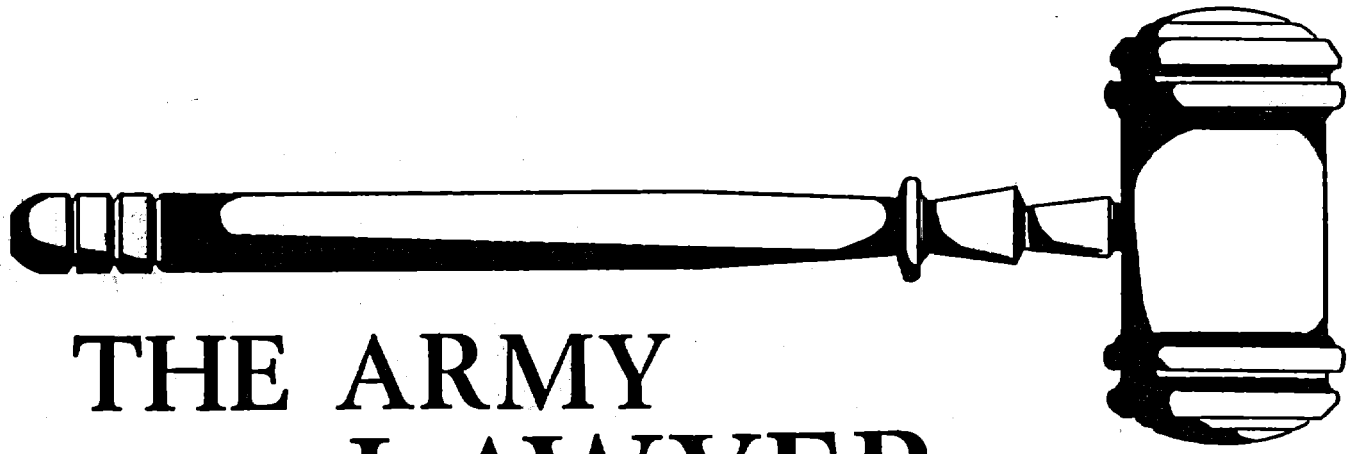

THE ARMY LAWYER

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The Fourteenth Kenneth J. Hodson Lecture in Criminal Law

The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Decisions of the United States Supreme Court

Charles H. Whitebread
The George T. Pfleger Professor of Law
University of Southern California,
Los Angeles, CA

The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson, who served as The Judge Advocate General from 1967-1971 and as Chief Judge, U.S. Army Judiciary from 1971-1973. General Hodson wrote and sponsored much of the federal military justice legislation existing today. In addition to his many accomplishments, he was a member of the original staff and faculty at TJAGSA in Charlottesville.

On 12 April 1985, Professor Charles H. Whitebread, the George T. Pfleger Professor of Law at the University of Southern California delivered the Fourteenth Kenneth J. Hodson Lecture in Criminal Law at TJAGSA. Professor Whitebread has written several books, numerous law review articles, and reports for such national commissions as the President's Commission on the Causes and Prevention of Violence and the National Commission on Marijuana and Drug

Abuse. Professor Whitebread is also on the faculty of the FBI National Academy in Quantico, Virginia.

Following is the text of Professor Whitebread's lecture.

There are few legal topics more exciting than the United States Supreme Court's recent decisions in criminal cases. As my title indicates, I think it clear the majority of the present Supreme Court has restructured the balance between the state and the accused in dramatic ways to favor the state and make convictions easier to secure.

Let me begin by presenting the major themes and agenda I see the Court pursuing; then, I will discuss those cases that document my analysis. First, with the accession of Justice O'Connor to replace Justice Stewart, it is now clear that the crime control model of the criminal process commands a majority of the present Court. A strong majority of the Court is eager to accommodate what they perceive as legitimate needs of effective law enforcement. The majority today wants to assist the law enforcement effort whenever possible and is not simply grudging but eager to eliminate legal obstacles to effective enforcement of the criminal law. Their zeal has produced what amounts to a presumption of regularity for police conduct. Whenever a criminal defendant claims the police have violated his constitutional rights, this Court unlike its predecessor almost assumes the police have acted correctly and places a very strong burden on the complaining citizen to demonstrate the unlawfulness of the police conduct. It may not overstate the contrast to say that while the Warren Court often worried that there existed a great gap between what the Constitution contemplates the police should do and actual police practice, the Burger Court majority believes the police comply with the constitutional ideal most of the time. The difference in perspective explains the present ascendance at the Court of the crime control philosophy.

Second, over the past decade—not just this past Term—the Burger Court in criminal cases has established a hierarchy among the provisions in the Bill of Rights. For this Court some constitutional rights of the criminal defendant are entitled to closer scrutiny than others. The single criterion against which this hierarchy is built is how much impact does the right in question have on the guilt determination at trial. Put another way, how positive an impact does the right in question have on what this Court sees as the ultimate mission of the criminal justice system—to convict the guilty and let the innocent go? Those trial-based rights such as the right to jury trial, the right to counsel, and the right to public trial sit at the top of the hierarchy and receive the closest scrutiny and most sympathetic attention from the Court. Halfway down the totem pole and dividing the more important rights from their lesser brothers is the fifth amendment right to be free from compelled self-incrimination. In their analysis of confessions the Court establishes its policy concerns most vividly. Truly involuntary statements must be excluded because they are unreliable evidence and as such undermine the quality of fact finding at trial. In contrast, failure of the police to comply with what this Court likes

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Captain Debra L. Boudreau

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LTT

15 MAR 1985

SUBJECT: Medical Care and Property Damage Recovery (UP Chapter 5, AR 27-40)--Calendar Year 1984 Statistics

ALL STAFF JUDGE ADVOCATES

1. I commend the many of you whose excellent programs produced record high recoveries in 1984 for both medical care ($8.5 million) and property damage ($1.4 million). The total for both medical care and property recovery is now nearly $10 million, a combined increase of $675,000 from 1983.

2. From reviewing the statistics on each installation, however, it is clear some of you need to improve. These offices should review their programs and put more emphasis and manpower on affirmative recoveries to insure all potential claims are identified, asserted, followed up, and concluded in a timely manner.

3. I challenge each of you to do even better in 1985. Affirmative recovery is an important part of Army fiscal policy and must be a high priority. Wherever recovery is possible, consistent with applicable law and regulation, you must vigorously pursue it.

Hugh J Clausen
HUGH J CLAUSEN
Major General, USA
The Judge Advocate General

(Continued from Page 2)

to call "the prophylactic rules of *Miranda*,[1] can be easily forgiven because the Miranda rules are seen by many on the present Court as technicalities unrelated to the ultimate issues of guilt. At the bottom of the hierarchy is the fourth amendment right prohibiting unreasonable searches and seizures. The majority of the present Court sees some confusion about the purpose of the right itself and considerable skepticism about its remedy—exclusion. In fact, when coupled with its unpopular exclusionary remedy, the fourth amendment can be characterized as having a negative impact on the ultimate mission of criminal justice because courts exclude reliable probative evidence of guilt when they grant defendant's motion to suppress illegally seized evidence. Over the past decade then, the Burger Court has created a hierarchy among defendants' constitutional rights.

The Burger Court's jurisprudential preference for case-by-case analysis rather than announcing their decisions in criminal cases in rules may be their most dangerous characteristic. This third theme shows us the nation's highest court preferring case-by-case jurisprudence which is more suitable to first level trial courts. This Court is reluctant to announce rules that the police, lower courts, and other components of the criminal justice system can understand and apply. Indeed, this Term the Court began to blur some of the rules formerly well established with a new rule for analysis of subtle factual differences from case to case. For over twelve years, I have taught at the FBI National Academy in Quantico, Virginia. I teach 300 state and local police officers each quarter. From that experience, I feel quite fervently the imperative of rule-oriented decision-making in police related cases. It is a major jurisprudential error for any appellate court to leave the police uncertain as to what they may lawfully do until a series of subsequent court decisions have supplied the nice factual distinctions necessary to delineate the line between permissible and impermissible conduct. The police will have no reliable idea of what they may do, many mistakes will be made and, if we use exclusion, guilty people will go unpunished because of police mistakes that would not have occurred had the Court stated an understandable rule to govern police conduct. The *New York v. Quarles* so-call public safety exception to the need to give the *Miranda* warnings is a paradigm of this case-by-case jurisprudence.

The fourth theme of the Burger Court which I first noticed in the early 1970s is this Court's near fixation on the importance of the defendant being guilty. This special attention to the defendant's factual guilt is, of course, a further expression of their concern for crime control and their case-by-case fact-specific style of jurisprudence. The Burger Court really cares about the facts of the case—cares that this particular guilty person not be set free. This somewhat flip observation explains functional differences in both the style of argument at the Court and the development of doctrine. In most criminal cases today, the government will spend considerable time in the brief and during oral argument detailing the facts of the crime the defendant has committed and the evidence of guilt adduced at trial. On the other side, as the ineffective assistance of counsel case will show,[2] the defendant must be prepared to make a colorable claim of innocence or of miscarriage of justice to prevail on many constitutional claims. The concern for factual guilt goes beyond its impact on the style of constitutional argument to explain the evolution of fact specific doctrines such as inevitable discovery,[3] harmless error,[4] and "overriding considerations of the public safety."[5]

The fifth and final agenda of the Burger Court developed very little this Term but remains for me its most enduring legacy—the creation of the new federalism and the resulting transfer of power from federal courts to state courts to interpret the meaning of the U.S. Constitution in state criminal cases. From 1976 to 1984, the Burger Court effectively tried to close the door of federal courts to state prisoners—people con-

[1] Brewer v. Williams, 430 U.S. 387, 438 (1977).

[2] Strickland v. Washington, 104 S. Ct. 2052 (1984); United States v. Cronic, 104 S. Ct. 2039 (1984).

[3] Nix v. Williams, 104 S. Ct. 2501 (1984).

[4] United States v. Hasting, 103 S. Ct. 1974 (1983).

[5] New York v. Quarles, 104 S. Ct. 2626 (1984).

victed in state cases. By limiting access of state prisoners to federal courts for *habeas* review of state court convictions, the Burger Court has insulated state criminal convictions from federal court review, thereby granting state judges considerable unreviewable authority to interpret the meaning of the U.S. Constitution in that state. There was only one relatively minor case this Term pursuing this theme[6] because the Court between 1976 and 1984 nearly completed its new federalism agenda. Nevertheless, this dramatic power transfer from federal courts to state courts may prove the most significant contribution of this Court to the administration of criminal justice in the United States.

Now we can look at some cases that support these themes. In both the 1982 and 1983 Terms of the Court, there were several cases that showed the crime control model ascendant. The crime control juggernaut has gained considerable momentum from the appointment of Justice O'Connor. This Court is eager to accommodate what it perceives as the legitimate needs of effective law enforcement. Take, for example, the open fields case, *United States v. Oliver*,[7] where the Court reaffirmed the open fields doctrine in two cases involving entry onto private property which was fenced and marked with "No Trespassing" signs. Justice Powell, writing for the majority, held that landowners have no reasonable expectation of privacy in fields which are removed from their home even if efforts have been made to bar public access. According to Powell:

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas.[8]

Thus, the police may enter and search a field without a warrant.

Another decision that demonstrates this Court's desire to assist law enforcement is *United States v. Delgado*,[9] which held that a "factory survey" of the entire workforce of a company by Immigration and Naturalization Service agents does not constitute a seizure of the entire workforce. Individual questioning of employees concerning their citizenship is not a detention or seizure contrary to the fourth amendment unless such interrogation is so intensive reasonable persons would not feel free to leave. In approving the use of "factory surveys" the Court acknowledged their indispensibility to enforcement of the immigration laws.

