinement should be given purely on the basis of fundamental fairness. It is just ludicrous in this day and age to maintain that a federal military prisoner should not be given credit for pretrial confinement served when a federal civilian prisoner must be." United States v. Washington, CM 443698 (ACMR 18 Aug 1983) (unpub.) (Hanft, J., dissenting).

Counsel should specifically request the military judge to direct that time spent in pretrial confinement be credited against the adjudged sentence. This request should be renewed in the Goode response. It is important to argue that the accused should receive "administrative credit" and not merely that the confinement be reduced. The former remedy ensures that the accused does not lose any "good time" credit toward his minimum release date from confinement. See United States v. Larner, 1 M.J. 371, 374 (CMA 1976).

In the related area of illegal pretrial confinement, see, e.g., United States v. Bruce, 14 M.J. 254 (CMA 1982), it is important for defense counsel to request more than day for day credit. The defense should argue that since legal confinement requires full credit, a victim of unlawful incarceration should be entitled to more than a day for day credit. Failure to make such a motion at trial would probably result in waiver of the issue because of the wide discretion given to the trial judge in fashioning remedies for illegal pretrial confinement. See United States v. Suzuki, 14 M.J. 491 (CMA 1983).

If Corporal Kildare-Marcano and the Navy appellants lose their cases ,or if DOD Instr. 1325.4 is amended to eliminate the incorporation by reference of § 2.10(a), future military prisoners seeking credit for lawful pretrial confinement will have to find a way around the military exclusion in § 3568. Judge Hanft's dissent in United States v. Washington, supra, may provide the best basis: it violates due process to distinguish between civilian and military prisoners in calculating periods of incarceration.

LAST MINUTE DEVELOPMENTS

THE MILITARY JUSTICE ACT OF 1983

Introduction

The Military Justice Act of 1983 has been signed into law and the majority of its provisions become effective on 1 August 1984. The Act makes several significant changes to the Uniform Code of Military Justice.¹ The impact of these changes includes: a reduction in the convening authority's pretrial and post-trial responsibilities; authorization for the Government to file interlocutory appeals of a military judge's rulings; a streamlining of post-trial procedures, including authorization for an accused to waive or withdraw an appeal to the Court of Military Review; authorization for either party to petition the Supreme Court for certiorari; and the creation of a separate punitive article proscribing drug abuse offenses.

Court-Martial Personnel

Article 25, UCMJ has been amended to allow the convening authority, under regulations prescribed by the Secretary of the Army, to delegate his authority to excuse a court member to his staff judge advocate or to any other principal assistant. Articles 26 and 27, UCMJ, are amended to relieve the convening authority of the duty to detail a military judge, trial counsel, and defense counsel. The amendments allow the Secretary of each service to prescribe appropriate regulations concerning those responsibilities. Article 29, UCMJ allows the military judge to excuse a court member, after assembly, for good cause rather than requiring that the convening authority do so.

Referral of Charges

While the convening authority remains the final authority for referral of charges to general court-martial, Article 34, UCMJ, shifts to the staff judge advocate the responsibility for determining: whether a specification alleges an offense under the UCMJ; whether the specification is warranted by the evidence; and whether the court-martial would

1. Uniform Code of Military Justice 10 U.S.C. § 801 et seq. [hereinafter cited as UCMJ]. For a complete listing of all the amendments to the UCMJ, see Dept. of Army Pam. 27-50-133, The Army Lawyer (January 1984).

have jurisdiction over the accused and the offense. The staff judge advocate must prepare a written conclusion and a written recommendation for appropriate action.

Trial Procedure

Article 16, UCMJ, has been amended to allow oral requests for trial by military judge alone. More importantly, Article 62, UCMJ, now allows the Government to file an interlocutory appeal of any order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a material fact. The provision applies only to courts-martial in which a punitive discharge may be adjudged, requires written notice to the military judge within 72 hours of the ruling, and requires certification by the trial counsel that the appeal is not for the purpose of delay. An appeal involving excluded evidence additionally requires certification that the excluded evidence is substantial proof of a material fact. Any such appeal is to have priority over other proceedings before the Courts of Military Review. Moreover, those courts are limited to act only with regard to matters of law. Delays resulting from interlocutory appeals are to be excluded from any speedy trial determinations.