A similar analysis supported the Court's decision in *United States v. Knotts*,[10] which involved the use of a "beeper" to monitor the location of defendant's automobile on public streets. Federal agents placed the beeper in a five gallon container of chloroform, which was subsequently picked up by one Petschen. Although the police followed Petschen's car, they eventually lost sight of it; the police were able to trace the car to the defendant's cabin only because a helicopter was later able to pick up the beeper's signals. On the basis of this and other information obtained during three days of intermittent surveillance of the cabin, a search warrant was obtained; the ensuing search uncovered a drug laboratory.

The Court sanctioned use of the beeper because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[11] Petschen's car was visible to anyone on the public roads; "the fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police re-

[6] Patton v. Yount, 104 S. Ct. 2885 (1984).

[7] 104 S. Ct. 1735 (1984).

[8] 104 S. Ct. at 1741.

[9] 104 S. Ct. 1758 (1984).

[10] 103 S. Ct. 1081 (1983).

[11] 103 S. Ct. at 1085.

ceiver, does not alter the situation."[12] Further, the Court reflected its concern to accommodate law enforcement by permitting the use of enhancement devices saying:

> The fact that officers in this case relied not only on visual surveillance but on the use of the beeper . . . does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.[13]

The Court in *Knotts* approved monitoring the location of Petschen's car by beeper but did not address the propriety of attaching the beeper in the first place. In *United States v. Karo*,[14] the Court said that neither of the following police actions constitute a search or seizure: (1) the initial installation of the beeper; (2) the discovery, using the beeper, of the container's whereabouts and movement. The majority opinions in *Knotts* and *Karo* show the willingness of this Court to approve the use of enhancement devices such as beepers. The definition appears to be based on what one might call an "unlimited resources" rationale: if, assuming unlimited time and personnel, the police could have tracked the evidence without enhancement devices, then their reliance on such aids to their natural faculties as science permits infringes no constitutionally protected privacy interest. The police in *Knotts* and *Karo*, for example, could have visually tracked the containers without the beepers had they kept a twenty-four hour watch.

However, this unlimited resources rationale is of little aid in analyzing the Court's approval of police practices that enhance law enforcement's ability to investigate criminal activity. Some tools the police use to detect evidence not discernible with the naked eye—*e.g.*, field chemical tests and canine sniffs—have also been held not to implicate a right of privacy. In *United States v. Jacobsen*,[15] the Court held that a field test designed to discover only whether the substance tested is cocaine is neither a search or seizure. Similarly, in *United States v. Place*,[16] the Court held that no warrant based on probable cause is required prior to subjecting a traveller's luggage to a sniff by a drug-detecting dog on the theory that odors emanating from one's luggage are held out to the public—or at least to the public dog. The dog sniff implicates no reasonable expectation of privacy and does not therefore amount to a search. The Court sought to justify the "canine sniff" in *Place* by noting that the technique does not involve opening the searched container, nor does it "expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage."[17] Moreover, the information obtained through the sniffing technique is limited to discovering the presence or absence of narcotics. Thus, according to the Court, use of a dog is much less intrusive than the typical search. The fact remains that a dog search *is* intrusive; moreover, a dog's ability to detect contraband by smell far exceeds that of a policeman's and thus arguably also exceeds society's expectations about the degree to which the government will invade the privacy of its citizens. The Court's reasoning might also render use of other detection devices—such as airport magnetometers—immune from fourth amendment scrutiny. Use of these techniques, however, involves a significant invasion of privacy and should at least be subject to some minimum reasonableness requirements.[18]

Jacobsen is also troubling, not so much because of its disposition of the specific case at issue but because it expands upon the rationale underlying *Place* without seeming to recognize the potential consequences. As was true of the canine sniff in *Place*, the field test used in *Jacobsen* apparently revealed only whether or not the substance tested was cocaine; it could not specifically indicate the identity of a substance which was

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[12] *Id.* at 1086.

[13] *Id.*

[14] 104 S. Ct. 3296 (1984).

[15] 104 S. Ct. 1652 (1984).

[16] 103 S. Ct. 2637 (1983).

[17] *Id.* at 2644.

[18] *See* Horton v. Goose Creek Independent School District, 693 F.2d 524 (5th Cir. 1982) (limitations on use of dogs to conduct searches of school children); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (rules for using magnetometer).

not cocaine. Six members of the Court, with Justice Stevens writing the opinion, focused on this fact in concluding that the test did not constitute a search.[19] As Justice Stevens put it:

> Congress has decided—and there is not question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.[20]

The problem with this language, as Justices Brennan and Marshall pointed out, is that it could be read to "allow ... law enforcement officers free rein in utilizing a potentially broad range of surveillance techniques that reveal only whether or not contraband is present in a particular location,"[21] including the home. Such intrusions, argued Justice Brennan, should not be permitted without a warrant in most instances because privacy interests would still be infringed. However, he did concede that under the circumstances of this case, which did not involve intrusion into a home or similarly intimate premises but rather involved a search of transparent plastic bags found in a tube packed in a package shipped via air freight, there was no need to invalidate the warrantless field test. Moreover, "[i]t was essentially inconceivable that a legal substance would be packaged in this manner for transport by a common carrier"; the circumstances were such that the agent should have already been "virtually certain" the substance was contraband.[22]

Finally, in *United States v. Villamonte-Marquez*,[23] customs officials boarded the defendants' vessel to inspect their papers pursuant to 19 U.S.C.A. § 1581(a), which authorizes officers to board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents. While examining a document, the officer smelled what he thought to be burning marijuana and, looking through an open hatch, saw burlap-wrapped bales that proved to be marijuana. Although recognizing that the customs officer had no reason to believe before he boarded the boat that it contained contraband, the Supreme Court, in a 6-3 decision, noted that such boardings are essential to ensure enforcement of the complex documentation requirements for boats. It also points out that "fixed checkpoints" are an impractical means of achieving the document-inspection objective on waterways. Thus, so long as the detention is "brief" and limited to inspecting documents, a suspicionless boarding of a boat by customs officials is constitutional and any evidence spied in plain view is admissible. In reaching this decision the Court relied on "the nature of waterborn commerce" and the fact that boats are often used to smuggle drugs and other contraband to justify the suspicionless boarding of a boat at random,[24] a practice previously denied constitutional sanction when the police stopped at random defendant's car solely to check his license and registration.[25]

All these cases consider dispositive the usefulness of these police practices to law enforcement in the judicial calculus in weighing the citizen's privacy interest against the government's need to detect crime. The present Court is motivated by considerations of crime control and hopes to accommodate as many needs of law enforcement authorities as possible.

My second theme is that the Burger Court has created a hierarchy among the provisions in the Bill of Rights with those rights that are trial-related at the top, the fifth amendment privilege in the middle, and the fourth amendment with its unpopular remedy of exclusion at the bottom. Let's take a look at the attack on exclusionary rule that took place this Term. On this theme, we will examine *United States v. Leon*[26] and *Massachusetts v. Sheppard*,[27] the two cases which extended the good faith defense to admit

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[19] Justice White concurred with the majority on the ground that the cocaine was in plain view.

[20] 104 S. Ct. at 1622.

[21] *Id.* at 1671.

[22] *Id.* at 1672.

[23] 103 S. Ct. 2573 (1983).

[24] *Id.* at 2582.

[25] Delaware v. Prouse, 440 U.S. 648 (1979).

[26] 104 S. Ct. 3405 (1984).

[27] 104 S. Ct. 3424 (1984).

illegally seized evidence when the police rely in good faith on a search warrant later found to be defective.

In *Leon*, the Court held, by a 6-3 margin, that evidence may be used in the prosecution's case-in-chief when obtained by police acting on authority of a warrant subsequently found to be unsupported by probable cause, provided that they had an objective good faith belief the warrant was valid and that the warrant was issued by a "neutral and detached" magistrate. In *Sheppard*, it concluded, again 6-3, that evidence obtained pursuant to a warrant for which there was probable cause but which was defective on its face is also admissible in the prosecution's case-in-chief, at least when the officer executing the warrant is the one who requested it. Both decisions mark a major change in the Court's stance on the exclusionary rule.

Not surprisingly, given his vigorous advocacy of the good faith exception over the previous decade, Justice White wrote the majority opinion for both decisions. He began by asserting, as the Court had in several past cases, that the exclusionary rule is not constitutionally required but rather is a judicially created remedy which may be modified when its social costs outweigh its benefits. In the specific context of searches conducted pursuant to a warrant, Justice White perceived few benefits to weigh against the cost of excluding relevant evidence of criminal activity. Imposing the exclusionary rule in such a situation could have virtually no deterrent effect on the police, he argued, because the judicial officer makes the decision to arrest or search. Nor, in White's opinion, would it act as a significant deterrent on judges and magistrates.

> There exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion....
>
> ....
>
> [W]e cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.[28]

Thus, "when an officer acting with objective good faith has obtained a search warrant and acted within its scope" there is no point in imposing the exclusionary rule if the warrant happens to be invalid.[29]

Justice White emphasized that the good faith tests he announced is an objective one. Thus, if the affidavit supporting the warrant is "so lacking in indicia of probably cause as to render official belief in its existence entirely unreasonable" or if the warrant is "so facially deficient—*i.e.*, in failing to particularize the place to be searched or things to be seized—that the executing officers cannot reasonably presume it to be valid" the exception does not apply.[30] Moreover, regardless of good faith, suppression will still occur when the magistrate is misled by information in the affidavit that the affiant knew was false, or when the magistrate "wholly abandons his judicial role" in issuing the warrant.

Justice White's opinion relies heavily on several questionable assumptions about police and judicial behavior. For instance, commentators have long expressed fear that a good faith exception will encourage "shopping" for magistrates willing to act as "rubber-stamps" for police who will now realize that most illicit actions, once judicially authorized, no longer lead to exclusion. Although Justice White recognized the possibility of complaint or incompetent magistrates, he stated, despite considerable evidence to the contrary,[31] that "we are not convinced that this

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[28] *Leon*, 104 S. Ct. at 3418.

[29] *Id.* at 3420.

[30] *Id.* at 3422.

[31] *See, e.g.*, 2 W. LaFave, Search and Seizure § 4.1 (1978); Barrett, Criminal Justice: The Problem of Mass Projection in the Courts, The Public and the Law Explosion 85, 117-18 (H.W. Jones ed. 1965), Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 Creighton L. Rev. 565, 569-71 (1984); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1412 (1981).

is a problem of major proportions."[32] He also may have been unduly sanguine about the willingness of even those magistrates who are competent to scrutinize warrant applications now that a good faith exception exists. As Justice Brennan argued in dissent,

> Creation of this new exception for good faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant is correct, the evidence will be admitted; if their decision was incorrect but the police rely in good faith on the warrant, the evidence will also be admitted. Inevitably, the care and attention devoted to such an inconsequential chore will dwindle.[33]

Similarly, Justice Brennan argued that police training programs will deemphasize fourth amendment jurisprudence as a result of *Leon* and *Sheppard*. Although the majority opinion asserted that the reasonableness standard would forestall such a development,[34] it is not unrealistic to predict that some officers will now be taught to recognize when, to use the majority's language, it is "*entirely* unreasonable" to believe probable cause exists. In all other cases, suggested Justice Brennan, police will be told simply to make sure the warrant has been signed, because "there will no longer be an incentive to err on the side of constitutional behavior.[35]

Two additional concerns about the good faith exception which are given similarly short shrift by the majority opinion have to do with its effect on appellate review. First, as with other "totality of the circumstances" tests, the good faith exception might cause considerable judidical confusion. In response to this concern, Justice White simply stated that the exception, "turning as it does on objective reasonableness, should not be difficult to apply in practice."[36] But the decision as to what is "entirely unreasonable" is sure to vary across jurisdictions depending upon a particular court's views on the costs of the exclusionary rule. Second, the good faith exception might remove incentive to develop or clarify substantive fourth amendment law because the courts can avoid such decisions, which are often difficult, simply by holding that the officer acted in reasonable good faith reliance on a warrant.

This latter point is illustrated by both *Leon* and *Sheppard*. In *Leon*, the warrant application was based in part on information supplied by a confidential informant of unproven reliability who came to police over five months before the application was submitted. Although the police independently investigated this information, both the district court and the court of appeals concluded that the additional data failed to corroborate the details of the tip in the manner required under the Court's decisions in *Aguilar v. Texas*[37] and *Spinelli v. United States*.[38] However, as Justice Stevens pointed out in his dissent to *Leon*, the Court's subsequent decision in *Illinois v. Gates*[39] had modified the *Aguilar-Spinelli* test to the point where the tip might have been sufficient to issue the warrant. Because the majority found that the officer in *Leon* acted in good faith, it neglected to decide whether the warrant was in fact valid under *Gates*, and thus failed to clarify this point.

Similarly, *Sheppard* conceivably could have been decided on substantive grounds rather than as a "good faith" case. In *Sheppard*, the Massachusetts Supreme Court had excluded cer-

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[32] 104 S. Ct. at 3418 n.14.

[33] *Sheppard*, 104 S. Ct. at 3444 (Brennan, J., dissenting).

[34] The Court quoted Professor Jerold Israel to the effect that "the possibility that illegally obtained evidence may be admitted in *borderline* cases is unlikely to encourage police instructors to pay less attention to the Fourth Amendment" nor should it "encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality." 104 S. Ct. at 3420 n.20 (quoting Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412-13 (1977) (emphasis added)).

[35] 104 S. Ct. at 3444 (Brennan, J., dissenting).

[36] *Id.* at 3422.

[37] 378 U.S. 108 (1964).

[38] 393 U.S. 410 (1969).

[39] 103 S. Ct. 2317 (1983).

tain evidence connecting the defendant to a murder because the search which produced it had been conducted pursuant to a warrant which, on its face, authorized only a search for controlled substances, therefore violating the "particularity" requirement of the fourth amendment.[40] The Supreme Court, relying on the newly created good faith exception, reversed this decision because the officer who conducted the search had drafted an affidavit which in fact set out sufficient facts to establish probable cause with respect to the seized items. The warrant had not listed those items because at the time the warrant was issued, the issuing judge had only been able to find a warrant form for controlled substances and had neglected to replace the references to controlled substances with the appropriate evidentiary descriptions. As Justice Stevens pointed out, the same reasoning could have supported a holding that the particularity clause of the fourth amendment was not violated in the first place because "the judge who issued the warrant, the police officers who executed it, and the reviewing courts all were able to ascertain the precise scope of the authorization provided by the court" by consulting the attached affidavit.[41] Regardless of the validity of Justice Stevens' analysis, the point is that the majority failed even to consider it because the good faith analysis made such consideration unnecessary.

Obviously, a number of empirical issues are raised by *Leon* and *Sheppard* regarding the impact of the good faith exception on police, magistrates, and the courts. In a concurring opinion, Justice Blackmun indicated that he, at least, would reconsider the decision "[i]f it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment."[42] There are vague indications that other members of the majority feel similarly.[43] However, there is a greater possibility that rather than retreating from the good faith exception as adopted in *Leon* and *Sheppard*, the Court will expand on the idea and apply it to any case, including those involving warrantless searches and seizures in which the officer reasonably believed he was acting constitutionally. On this point, it is noteworthy that in *Leon*, Justice White quoted liberally from *Peltier* and his dissent in *Powell* to the effect that a search conducted in reasonable good faith should not trigger the exclusionary sanction. His subsequent statement that this precept was "*particularly* true" in situations such as those involved in *Leon*[44] suggests that it might also be "true," as far as the majority is concerned, in cases which do not involve warrants.

The fifth amendment and confessions issues of this Term were delineations of *Miranda*. In *Minnesota v. Murphy*,[45] the Court held that interviews with probation officers are not custodial settings and that *Miranda* warnings are not required, even though in *Murphy* the terms of the probation required Murphy to attend such interviews and answer the officer's questions. The Court further held in *Beckemer v. McCarty*,[46] that a person questioned after a routine traffic stop is not subject to custodial interrogation. Because the traffic stop is brief, temporary, and public, Justice Marshall writing for the majority felt motorists should not feel unduly coerced. Both of these cases reflect to some degree the present lack of sympathy at the Supreme Court for *Miranda*-based claims. *New York v.*

[40] 387 Mass. 488, 441 N.E.2d 725 (1982).

[41] 104 S. Ct. at 3449 (Stevens, J., concurring in part, dissenting in part).

[42] 104 S. Ct. at 3424 (Blackmun, J., concurring).

[43] In INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), Justices O'Connor, Blackmun, Powell and Rehnquist all joined in that part of the opinion which in the context of holding the exclusionary rule need not apply in civil deportation proceedings stated: "Our conclusions concerning the exclusionary rule's value [in deportation proceedings] might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." The opinion then cited Blackmun's concurring opinion in *Leon*. 104 S. Ct. at 3490. Presumably, Justices Brennan, Marshall, and Stevens, all of whom dissented in *Lopez-Mendoza*, would agree with this statement.

[44] 104 S. Ct. at 3420 [emphasis added].

[45] 104 S. Ct. 1136 (1984).

[46] 104 S. Ct. 3138 (1984).

Quarles,[47] which I will discuss later, is an even better example. The moral at this point is that *Miranda*-based claims are not likely to succeed at the Supreme Court today.

By contrast, the true voluntariness claims fare much better. Take, for example, *Mincey v. Arizona*.[48] Following a shootout with the police, Mincey was taken to the hospital with a gunshot wound on his hip. He was immediately placed in intensive care. A respirator prevented him from speaking. A police detective questioned Mincey while he was in pain. Because of the respirator, Mincey had to write out his answers. The interrogation lasted four hours, although actual questioning was according to the officers much shorter; the remaining time was taken up by medical attention and Mincey's loss of consciousness. On this record, the Supreme Court held Mincey's written responses were truly involuntary and inadmissible either as part of the state's case-in-chief or to impeach Mincey's testimony at trial. Because the admission of statements procured by coercion pollutes the guilt determination processed at trial, the Burger Court is far more likely to give the defendant relief on claims he was overreached and his statement involuntary rather than for violations of the *Miranda* rules.

For the same reason, voluntariness claims on confessions cases serve as a bridge to the top of the hierarchy the Burger Court has created—the trial-related rights—the right to counsel, the right to confront and cross-examine witnesses, presumptions and inferences and the burden of proof, the right to jury trial, and, this Term, the right to public trial. The Supreme Court in *Press Enterprise v. Superior Court*[49] and *Waller v. Georgia*,[50] held that every stage of a criminal proceeding is presumptively open to the press and public.

The trial judge in *Press-Enterprise* ordered that all but three days of a six-week *voir dire* for a rape-murder trial of a teenage girl be closed to the public and press. He also refused to grant the defendant's pretrial motion for release of the *voir dire* transcript. After the defendant was convicted and sentenced to death, the judge again refused a motion to release the transcript. The California Supreme Court denied the defendant's request for a hearing.[51]

The Supreme Court unanimously reversed, holding that both the historical evidence on the process of juror selection and the policy of enhancing basic fairness and public confidence through openness require that *voir dire* proceedings be open to the public unless fair trial interests would be better served by closure. This presumption in favor of openness can be rebutted, the Court held, if a prospective juror can convince a judge that he or she will be subject to deep personal embarrassment by the proceeding.[52] The judge is to make this determination *in camera*, but with counsel present and on the record. If the judge does find that the proceedings must be closed, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceeding available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests."[53] Even then, part of the transcript may need to be sealed to protect a juror's privacy. In *Press-Enterprise*, however, the conviction had to be overturned given "an incredible *six* weeks of voir dire without considering alternatives to closure"[54] and the failure of the judge, when ruling on the defendant's transcript motions, to determine whether parts of the transcript could be disclosed.

Using language similar to that found in *Press-Enterprise*, but relying on the sixth amendment instead of the first amendment, the Court has also indicated in *Waller v. Georgia* that blanket closure of pretrial suppression hearings is unconstitutional. In *Waller* the state convinced the trial judge that court-ordered wiretaps to be examined during a suppression hearing should not be made public because they referred both to

[47] 104 S. Ct. 2626 (1984).

[48] 437 U.S. 385 (1978).

[49] 104 S. Ct. 819 (1984).

[50] 104 S. Ct. 2210 (1984).

[51] 104 S. Ct. at 821.

[52] *Id.* at 825.

[53] *Id.* at 820.

[54] *Id.* at 826.

persons who were indicted but not then on trial and to others who were not then indicted. However, during the seven-day suppression hearing, less than two-and-one-half hours were devoted to playing the tapes of the intercepted telephone conversations and few of those conversations mentioned or involved parties not then before the court. In reversing the judgment below upholding the defendant's conviction on gambling charges, the Court, in a unanimous decision written by Justice Powell, first concluded that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."[55] It also repeated the observation it had made in *Gannett* that public access to suppression hearings can be as important as open trials in terms of ensuring a fair result for the defendant and educating the public about governmental conduct. Given these two points, Justice Powell stated, "We hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."[56]

Thus, the state must prove an overriding interest in having a suppression hearing closed, the closure may be only as broad as necessary to protect that interest, and reasonable alternatives to closure must be explored. Here, given the failure of the state to identify specifically "whose privacy interests might be infringed [by publishing the tapes], how they would be infringed, what portions of the tape might infringe them, and what portion of the evidence consisted of the tapes,"[57] and because the closure went far beyond that necessary to protect against inappropriate disclosure, the defendants were entitled to a new suppression hearing and, if the results of the hearing were significantly different from the first suppression hearing, a new trial.

The classic example of the reigning preference for case-by-case rather than rule-oriented jurisprudence was the announcement in *New York v. Quarles* of a public safety exception to the need to give *Miranda* warnings.

There the Court held that the warning need not be given at all if the prosecution can show that warning a suspect could have endangered the public. The "public safety exception" to *Miranda* not only substantially erodes the prophylactic nature of the *Miranda* doctrine but for the first time authorized the use of clearly coerced statements in the prosecution's case-in-chief.

Quarles aptly illustrates both points. Based on information that a man with a gun had just entered a supermarket, Officer Kraft, assisted by three other officers, entered the store, spotted the defendant, and with gun drawn ordered him to stop and put his hands over his head. After frisking the defendant, and discovering an empty shoulder holster, Kraft handcuffed the defendant and asked him where the gun was. The defendant responded, "[T]he gun is over there," while nodding in the direction of some empty cartons, from which Kraft retrieved a loaded revolver. At that point, Kraft formally placed the defendant under arrest and read him his *Miranda* rights. In response to further questioning, the defendant admitted to owning the gun. The trial court and the lower appellate courts excluded the gun on the ground it was obtained in violation of *Miranda* and excluded all the defendant's statements about the gun on the ground that they were "fruit" of the illegal interrogation.