Post-Trial Proceedings

At the conclusion of the trial, the findings and sentence are to be reported promptly to the convening authority. The defense counsel and the accused may submit matters to the convening authority for his consideration pursuant to Article 38(c) and Article 60(b), UCMJ. However, Article 60, UCMJ, as amended, places a time limit on such submissions ranging from 30 days after the imposition of sentence in a general court-martial or a special court-martial in which a bad-conduct discharge has been adjudged to 7 days for a summary court-martial. An extension of 10 or 20 days may be allowed for good cause. In no case may the accused have less than 7 days from the time he is given a copy of an authenticated record of trial to submit matters to the convening authority.

The amendments also remove the requirement that the staff judge advocate provide a written opinion prior to the convening authority taking action in general courts-martial and special courts-martial in which a punitive discharge has been adjudged. In its place, Article 60, UCMJ, now requires the staff judge advocate to provide his recommendation in those cases prior to action. The content of the recommendation is to be prescribed by Presidential regulation. It is possible that the new reviews will be truncated versions of the old post-trial reviews. The

accused will still have five days to respond to the recommendation and its attachments. Failure to do so constitutes waiver.

Article 60, UCMJ now requires a convening authority to take action only on sentence, not on both findings and sentence as mandated by the old Article 64, UCMJ. Authority to modify findings and sentence remains a matter of command prerogative in the sole discretion of the convening authority. Thus, the convening authority may continue to set aside a finding of guilty to any offense or find an accused guilty of a lesser included offense. The convening authority also retains the power to order a proceeding in revision or a rehearing.

Appellate Review

Review by the Court of Military Review is still available in all cases in which the punishment approved includes a punitive discharge or confinement for at least one year. However, the new Article 61, UCMJ, allows an accused to waive or withdraw an appeal, unless the approved punishment includes death. Waiver must be made in writing within 10 days (extendable to 40 days) after approval by the convening authority and must be signed by the accused and his defense counsel. Withdrawal may occur at any time.

If an accused waives or withdraws his appeal, or if the case is not a general court-martial and Article 66, UCMJ, does not provide for review by a Court of Military Review, Article 64, UCMJ, requires that the case be reviewed by a judge advocate. The judge advocate's review must contain written conclusions as to whether the court had proper jurisdiction; whether the charge and specification stated an offense; and whether the sentence was within the limits prescribed by law. The judge advocate must also respond to each allegation of error made in writing by the accused.

If the approved sentence includes a punitive discharge or over six months confinement or, if corrective action is recommended by the reviewing judge advocate, the case must be sent to the general court-martial convening authority with a recommendation as to appropriate action and an opinion as to whether any action is required as a matter of law. If the reviewing judge advocate opines that corrective action is mandated and the convening authority does not take at least the recommended action, the case must be forwarded to the Judge Advocate General for review pursuant to Article 69, UCMJ.

The record of trial in each general court-martial in which Article 66, UCMJ, does not provide for review by a Court of Military Review shall be reviewed by The Judge Advocate General, if the accused has not waived or withdrawn his right to appeal. Article 69, UCMJ, has been amended to give The Judge Advocate General the power to assess the appropriateness of a sentence.

Article 66, UCMJ, has been amended to specifically allow a Court of Military Review to sit en banc to reconsider the decision of a panel. Article 67, UCMJ, no longer mandates review by the Court of Military Appeals of all cases involving a general or flag officer. Most importantly, Article 67, UCMJ, now provides that decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari. Supreme Court review can only occur if the Court of Military Appeals has acted on the case in some manner. Mere refusal to grant a petition for review is not grounds for review by the Supreme Court.