Justice Rehnquist, in an opinion joined by four other Justices, admitted that the defendant had been in custody at the time Officer Kraft asked him about the location of the gun, but held that the fear of coerced admissions which led to *Miranda* no longer justified reliance on a rigid rule; rather this concern must be balanced against the needs of the public. He then concluded:

> [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether

[55] 104 S. Ct. at 2215.

[56] *Id.* at 2216.

[57] *Id.*

> it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.[58]

Justice Rehnquist also made it clear that the public safety exception is a purely objective standard. Given the "kaleidoscopic situation" confronting officers when public safety is threatened, "where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the [public safety] exception . . . should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.[59]

To the majority, the events in the supermarket clearly presented such an objectively threatening situation. So long as the whereabouts of the gun remained unknown, "it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it."[60] The existence of these dangers outweighed, in the majority's eyes, the fact that the defendant had been handcuffed and confronted by four officers with guns drawn when he was asked, without being told he could remain silent, about the gun.

Quarles is a questionable decision at best, both as to its rule and as to the manner in which it applied the rule. With respect to the latter, Justice Marshall pointed out, in dissent, that because the defendant's apprehension took place after the store was closed and there was no known accomplice, the threat to the public in *Quarles* was miniscule. In fact, the New York Court of Appeals had specifically found "no evidence in the record before us that there were exigent circumstances posing a risk to public safety. . . ."[61] Thus, even assuming the validity of a public safety exception to *Miranda*, *Quarles* seems an inappropriate case in which to apply it.

The divergence between the New York court's conclusion concerning the facts and the majority's characterization of them also illustrates the danger of departing from the prophylactic rule in the first place. Police and courts will no longer have the relative clarity offered by *Miranda* but will disagree, as they did in *Quarles*, over when the public is threatened. The majority recognized this possibility but argued that, at least with respect to police, the public safety exception "will not be difficult . . . to apply" because "officers can and will distinguish almost instinctively between questions to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from the suspect.[62] Justice O'Connor, who agreed with the result reached by the court,[63] but dissented with respect to the adoption of the public safety exception, seems more realistic about the consequences of *Quarles*: "The end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."[64] As with the Court's newly announced good faith exception to the exclusionary rule, the public safety exception to *Miranda* could swallow the rule.

Most importantly, *Quarles* totally disregards the underlying premise of *Miranda*. Justice O'Connor once again put the matter succinctly when she stated:

> *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Miranda*, for better

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[58] 104 S. Ct. at 2633.

[59] *Id.* at 2632.

[60] *Id.*

[61] 58 N.Y.2d 664, 666, 458 N.Y.S.2d 520, 521, 444 N.E.2d. 984, 985 (1982).

[62] 104 S. Ct. at 2633.

[63] Justice O'Connor felt that the gun should have been admitted because it was "nontestimonial" in nature and, thus, under *Schmerber v. California*, 384 U.S. 757 (1966), not covered by the fifth amendment.

[64] 104 S. Ct. at 2635 (O'Connor, J. concurring).

> or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State.[65]

I can confidently join Justice O'Connor is predicting a spate of future cases attempting to explain to the police and lower courts when "overriding concern for the public safety" can justify questioning a suspect in custody without first giving him the *Miranda* warnings. With equal confidence, one can foresee considerable confusion from jurisdiction to jurisdiction as to the scope and content of this ill-advised opinion. While the majority in *Quarles* undoubtedly believe they helped law enforcement, Justice O'Connor seems more realistic in predicting an adverse impact of this decision on law enforcement and a crowding of court dockets to determine the limits of the new public safety exception.

Related to its case-by-case jurisprudence is this Court's concern with the importance of the defendant being guilty. Focusing on defendant's factual guilt not only restructures the nature of appellate argument but inevitably brings reliance on such fact specific doctrines as harmless error. In *United States v. Hasting*,[66] five defendants, all charged with kidnapping and transporting women across state lines for immoral purposes, relied on a theory of consent and mistaken identity on the part of the victims. None of the defendants testified and the defense put on little evidence. The prosecution's evidence was very strong. In closing argument, the prosecutor made an impermissible negative comment on defendant's failure to testify or rebut the state evidence. The Supreme Court concluded the error was harmless beyond a reasonable doubt because, as the Chief Justice wrote for a seven person majority: "In short, a more compelling case of guilt is difficult to imagine."[67]

This Term's ineffective assistance of counsel decisions reflect the Court's concern with the importance of the defendant being guilty. The Court in *Strickland v. Washington*,[68] announced for the first time the substantive standard they think appropriate to judge claims of ineffective assistance of counsel. In order to prevail on this commonly raised claim, the defendant must show (1) that counsel's conduct was objectively unreasonable, *and* (2) a reasonable probability that counsel's conduct affected the outcome of the case. This second part focuses directly on the defendant's guilt. To win an ineffective assistance claim after *Strickland*, the defendant must present either a colorable claim that he was innocent or that his attorney's conduct produced some consciousness-shocking miscarriage of justice. Justice O'Connor, in her opinion for the 8-1 majority, set forth the test precisely as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.[69]

United States v. Cronic,[70] a companion case to *Strickland*, illustrates the intertwined nature of the prejudice and performance prongs. The Tenth Circuit Court of Appeals had overturned on ineffective assistance grounds Cronic's conviction for a "check kiting" scheme, based on its application of the following five criteria: (1) the time afforded the attorney for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. The attorney who represented the defendant at trial was only allowed twenty-five days to prepare for a case which had taken the government over four-and-one-half years to investigate and which involved hundreds of documents. Additionally, the attorney was a

[65] *Id.*

[66] 103 S. Ct. 1974 (1983).

[67] 103 S. Ct. at 1982.

[68] 104 S. Ct. 2052 (1984).

[69] *Id.* at 2065.

[70] 104 S. Ct. 2039 (1984).

young real estate attorney who had never tried a case before a jury.

However, as Justice Stevens noted in the unanimous Supreme Court opinion overturning the Tenth Circuit, Cronic was unable to point to any specific deficiency in counsel's representation. With respect to the first factor, Justice Stevens pointed out that the government had required a long investigation period because the check kiting scheme had involved several banks in several jurisdictions and literally thousands of documents, all of which had to be authenticated. The only colorable defense the defendant's attorney could make, on the other hand, was that his client did not possess the intent to defraud at the time of the check transfers. Neither the fact that the transaction had taken place or the authenticity of the government's exhibits could effectively be challenged. Seen in this light, the twenty-five-day preparation period did not seem unduly short. With respect to the attorney's experience, Justice Stevens noted that "[e]very experienced criminal defense attorney once tried his first criminal case" and that, in trying a criminal case involving financial transactions, real estate experience might actually be more useful than "prior experience in handling, for example, armed robbery prosecutions.[71] As for the final three factors—the gravity of the charge, the complexity of the case, and the accessibility of witnesses—they, like the first two factors, "may affect what a reasonably competent attorney could be expected to have done under the circumstances, but none identifies circumstances that in themselves make it unlikely that respondent received the effective assistance of counsel."[72]

After *Strickland* and *Cronic*, the Court's requirement of a colorable claim of innocence or miscarriage of justice should dramatically reduce the number of successful claims of ineffective assistance of counsel.

Strickland's stringent test for ineffective assistance of counsel claims is only partly explained by the Court's focus on the defendant's guilt. The other consideration is the significant cost this Court sees the writ of *habeas corpus* imposing on society and the accused. This brings us to the final, yet probably most important, theme of the Burger Court in recent criminal cases—the limitation on federal *habeas* review and the creation of what I call the "new federalism" in the American criminal justice system.

A substantive right has no value unless its possessor has an opportunity to assert it. As the Warren Court expanded the scope of the Bill of Rights and incorporated those rights into state cases, it became clear that the state courts, which were often opposed to the incorporation of federal rights in the first place, could effectively nullify the Supreme Court's efforts be failing to provide a fair opportunity for state criminal defendants to assert the newly created rights. For this reason the ability of state criminal defendants to obtain review in federal court depended on the Warren Court's expansion of federally protected constitutional rights.

Generally, a state criminal defendant can gain access to federal courts in one of two ways—direct review or petitioning for the writ of *habeas corpus*. The tremendous number of criminal cases each year prevents direct review by the Supreme Court from being an effective remedy for state prisoners. Because the United States Supreme Court hears only twenty to forty criminal cases each term,[73] it is obvious the Court cannot use direct review to assure enforcement of its decisions if it is skeptical of the cooperation or ability of state courts. If the Supreme Court does not trust state courts to enforce federally protected rights, the only realistic access to federal court must be *habeas* review, making the lower federal courts the frontline enforcement agents of federal constitutional guarantees.

The Warren Court, which dramatically expanded the scope of federal constitutional claims available to state prisoners appeared to distrust state courts for vindication of these new substantive rights and established a system of easy access to federal courts for *habeas* review of state court decisions in criminal cases. Federal *habeas* became the principal remedy for asserting and protecting the newly incorporated federal consti-

[71] *Id.* at 2050.

[72] *Id.* at 2051.

[73] *See, e.g., The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 299-301 (1977).

tutional rights. It is only a slight overstatement to characterize the Warren Court attitude as for every federal right a federal forum for vindication of that right.

By contrast, as the Burger Court has narrowed the substantive federal constitutional rights of state criminal defendants, it has simultaneously reduced access of state prisoners to federal *habeas* review. While the Warren Court opted for enforcement of federal rights by the United States district courts, the Burger Court has promoted a "new federalism" by insulating state court decisions from *habeas* review in federal courts, thereby transferring more responsibility for the interpretation and meaning of federal constitutional provisions to state courts. This attempt has been due at least in part to the Court's attitude that the original purpose of the writ had been grossly distorted by the Warren Court's decisions. As Justice Powell wrote

> Originally this writ was granted only when the criminal trial court had been without jurisdiction to entertain the action.... Subsequently the scope of the writ was modestly expanded to encompass those cases where the defendant's federal constitutional claims had been considered in the state court proceeding.... In recent years this Court has extended habeas corpus far beyond the historical uses to which the writ was put.
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> ...
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> In expanding the scope of habeas corpus ... the Court seems to have lost sight entirely of the historical purpose of the writ. It has come to accept review by federal district courts of state court judgments in criminal cases as the rule, rather than the exception that it should be. Federal constitutional challenges are raised in almost every state criminal case, in part because every lawyer knows that such claims will provide nearly automatic federal habeas corpus review. If we now extend habeas corpus [to constitutional claims unrelated to the trial's fairness] we will take another long step toward the creation of a dual system of review under which a defendant convicted of crime in a state court, having exhausted his remedies in the state system, repeats the process through the federal system. The extent to which this duplication already exists in this country is without parallel in any other system of justice in the world.[74]

The Burger Court has tried to "close the door" to federal courts for state prisoners in two different ways. First, the Court has limited those substantive issues which may be relitigated in federal court if there was a full and fair opportunity afforded in state court.[75] Second, the Court has barred litigation of first time constitutional claims when the state's criminal procedure characterized the defendant's failure to raise his claim in state court as a waiver.[76] The state waiver is a bar raising this claim on federal habeas unless the defendant can show both cause for his failure to raise the claim and prejudice to his case from that omission.[77]

In 1976 in *Stone v. Powell*, the Burger Court signalled that the Court had found no rationale which justified federal *habeas corpus* relief in search and seizure cases when adequate opportunity for relief had been provided by the state court.[78] Noting that the exclusionary rule is a judicially created remedy intended to promote judicial integrity and to deter illegal police conduct, the Court felt that these goals are promoted to a much lesser extent in federal *habeas* proceed-

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[74] Rose v. Mitchell, 443 U.S. 545, 580-81, (1979) (Powell, J., concurring) (citations omitted).

[75] Stone v. Powell, 428 U.S. 465 (1976).

[76] Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976).

[77] Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982).

[78] 428 U.S. 465, 481-82 (1976). The question raised in *Powell* was far from original. In an earlier case, Justice Powell had stated:

> I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts.

Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

ings.[79] Using what is best described as a cost-benefit analysis, the Court found that in determining the desirability of allowing federal *habeas* relief for state defendants with fourth amendment claims," [t]he answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."[80] In weighing the various factors involved, the Court determined that allowing federal *habeas* review of search and seizure claims "deflects the truthfinding process and often frees the guilty."[81] As a result, the Court concluded that:

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.[82]

The effect of the holding in *Stone v. Powell* is to limit the state prisoner with a fourth amendment claim to the single federal remedy of direct appeal from the state court system to the U.S. Supreme Court. Where the state criminal defendant has had a "full and fair opportunity" to raise his claim in the state courts, his access to the lower federal courts is foreclosed.

In 1977 in *Wainwright v. Sykes*,[83] the court barred federal *habeas* review for claims defendant did not raise in state court when the state rules require, contemporaneous objection at trial or deem the defendant to have waived his right to pursue that claim. The state waiver becomes a federal bar. The only exception is when a defendant can show cause for not having raised the claim in state court and prejudice to his case from such failure.

[79] 428 U.S. at 493.

[80] *Id.* at 489.

[81] *Id.*

[82] *Id.* at 494-95 (citations omitted).

[83] 433 U.S. 72 (1977).

Though the terms "for cause" and "prejudice" are crucial to the import of *Sykes*, the Court left the precise interpretation of these phrases to future decisions.[84] Two cases since *Sykes* have fleshed out these standards and reaffirmed the rule that a convicted defendant may not obtain collateral relief based on trial errors to which no contemporaneous objection was made unless he shows "both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains."[85]

In *Engle v. Isaac*,[86] the Court expounded on the first standard, making it clear that the reason for failing to object to a claimed trial error must be extremely compelling before *habeas* review will be granted. *Isaac* involved three separate *habeas* petitions filed by defendants who had been convicted by Ohio courts despite self-defense claims. At the time of these convictions, Ohio common law required defendants to carry the burden of proving self-defense by a preponderance of the evidence; the juries in all three of the cases consolidated in *Isaac* were so instructed with no objection from the defendants. However, a new Ohio criminal code provision, which went into effect shortly before the defendants' trials, provided: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."[87]

Ten months *after* the last of the three *Isaac* defendants was tried, the Ohio Supreme Court construed this statute to place only the burden of production, and not the ultimate burden of persuasion, on the defendant.[88] Thus, under the new

[84] 433 U.S. at 90.

[85] United States v. Frady, 456 U.S. 152, 167 (1982).

[86] 456 U.S. 107 (1982).

[87] Ohio Rev. Code Ann. § 2901.05(A) (1975).

[88] State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). In State v. Humphries, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977), the Ohio Supreme Court applied *Robinson* retroactively to the effective date of the statute, but refused to extend its ruling to defendants, like those in *Isaac*, who had not adhered to Ohio's contemporaneous objection statute and objected to the common law instruction at the time of trial.

statute, as interpreted by the Ohio court, the prosecution has to disprove self-defense beyond a reasonable doubt. The issue before the Supreme Court in *Isaac* was whether *Sykes* permitted the defendants to litigate in a federal *habeas* proceeding the claim that the self-defense instructions given at their trials violated constitutional due process.

Justice O'Connor began the majority opinion by noting the "significant costs" the writ of *habeas corpus* imposes on society and the accused. She asserted that the writ "undermines the usual principles of finality of litigation" by permitting collateral attack, "degrades the prominence of the trial itself" by providing an alternative forum for resolution of constitutional issues, "frequently cost[s] society the right to punish admitted offenders" whom the state cannot reconvict on retrial because of the passage of time and dispersion of witnesses, and "frustrate[s] both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights" by permitting federal courts to review their decisions.[89] Particularly when failure to object has denied the state trial court the opportunity to correct the defect, concluded O'Connor, considerations of comity require cautious use of the writ.

Thus, according to the majority, only when the defendant can show both cause and actual prejudice will a claim unobjected to at trial be heard collaterally in federal court. The Court reinforced this notion by specifically rejecting the *Isaac* defendants' contention that *Sykes*, which involved a *Miranda* claim that did not influence the determination of a guilt at trial, should not apply when the nature of the constitutional claim affects the truthfinding function of the trial. The Court noted that "[w]hile the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing."[90]

The defendants in *Isaac* argued that even if this standard did apply, they should be excused from the state's contemporaneous objection requirement because at the time of their trial any objection to Ohio's self-defense instruction would have been futile and because they could not have known that the self-defense instruction raised constitutional questions. Justice O'Connor dismissed both arguments. With respect to the first contention she noted:

> [T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial.... Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.[91]

Responding to the second argument, she noted that since the Supreme Court's 1970 decision in *In re Winship*[92] requiring the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, dozens of courts had addressed the issue of whether the due process clause requires the prosecution to bear the burden of disproving affirmative defenses.[93] "In light of this activity, we cannot say that respondents lacked the tools to construct their constitutional claim."[94]

Isaac concludes that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection" as sufficient cause for purposes of earning federal review.[95] This language suggests that unless the attorney's failure to object constitutes ineffective assistance of counsel, an extremely rare occurrence, a state criminal defendant who does not raise the claim at trial will not be able to litigate that claim in federal court. Applying such a narrow standard to all cases does not seem justified, even in light of the comity and finality concerns identified in *Sykes* and *Isaac*. For example, had the defendants in *Isaac* been retried

[89] *Id.* at 126-30.

[90] *Id.* at 128.

[91] *Id.* at 130.

[92] 397 U.S. 358 (1970).

[93] *Id.* at 130-33.

[94] *Id.* at 133.

[95] *Id.* at 134.

under the new code and the jury instructed that the prosecution bears the burden of disproving self-defense beyond a reasonable doubt, their chances for acquittal would probably have improved significantly. Yet, because their attorneys did not object to the common law instruction—one which had never been challenged on due process grounds in either their state's courts or in the federal courts in their circuit[96]—the defendants were denied even the *opportunity* to seek such a retrial. State procedural law prevented them from seeking review in state court, and the fact that attorneys in other jurisdictions had challenged such instructions made it impossible, under *Isaac*, for them to get into federal court. Justice Brennan, in his *Isaac* dissent, stated:

> *Sykes* promised that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." . . . Today's decision, with its unvarnished hostility to the assertion of federal constitutional claims, starkly reveals the emptiness of that promise.[97]

This Term in *Reed v. Ross*,[98] the Court identified several situations in which the "cause" test could be met. In so doing, however, it reaffirmed the narrow scope of the test as described in *Isaac* and illustrated just how novel a constitutional claim must be in order to satisfy *Isaac's* requirements. *Ross* involved the same legal issue as *Isaac*: whether an attorney's failure to object to an instruction placing the burden of proving self-defense on the defendant was justified in light of the current state of the law. However, whereas the attorney in *Isaac* had the benefit of the Court's 1970 decision of *In re Winship* and "dozens" of lower court decisions addressing the issue, the attorney who represented Ross during his 1969 trial could have relied on only two lower court decisions in making an objection to the instruction, and neither provided "direct support" for Ross' claim.[99] The first decision, a 1968 Eighth Circuit case, involved the burden of proving an alibi defense, and the second, a 1968 Connecticut case, struck down as violative of due process a statute making it unlawful for an individual to possess burglary tools "without lawful excuse, the proof of which excuse shall be upon him." Moreover, at the time of Ross' appeal, the primary Supreme Court case relevant to the burden of proof issue, *Leland v. Oregon*,[100] permitted the state to require the defendant to bear the burden of proving insanity beyond a reasonable doubt and was seen as standing for the proposition that it was constitutionally permissible to force the defendant to prove an essential element of the crime if it was characterized as an affirmative defense. Finally, the burden issue did not surface in North Carolina, the state in which Ross was tried, until five years after his appeal and even then the argument that the state should bear the burden of showing absence of self-defense was rejected "out of hand" by North Carolina courts.[101] These facts made Ross' claim concerning the self-defense instruction sufficiently novel in 1969 that they excused his attorney's failure to raise the issue at the time.

In arriving at this result, Justice O'Connor's opinion, joined by the entire Court, identified three situations in which a *habeas* claim like Ross'—that is, one based on a court opinion which is decided subsequent to the challenged trial but which is given retroactive application—might successfully survive the *Isaac* test: (1) when the decision explicitly overrules one of the Court's precedents; (2) when it overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and (3) when the decision disapproves "a practice this Court arguably has sanctioned in prior cases."[102] In the first two instances, according to Justice O'Connor, "there will almost certainly have been no reasonable basis upon which an attorney previously could have

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[96] *Id.* at 124.

[97] *Id.* at 147.

[98] 104 S. Ct. 2901 (1984).

[99] *Id.* at 2911-12.

[100] 343 U.S. 790 (1952).

[101] 104 S. Ct. at 2911.

[102] *Id.*

urged a state court to adopt the position that this court has ultimately adopted";[103] consequently *Isaac* will be satisfied. In the third category, however, whether the cause prong is met will depend "on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice."[104] Although Ross' claim, which fell in this latter category, was sufficiently novel to meet these criteria, it is obvious that the cause test as currently construed by the Court is a difficult one to meet.

The Court evidenced similar hostility to federal *habeas* claims in *United States v. Frady*,[105] which considered the prejudice prong of the *Sykes* test. Frady asserted in his *habeas* petition that the federal jury which had convicted him of first degree murder, a crime requiring "malice aforethought," had been erroneously instructed on the meaning of "malice." Although later cases had indicated that the type of instruction given at Frady's trial was indeed erroneous, the district court rejected his petition on the ground that he had not objected to this instruction at trial, and thus, under Rule 30 of the Federal Rules of Criminal Procedure,[106] was barred from collaterally asserting the defect. The Circuit Court of Appeals for the District of Columbia, however, overturned the district court on the basis of Rule 52(b), which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court reversed the circuit court, holding that the "plain error" standard was inappropriate for *habeas* review. The Court, with Justice O'Connor again writing the majority opinion, held that while the plain error standard should apply in considering direct appeals, it was "out of place when a prisoner launches a collateral attack against a criminal conviction."[107] As in *Isaac*, considerations of finality underlay the decision. "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks."[108] Thus, to obtain collateral relief, "a prisoner must clear a significantly higher hurdle than would exist on direct appeal."[109] That "higher hurdle," according to the Court, is the *Sykes* cause and prejudice standard.

In applying the *Sykes* standard, the Court indicated that it would not need to consider whether Frady could show cause because of its determination that no actual prejudice had occurred.[110] Given the fact that the prosecution's evidence at Frady's trial had convinced both the trial judge and the nine appellate judges that Frady had acted with malice,[111] and the additional fact that Frady himself had never tried to rebut this evidence, but rather claimed that he had had nothing to do with the crime,[112] the Court found that the erroneous malice instruction did not actually prejudice Frady.

Isaac and *Frady* firmly entrench the cause-and-prejudice standard as the appropriate test for determining whether federal collateral review is permissible on claims which were not raised at trial. They also illustrate the Burger Court's significant shift away from the Warren Court's view that the federal courts should be available to most state or federal defendants seeking collateral relief. At the Warren Court, only those defendants whose failure to object at trial was deliberate were barred from later raising the claim collaterally. Under *Isaac*, on the other hand, *habeas* review may not be available even if the failure to object results from attorney inadvertence or unawareness of the potential objection at the time of the trial. *Frady* further restricts access to the federal courts by requiring the de-

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[103] *Id.*

[104] *Id.*

[105] 456 U.S. 152 (1982).