New Punitive Article

To highlight the concern of the military over the use of illegal drugs, a new punitive article has been added. Article 112a, UCMJ, prohibits the wrongful use, possession, manufacture, distribution, importation, export, or introduction of controlled substances. In addition to naming some specific drugs, the article allows the President to prescribe additional substances for inclusion in the Article 112a, UCMJ, prohibition. Moreover, the article makes direct reference to the substances specified in schedules I through V of § 202 of the Controlled Substances Act, 21 U.S.C. § 821 (1978).

Miscellaneous Changes

Other changes in the new code include a prohibition, in Article 38, UCMJ, against regulations which limit the availability of a requested defense counsel solely on the grounds that the selected counsel is in a different service. Articles 57 and 71, UCMJ, now seem to permit all forfeitures, even those involving suspended or deferred confinement, to begin to accrue on the date the sentence is approved. Article 63, UCMJ, has been amended to alter the maximum sentence imposable at a rehearing. If the sentence approved after the first court-martial was reduced below that adjudged, in accordance with a pretrial agreement, the accused now must again comply with all the provisions of that agreement or the maximum sentence imposable at the rehearing, as to those charges and specifications, may include any punishment not in excess of that lawfully adjudged at the first court-martial.

Amendments to 10 U.S.C. §§ 1552 and 1553 impose limitations on the powers of the Board for the Correction of Military Records and the Discharge Review Board. With regard to records of courts-martial and related administrative records, the boards may now only perform acts of clemency. The boards retain the power to correct records to reflect actions taken by other reviewing authorities.

The Military Justice Act also requires the Secretary of Defense to establish a commission to study: 1) whether the sole sentencing authority in all non-capital cases should be the military judge; 2) whether a military judge and the Courts of Military Review should have the power to suspend sentences; 3) whether the power of a special court-martial should be expanded to include confinement for up to one year; and 4) whether military judges at both the trial and appellate levels should have tenure.

PRETRIAL CONFINEMENT

As The Advocate went to press, the Court of Military Appeals handed down its decision in United States v. Allen, 17 M.J. 126 (CMA 1984). In Allen, the Court required that administrative credit be given to all servicemembers sentenced to confinement, for each day spent in pretrial confinement. Although the Court has ruled in Allen, many questions remain and much of CPT Liebross' discussion remains relevant. Counsel should continue to seek more than day for day credit in cases of illegal pretrial confinement. Moreover, in cases in which the sentence adjudged does not include confinement, counsel should suggest that the convening authority adhere to the "spirit" of Allen and reduce the forfeitures portion of the adjudged sentence. See United States v. Lee, 13 M.J. 181 (CMA 1982); United States v. Allen, 20 USCMA 317, 43 CMR 157 (1971); United States v. Garza, 20 USCMA 536, 43 CMP 376 (1971); Paragraph 127c, Manual for Courts-Martial, United States, 1969 (Revised edition). Finally, the language of the Department of Justice regulation referred to in DOD Message 1325.4 uses the term "custody" when referring to pretrial confinement. Therefore, counsel should argue that days spent in rigorous restriction, perhaps akin to the type of restriction which may be included when computing the length of pretrial confinement for the purpose of the "Burton 90 day rule," should entitle the accused to administrative credit.

Major General Walter A. Bethel was appointed The Judge Advocate General on 15 February 1923. He considered the crossed pen and sword, emblem of The Judge Advocate General's Corps since 1890, to be not sufficiently symbolic of the judge advocate's function. He wished to change the insignia to the emblem depicted on the front cover: "A balance upheld by a Roman sword and ribbon blindfold." The sword represented the military character of the judge advocate's mission and the Romans were among the earliest great lawgivers. The balance or scales was the symbol of justice. The design was taken from the bronze zodiac signs ornamenting the floor of the main reading room of the Library of Congress. Colonel John A. Hull, The Judge Advocate General immediately following MG Bethel, did not support the new insignia and procured a rescission of the still pending change. (From The Army Lawyer: A History of the JAG Corps, 1775-1975).