[106] "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[107] *Id.* at 162.

[108] *Id.* at 165.

[109] *Id.* at 167.

[110] *Id.*

[111] 456 U.S. at 170.

[112] *Id.*

fendant to show something beyond plain error, namely that the alleged constitutional violation significantly affected the accuracy of the guilt determination, before he can meet the "actual prejudice" prong of the *Sykes* test.

In conclusion, what predictions for the future? What can we anticipate from the Supreme Court in coming Terms. The first and easiest prediction is that the juggernaut for crime control will continue to roll bringing with it a further extension of the good faith defense to exclusion to cover warrantless searches as well as those in which the police relied on a warrant. Second, there will be a great deal of litigation trying to delineate the public safety exception to the need to give the *Miranda* warnings. I believe the Court and society will pay a very considerable price for this blurring of the previously clear line that the *Miranda* warnings were the constitutional prerequisite to the admissibility of any product of police custodial interrogation. Third, after *Strickland v. Washington,* few criminal defendants will be successful with claims of ineffective assistance of counsel unless they can present a colorable claim of miscarriage of justice. Fourth, as the Burger Court continues to narrow the federal constitutional rights of state criminal defendants, the state courts may develop state constitutional provisions to require more than the federal minimum. Finally, I would anticipate further refinement of what constitutes cause and prejudice to justify raising a novel claim in federal *habeas* review.

Overall, American constitutional criminal procedure at the Supreme Court is cyclical. The Warren Court dramatically expanded the federally protected constitutional rights of state criminal defendants while the Burger Court has to some degree contracted them. The Warren Court chose to rely on federal courts to enforce the newly created rights while the Burger Court has largely closed the door of federal courts to state criminal defendants, preferring to rely on state courts as the arbiters of the meaning of the federal constitution in state criminal cases. It appears nearly certain this counter-revolution on constitutional criminal procedure is not yet over.

Bankruptcy: Effective Relief for the Soldier in Financial Distress

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Introduction

When President Carter signed the Bankruptcy Reform Act of 1978 (the "new Code") into law, a revised and especially effective remedy was created for the citizen experiencing serious financial difficulties.[1] The new Code was the first major revision of bankruptcy laws in over forty years. Its primary purposes were to modernize bankruptcy provisions in view of the vast use of consumer credit in the United States and to provide the consumer a "fresh start" after using bankruptcy to discharge financial responsibilities.[2] This constitutionally authorized remedy is available to all citizens, including soldiers and federal civilian employees.[3] The Bankruptcy Code now provides a comprehensive, judicially supervised method for the "debt-ridden" soldier to obtain relief from financial difficulties. It may enable the soldier to keep his or her home or automobile and

[1] 11 U.S.C.A. §§ 101-1330 (West Supp. 1985). The Bankruptcy Reform Act of 1978 went into effect on October 1, 1979.

[2] The new Bankruptcy Code alters bankruptcy law more than any legislation since Congress first provided for bankruptcy by enacting the Bankruptcy Act of 1898.

[3] U.S. Const. art. I, § 7, cl. 3. The U.S. Army Finance and Accounting Center processed 1800 bankruptcy actions involving soldiers and civilian employees during fiscal year 1980, the first year of the new Bankruptcy Code. The most common service member who files bankruptcy is the noncommissioned officer with ten years' service. Louder & Richardson, *Soldier Bankruptcy* , Soldier Support Journal, Nov./Dec. 1981, at 41.

at the same time protect him or her from being harassed by creditors and employers.[4]

In the past two years the Army has initiated aggressive programs to influence soldiers' behavior to prevent alcohol and drug abuse.[5] Although these problems clearly affect a soldier's ability to accomplish his or her job and, consequently, adversely impact on mission accomplishment, the soldier with serious personal financial problems is equally as ineffective as the soldier who abuses alcohol or drugs. Accordingly, judge advocates should be aware of the effectiveness of the bankruptcy remedy and be prepared to advise the soldier of the benefits and ramifications of seeking immediate relief for financial problems by filing a petition in bankruptcy court.

The purpose of this article is to provide an overview of the new bankruptcy law as it applies to the soldier-debtor. Both the chapter 7 liquidation, or straight bankruptcy, proceeding and the chapter 13 repayment plan will be discussed. This article will highlight the role of the legal assistance officer in advising the soldier on the ramifications of filing the bankruptcy petition and of the choice between the chapter 7 for chapter 13 remedy.[6]

The Bankruptcy Amendments Act of 1984

Immediately after the enactment of the new Bankruptcy Code, the consumer credit industry initiated a lobbying campaign to amend those bankruptcy provisions that the industry perceived as too favorable to debtors. Some referred to the new Code as "legalized larceny" because they perceived it as allowing a consumer to accumulate large debts with the intention of declaring bankruptcy to avoid repayment.[7] Although it is debatable that there is a significant number of consumers who run up debts in anticipation of filing for bankruptcy, four years of intense lobbying by the consumer credit industry resulted in Congress enacting the "Bankruptcy Amendments and Federal Judgeship Act of 1984" ("Bankruptcy Amendments Act").[8] The consumer credit provisions contained in the Bankruptcy Amendments Act are scaled-down versions of numerous provisions drafted by the credit industry during the four year lobbying effort. Although these provisions are unlikely to change the results of bankruptcy for most soldier-debtors, the substantive changes that may affect a soldier's bankruptcy will be discussed in this article.

The Effect of Bankruptcy

The first concern of the soldier considering bankruptcy is normally what effect the bankruptcy action will have upon his or her debts, property, credit rating, and reputation. Sometimes it is necessary for the legal assistance officer to dispel some of the common myths about bankruptcy—that the soldier will lose all his or her property in bankruptcy and be prevented by law from getting credit after the bankruptcy action is completed.[9] Although neither of these events will occur, the soldier must be advised that even with the new, liberalized bankruptcy provisions, a stigma nevertheless may attach to the person who files for bankruptcy. Generally our society looks with disfavor upon people who do not pay their debts as promised.[10] Although

[4] Filing the bankruptcy petition results in an automatic stay of all collection actions by creditors against a debtor. The creditor's exclusive remedy is to file a claim in bankruptcy court against the debtor. 11 U.S.C.A. §§ 362, 1301 (West Supp. 1985).

[5] *See generally* U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel (15 April 1985) (drug abuse) and U.S. Dep't of Army, Reg. No. 190-5, Motor Vehicle Traffic Supervision (1 Aug. 1973, C4, 27 July 1983) (alcohol abuse).

[6] *See generally* U.S. Dep't of Army, Reg. No. 27-3, Legal Services-Legal Assistance (1 March 1984). Although the legal assistance officer will normally provide only office counseling to the soldier contemplating a bankruptcy action, the new legal assistance regulation authorizes court representation of an individual who files for bankruptcy. The staff judge advocate must determine that the soldier meets the substantial financial hardship test prior to authorizing court representation. AR 27-3, para. 2-5*b*.

[7] Army Times, 9 Mar. 1981, at 10, col. 1.

[8] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353. 98 Stat. 333 (1984) [hereinafter cited as Bankruptcy Amendments Act]. The Act was effective on October 8, 1984.

[9] Sommer, *Counseling the Consumer Debtor*, Prac. Law., Jan. 15, 1983, at 20. One study found that 70% of the individuals who successfully completed a bankruptcy action were able to make major credit purchases subsequent to receiving a bankruptcy discharge. *Id.* at 23.

[10] Louder & Richardson, *Soldier Bankruptcy*, Soldier Support Journal, Nov./Dec. 1981, at 43.

this attitude would appear to be especially pervasive among military commanders, the legal assistance officer should advise the soldier that his or her commander may not administratively separate the soldier solely because he or she filed a petition in bankruptcy or received a bankruptcy discharge.[11] This is distinguishable from the situation where the soldier files for bankruptcy and continues to write worthless checks on the installation. In this case, the soldier would be subject to adverse criminal and administrative actions for these post-petition acts.[12]

In view of the above considerations, the soldier may want to pursue options short of bankruptcy to solve his or her financial difficulties. It may be possible for the legal assistance officer to assist the soldier in arranging with creditors an informal payment schedule of his or her debts. A second option is the financial counseling service provided by Army Community Services on some installations. Even the soldier who is on the brink of filing bankruptcy will benefit from personal financial management education. Intense counseling may enable the soldier to develop a budget that permits payment of all outstanding debts. Additionally, some soldiers may benefit from provisions of the Soldiers' and Sailors' Civil Relief Act of 1940.[13] Generally, a soldier who enters the service with a financial obligation may be able to modify or delay enforcement of that obligation if he or she can demonstrate that his or her ability to pay has been materially compromised by military service.[14] For example, a soldier with a home mortgage may be able to stay the foreclosure of that mortgage during the period of the military service.[15]

The legal assistance officer counseling a soldier with financial difficulties should also explain the consequences to the soldier of doing nothing to solve his or her financial problems. Inaction will usually subject the soldier's property to execution remedies available to the debtor's secured and unsecured creditors in state court. Inasmuch as bankruptcy is normally the only way to protect the soldier's property from creditors' liens, the soldier may decide that the only option is to file a bankruptcy petition. The next question for the legal assistance officer is whether the soldier should file a chapter 7 liquidation petition or a chapter 13 repayment plan.

Chapter 7 Liquidation

Prior to the new Bankruptcy Code, "straight bankruptcy" was traditionally the remedy chosen by most consumer debtors.[16] Straight bankruptcy is now provided in the chapter 7 liquidation proceeding.[17] The general concept is that all the debtor's non-exempt property, *i.e.*, the bankruptcy estate, is collected and sold by a court appointed trustee. The proceeds of the sale are distributed in accordance with a statutory scheme which provides for the payment of priority, secured, and unsecured claims.[18] A key aspect of the chapter 7 liquidation action is that the debtor's future earnings are *not* assets of the estate.[19] Generally, most consumer chapter 7 cases are characterized as "no asset" cases. This means that after the sale of the debtor's non-exempt property and the distribution of proceeds, there is no money left to distribute to the holders of unsecured claims. It is likely that most soldier liquidation cases would also be "no asset" cases.[20]

The Petition(s)

The filing of the chapter 7 petition starts the proceeding to liquidate the debtor's non-exempt

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[11] 11 U.S.C.A. § 525 (West Supp. 1985). The anti-discrimination provision affects private as well as public employers. An employer may not terminate the employment of, or discriminate with respect to employment against, an individual solely because that individual has been a debtor under the bankruptcy code.

[12] DAJA-AL 1982/2902, 27 Oct. 1982.

[13] Act of October 17, 1940, 888, 54 Stat 1178 (1940).

[14] Dep't of Army, Pamphlet No. 27-166, Soldiers' and Sailors' Civil Relief Act, para. 1-3 (Aug. 1981).

[15] 50 U.S.C.A. App. § 532 (1981).

[16] Klein, *The New Bankruptcy Code*, Prac. Law., Jan. 15, 1979, at 43.

[17] 11U.S.C.A.§§ 701-752(West Supp.1985).

[18] *Id.* § 507.

[19] *Id.* § 541. A debtor's military retired pay is also not an asset of the bankruptcy estate. *In re* Haynes, 697 F.2d 718 (7th Cir. 1982).

[20] Interview, Judge Thomas M. Moore, Bankruptcy Judge, Eastern District of North Carolina, Wilson, North Carolina, 23 Apr. 1985.

assets; the filing fee is $60.[21] The proper venue for the petition is the judicial district where the debtor's domicile, residence, or principal place of business has been located for ninety-one days immediately preceding the action.[22] The new Code provides for two types of chapter 7 petitions: voluntary and involuntary.

Any person may commence a chapter 7 proceeding by filing a voluntary petition.[23] Unlike prior law, under the new Code there is no threshold test a person must meet to pursue a liquidation action.[24] The liberalness of this provision caused the credit industry to complain that people with a substantial future earnings potential were discharging a significant portion of their unsecured debts in liquidation proceedings.[25] In response to credit industry pressure, Congress provided in the Bankruptcy Amendments Act authority for the bankruptcy court, on its own motion, to dismiss a consumer chapter 7 case if it finds that granting relief would be a substantial abuse of the provisions of chapter 7.[26] The legislative history of the Bankruptcy Amendments Act indicates that the substantial abuse test will be met if a debtor can meet his or her debts without difficulty when they become due.[27] Inasmuch as the bankruptcy court may dismiss a petition only on its own motion, it seems clear that this new provision does not institute a threshold requirement for a voluntary chapter 7 petition.[28] Likewise, it appears that it is targeted to affect high income debtors, such as doctors, lawyers, and professional athletes. It is unlikely that a debt-ridden soldier's future income would increase to the point that he or she could meet debts without difficulty.

The second way for the soldier-debtor to become involved in a liquidation action is by his or her creditors forcing the action with an involuntary chapter 7 petition.[29] If the debtor owes more than $5000 in unsecured obligations, the holders of those debts may file a bankruptcy petition against the debtor.[30] If the debtor contests this petition, the bankruptcy court must determine that the debtor is generally not paying his or her debts as they become due or that a state appointed custodian has taken possession of substantially all the debtor's property within the 120-day period preceding the filing of the involuntary petition.[31] This is generally referred to as the "equity insolvency" test and replaces the requirement under prior law that creditors prove a balance sheet insolvency and an act of bankruptcy, e.g., a transfer of assets, to force a debtor into bankruptcy.[32] Since most soldier chapter 7 cases are "no asset" cases, it is not common for a soldier's unsecured creditors to force a soldier into a bankruptcy action because they will probably recover a greater portion of

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[21] 28 U.S.C.A. § 1930 (West Supp. 1985). Although the fee is normally paid at the time of filing, the court will accept the petition without payment if it is accompanied by an application to pay the fee in installments. *Id.*

[22] 28 U.S.C.A. § 1408 (West Supp. 1985). This provision may pose a problem for a soldier assigned overseas. Some bankruptcy judges will entertain a joint petition submitted by a spouse who possesses a power of attorney from the service member spouse. Interview, Judge Thomas M. Moore, Bankruptcy Judge, Eastern District of North Carolina, Wilson, North Carolina, 23 Apr. 1985.

[23] 11 U.S.C.A. § 301 (West Supp. 1985). A person may not file a chapter 7 petition if he or she has received a chapter 7 discharge in a case filed within the previous six years. *Id.* § 727(a).

[24] Under prior law a person had to be adjudicated a bankrupt in order to qualify for a voluntary bankruptcy action. This required the court to determine that the person possessed a balance sheet insolvency and had committed an act of bankruptcy. Quite often creditors litigated these issues to keep the individual out of bankruptcy. Of course, the petitioner's financial situation usually deteriorated during the litigation over his or her qualification for bankruptcy.

[25] 130 Cong. Rec. S7624 (daily ed. June 19, 1984).

[26] 11 U.S.C.A. § 707 (West Supp. 1985).

[27] S. Rep. No. 65, 98th Cong., 1st Sess. 54 (1983).

[28] If a creditor requests dismissal on the basis of the debtor's substantial abuse of the provisions of chapter 7, the court may not dismiss the case. 130 Cong. Rec. S7624 (daily ed. June 19, 1984).

[29] 11 U.S.C.A. § 303(a) (West Supp. 1985).

[30] If debtor has twelve or more unsecured creditors, at least three must join in the petition. If the debtor has less than twelve unsecured creditors, only one need file the petition. 11 U.S.C.A. § 303(b) (West Supp. 1985).

[31] 11 U.S.C.A. § 303(h) (West Supp. 1985). This is generally a factual issue for the court. The court will compare the petitioner's debt schedule to his or her monthly income to determine if the equity insolvency test is met.

[32] H.R. Rep. No. 595, 95th Cong., 1st Sess. 324 (1977).

their claims by using non-bankruptcy state enforcement remedies.[33]

The new Code also provides that a husband and wife may commence a voluntary chapter 7 case by filing a joint petition.[34] In a joint case the estates of a husband and wife are consolidated. This could benefit the soldier and spouse by reducing the cost of administration and increasing the amount of the debtors' exempt property.[35] Although one spouse can not force the other spouse to join in the chapter 7 petition,[36] if both spouses file separate petitions, the bankruptcy court may consolidate the case to save administrative expenses.[37]

Regardless of the type of petition filed, if the bankruptcy court entertains the petition it will immediately enter an order for relief.[38] The effect of the order for relief is to stay virtually all collection actions against the debtor.[39] Consequently, a soldier whose home mortgage is being foreclosed or whose automobile is being sold to satisfy judgment lien creditors may avoid these actions by filing a bankruptcy petition. Likewise, the stay operates against the United States and will prevent the finance office from collecting debts, such as partial or advance pay or even report of survey obligations, from the soldier's pay.[40] The sole remedy of the United States is to file an unsecured claim in the chapter 7 proceeding. The United States Army Finance and Accounting Center is responsible for asserting all claims on behalf of the government in a bankruptcy action.[41]

Exemptions

Although the debtor's estate is subject to liquidation in a chapter 7 proceeding, exempt property is not part of the estate.[42] The new Code provides the debtor the option of electing the new uniform federal exemptions or the exemptions provided by the state of his or her residence.[43] The debtor must select the complete set of federal or state exemptions and may exempt only unencumbered property or the equity in encumbered property.[44] The purpose of the exemptions is to provide the debtor a fresh start by permitting the retention of essential property after the debtor discharges debts in bankruptcy. To effect this purpose, the new Code provides that a person may not waive bankruptcy exemptions in a credit agreement.[45] Consequently, there is nothing wrong with a legal assistance officer advising a soldier contemplating bankruptcy

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[33] Interview, Judge Thomas M. Moore, Bankruptcy Judge, Eastern District of North Carolina, Wilson, North Carolina, 23 April 1985.

[34] 11 U.S.C.A. § 302 (West Supp. 1985).

[35] Only one filing fee ($60) is required in a joint case. *Id.* *See infra* text accompanying footnotes 50-51 for a discussion of the impact of a double set of exemptions in a joint bankruptcy action.

[36] 11 U.S.C.A. § 302(a) (West Supp. 1985). Both husband and wife must sign the petition.

[37] R. Bankr. P. 1015.

[38] 11 U.S.C.A. §§ 301, 303 (West Supp. 1985). The term "order for relief" replaces the old term "adjudication." H.R. Rep. No. 595, 95th Cong., 1st Sess. 321 (1977).

[39] 11 U.S.C.A. § 362 (West Supp. 1985). Likewise, no utility company may alter, refuse, or discontinue service or discriminate against a debtor on the basis of an unpaid prepetition utility debt. The utility company may discontinue service if the debtor or the bankruptcy trustee does not furnish adequate assurance of future payment within twenty days of the filing of the case. 11 U.S.C.A. § 366 (West Supp. 1985).

[40] *Id.*

[41] Bankruptcy Procedural Guidelines for Nonbusiness Cases, U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249 (undated). Under these guidelines each finance and accounting office is required to designate a bankruptcy action officer. This officer will report amounts due from service members, such as advance pay, overpayment of allowances, and pecuniary obligations. The Finance and Accounting Center normally does not assert unsecured claims in amounts less than $600. However, claims for less than $600 may be asserted on a case-by-case basis. Bankruptcy action officers should coordinate with the Finance and Accounting Center to arrange for the submission of these claims. Interview, Mr. James L. Richardson, Bankruptcy Fiscal Officer, U.S. Army Finance and Accounting Center, Indianapolis, Indiana, 23 Apr. 1985. *See generally* GAO Policy and Procedure Manual for Guidance to Federal Agencies, Section 98, Chapter 15, Title 4 (undated).

[42] 11 U.S.C.A. § 541 (West Supp. 1985).

[43] *Id.* § 522(b).

[44] *Id.* § 522(b)(2). Although debtors do not normally have equity in encumbered personal property (an automobile), it is not uncommon for a debtor to possess equity in real property. For example, assume a soldier owns a home encumbered by a $50,000 mortgage and the fair market value of the home is $57,500. The soldier may generally exempt the $7500 equity under federal and state exemption laws.

[45] *Id.* § 522(e).

to convert non-exempt property "to property protected by federal or state exemptions.[46]

The more important of the eleven uniform federal exemptions are the $7500 homestead exemption, the $1200 motor vehicle exemption, and the exemption of the debtor's interest up to $200 in any particular item of household goods, including wearing apparel.[47] Although the initial plan under the new Code was to authorize only federal exemptions, the credit industry lobby was able to persuade Congress to permit the states the option, through legislative action, of precluding the use of the uniform federal exemptions by state residents.[48] Thirty-five states have opted to preclude use of the federal exemptions.[49] Regardless of which exemptions are available to the soldier-debtor, it is likely that most soldiers, especially lower ranking soldiers, will be able to exempt a majority of their unencumbered personal property.

The Bankruptcy Amendments Act made two significant changes in the exemption area. The first change was to place a ceiling of $4000 per debtor on the total value of household goods items exempted.[50] The second change prohibits a husband and wife from filing a joint petition and "stacking" state and federal exemptions. Prior to this change couples were able to maximize their exemptions by only one spouse electing to use federal exemptions and the other spouse electing to use the state exemptions. They must now each select the same set of exemptions.[51] Of course, these two changes will affect only debtors in those states that have not "opted out" of the federal exemptions.

Secured Claims

The new Code made a significant change in the treatment of secured claims in a bankruptcy action. By using what is commonly referred to as the "cram-down" provision, the debtor may now modify the value of the secured claim. Under this provision the creditor has a secured claim to the extent the value of the claim exceeds the value of the security.[52] Consequently both oversecured and undersecured claims may exist in a bankruptcy action. Normally, the holder of a home mortgage has an oversecured claim because the value of the home exceeds the balance on the mortgage. In contrast, the holder of a claim secured by a lien on an automobile may have an undersecured claim. For example, a soldier purchased a 1984 automobile for $10,000 by trading in an old car and signing a loan for the remaining $8000. A year later the value of the rapidly depreciating security is $6000 and the loan balance is $7000. If the soldier files a bankruptcy petition and the automobile is sold, the holder of this obligation has a secured claim for $6000 and an unsecured claim for $1000, the amount by which the claim exceeds the value of the security. Inasmuch as most consumer chapter 7 liquidations are "no asset" cases, the holder of the secured automobile claim will not recover the unsecured amount, in this example $1000.[53] The significance of this provision for the soldier debtor should not be overlooked because it is

[46] The purpose of the exemptions is to give the debtor a fresh start by allowing him or her to retain items of property essential to daily life. Consequently, a debtor can generally arrange his or her property prior to filing for bankruptcy to maximize the amount of property exempt and consequently minimize the amount of property lost to creditors. H.R. Rep. No 595, 95th Cong., 2 Sess 361, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6317.

[47] 11 U.S.C.A. § 522(d) (West Supp. 1985). The household goods exemption is especially beneficial to the soldier because it is unlikely that many items in the soldiers home will be worth more than $200 per item. Consequently a majority, if not all, of the soldiers personal property will be protected from liquidation by the federal exemptions. *Id.*

[48] 11 U.S.C.A. § 522(b) (West Supp. 1985).

[49] The following states have opted out: Alabama, Alaska, Arkansas, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, New Hampshire, New York, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

[50] 11 U.S.C.A. § 522(d)(3) (West Supp. 1985).

[51] *Id.* § 522(b). If a husband and wife cannot agree on which set of exemptions to elect, they shall be deemed to have elected the federal exemptions in jurisdictions where their use is permitted. *Id.*

[52] *Id.* § 506(a). The bankruptcy court will determine the value of the collateral in light of the purpose of the valuation and the proposed disposition or use of the subject property. *Id.*

[53] *See supra* text accompanying footnotes 16-20 for a discussion of the chapter 7 "no asset" case.

common for a soldier to be overextended financially by purchasing an expensive automobile.

The Discharge of Debts

The soldier-debtor's objective in filing a chapter 7 liquidation action is the total discharge of indebtedness. A discharge under the new Code voids all judgments and enjoins all collection actions on prepetition debts, even if the creditor did not file a claim.[54] Even though the expanded scope of the bankruptcy discharge is the heart of the "fresh start" concept under the new Code, not all of the debtor's debts are discharged in a chapter 7 proceeding.[55] From the soldier's perspective, the most important debts not discharged are obligations for alimony and child support,[56] obligations for the willful and malicious injury by the debtor of another person or that person's property,[57] obligations for some student loans,[58] and obligations incurred by the debtor through the use of false representations.[59]

The Bankruptcy Amendments Act added two new categories of debts that are not dischargeable in a chapter 7 action. The first change was in response to creditor complaints that consumers were going on spending sprees in anticipation of filing for bankruptcy. The new provision creates a presumption against the discharge of consumer debts to a single creditor for luxury goods and services incurred forty days prior to the petition and for cash advances of over $1000 incurred under an open-end credit plan within twenty days prior to the petition.[60] The second change excepts from chapter 7 discharge those debts that arise from a judgment or consent decree in which liability was incurred as a result of the debtor's operation of a motor vehicle while intoxicated.[61]

A soldier considering bankruptcy may decide that a chapter 7 liquidation action is not attractive for many reasons. If the soldier is a resident of a low exemption state that has "opted out" of the federal exemptions, he or she stands to lose a significant amount of property in liquidation. The soldier may also have debts, such as a personal injury judgment resulting from intoxicated driving, which are not dischargeable under chapter 7. Most importantly, the soldier may desire to pay all or a portion of his or her debts over time but needs a bankruptcy court to protect his or her assets from creditor repossession actions. Under these circumstances, the legal assistance officer should advise the soldier of the ramifications of filing a chapter 13 repayment plan.

The Chapter 13 Repayment Plan

The new chapter 13 repayment plan may be especially beneficial to the soldier who is unable to meet obligations as they become due.[62] Under the new law the debtor may reduce debts to fit the debtor's income and is no longer required to stretch his or her income to fit the debt schedule, as was after the case under the old wage earner plan.[63] After filing the petition, the debtor develops a full or partial repayment plan which the court approves. The debtor than makes pay-

[54] 11 U.S.C.A. §§ 524, 727 (West Supp. 1985). The discharge covers debts that arose before the date of the order for relief. *Id.*

[55] *Id.* § 523.

[56] *Id.* § 523(a)(5). Only alimony, maintenance or child support owed directly to a spouse or dependent are excepted from discharge. Such debts assigned to another entity are dischargeable in a chapter 7 action. For example, a child support obligation assigned to a state as a condition to aid for dependent children eligibility is dischargeable. *Id.* § 523(a)(5)(A).

[57] *Id.* § 523(a)(6). The provision usually will prevent the soldier from discharging forfeitures and fines adjudged by a court-martial.

[58] *Id.* § 523(a)(8). Student loans made or insured by a governmental unit are not dischargeable unless the loan was first due five years before the filing of the bankruptcy petition and excepting the debt from discharge would impose an undue hardship on the debtor. *Id.*

[59] *Id.* § 523(a)(1), (2), and (4).

[60] *Id.* § 523(a)(2). Luxury goods and services are defined as goods and services not reasonably acquired for the support of the debtor or the debtor's dependents.

[61] *Id.* § 523(a)(9). The judgment or consent decree must be entered in a court of record and the debtor must have met the legal standard for intoxication in the jurisdiction where the accident occurred.

[62] 11 U.S.C.A. §§ 1301-1330 (West Supp. 1985).

[63] Under prior law the consent of the debtor's unsecured creditors was a prerequisite to confirmation of a wage earner plan. Unsecured creditors normally would not consent to the plan unless they were paid a substantial portion of these claims. This usually resulted in a payment schedule that exceeded the debtor's financial ability. *See generally* Klein, *The New Bankruptcy Code*, Prac. Law., Jan. 15. 1979.

ments to a court appointed trustee who distributes the money to the debtor's creditors.[64] Upon completion of the plan, the debts included in the plan are discharged.[65] A major advantage of chapter 13 is that the debtor retains all assets and is free to dispose of those assets subject, of course, to security interests.

Petition(s)

The new chapter 13 action is no longer limited to wage earners. Any person with income sufficiently stable to permit regular payments and whose unsecured debts are less than $100,000 and secured debts are less than $350,000 may file a chapter 13 petition.[66] The new Code permits only voluntary chapter 13 petitions and authorizes joint petitions by husband and wife.[67] Most soldier-debtors should easily qualify for a chapter 13 because they normally have a very stable income and usually do not acquire debts in excess of the $100,000/$350,000 limit.

Just as under chapter 7, the filing of the chapter 13 petition operates as an automatic stay of various creditor actions against the debtor.[68] Additionally, the stay in a chapter 13 action is extended to protect accommodation co-debtors from creditor enforcement actions on consumer debts.[69] This provision is often referred to as the "mother-in-law" clause and is intended to protect the debtor from indirect pressure exerted by creditors through the debtor's friends or relatives who may have cosigned an obligation.[70]

The Plan

After filing the petition the debtor has ten days to submit a plan to the bankruptcy court.[71] The plan must provide for the submission of future income to a court appointed trustee and for the full payment of priority claims, such as administrative expenses and tax obligations.[72] The plan may classify claims into related categories but it must provide for uniform treatment of all claims within a particular class.[73] For example, a debtor may want to pay all of his or her unsecured medical expenses under the chapter 13 plan but pay only a portion of his or her unsecured credit card debts. This is permissible so long as all credit card claimants are paid the same percentage of their claims.

Under the new Code, the duration of debtor's chapter 13 plan is limited to three years, except that the bankruptcy court extends it up to five years for good cause.[74] In discussing a chapter 13 plan, the legal assistance officer should assist the soldier in calculating his or her monthly income. From this figure the soldier should subtract monthly living expenses. These expenses should be reasonable but should not include payments on debts included in the plan.[75] The amount remaining is the amount available to fund the plan over the three-year repayment period. For example the following figures might apply to a staff

[64] A soldier may initiate a voluntary allotment to fund a chapter 13 plan. If a voluntary allotment is not initiated, the bankruptcy court will issue an order which requires the finance center to pay the court appointed trustee the monthly payment amount. DAJA-AL 1979/2568, 31 May 1979.

[65] 11 U.S.C.A. § 1328 (West Supp. 1985).

[66] *Id.* § 109(e). A nonsalaried attorney has been held to have income sufficiently stable enough to qualify him for chapter 13. *In re* Ballard, 6 B.C.D. 446 (BC E.D. Va. 1980).

[67] 11 U.S.C.A. §§ 302, 303(a) (West Supp. 1985).

[68] *Id.* § 362. The Bankruptcy Amendments Act provides that a debtor may recover compensatory and punitive damages and attorneys fees from a person or entity that willfully violates the stay. *Id.* § 362(h).

[69] *Id.* § 1301.

[70] H.R. Rep. No. 595, 95th Cong., 1st Sess. 426 (1977).

[71] R. Bankr. P. 13-107(b). The court may extend the ten day period for filing the plan. *Id.*

[72] 11 U.S.C.A. § 1322 (West Supp. 1985).

[73] The Bankruptcy Amendments Act specifically authorizes treating co-debtor claims as a separate class. *Id.* § 1322(b)(1).

[74] *Id.* § 1322(c). A plan may also last less than three years. *In re* Markham, 6 B.C.D. 632 (E.D.N.Y. 1980) (18 months). Although most chapter 13 plans run for three years, the bankruptcy judge will normally approve a long plan (up to five years) if the debtor wants to pay the holders of secured claims a greater percentage of their claims. Interview, Judge Thomas M. Moore, Bankruptcy Judge, Eastern District of North Carolina, Wilson, North Carolina, 23 Apr. 1985.

[75] The Bankruptcy Amendments Act provides the holder of an unsecured claim the right to obtain to confirmation of a chapter 13 plan if it fails to pay the claim in full or commit all of the debtor's disposable income during the plan period. Disposable income is income received by the debtor that is not reasonably necessary for the support of the debtor or the debtor's dependents. 11 U.S.C.A. § 1325(b)(1) (West Supp. 1985).

sergeant with ten years service who files a chapter 13 plan:

Monthly income after taxes		$1450.00
Monthly expenses		
Housing	450.00	
Food	300.00	
Insurance	75.00	
Other expenses	425.00	
	1250.00	$1250.00
Amount available monthly to fund the chapter 13 plan		$ 200.00
Amount of debt that could be paid over 36 months		$7200.00
less administrative expenses		-$1180.00
Amount available over 36 months to pay claims		$6020.00

Confirmation of the Plan

The bankruptcy court is required to conduct a hearing to approve the plan and normally will approve the plan if it is feasible and all filing fees have been paid.[76] Although there is no longer a requirement that the holders of unsecured claims consent to the plan for it to be approved, the bankruptcy court must conclude that the plan meets the "best interest of the creditors" test.[77] This test is fulfilled if the holders of unsecured claims receive more under the chapter 13 plan than they would have had the debtor obtained a discharge in a chapter 7 liquidation action.[78] Inasmuch as most soldier chapter 7 actions are "no asset" cases, this is not a difficult test for the soldier-debtor to meet. Consequently, plans have been approved where debtors have paid from zero cents to 100 cents on each dollar of debt due to the holders of unsecured claims.[79]

[76] *Id.* §§ 1324, 1325.

[77] *Id.* § 1325(a)(4).

[78] *Id.*

[79] A chapter 13 plan which proposes no payment to the holders of unsecured claims was confirmed because the bankruptcy judge determined it was a reasonable repayment effort and not an attempt to abuse the spirit of the Bankruptcy Code. Public Finance Corp. v. Freeman, 712 F.2d 219 (9th Cir. 1983). Ninety-five percent of the military debtors in the Eastern District of North Carolina pay more than 50 cents on the dollar to the holders of unsecured claims. Forty percent pay 100 cents on each dollar of debt. Interview, Judge Thomas M. Moore, Bankruptcy Judge, Eastern District of North Carolina, Wilson, North Carolina, 23 Apr. 1985.

Secured Claims

As under chapter 7, the chapter 13 debtor is given extensive authority to modify the rights of the holders of secured claims.[80] The debtor has two options in dealing with secured claims in a chapter 13 action. He or she may reduce the monthly payments on secured loans included in the plan, provided that the holder of the claim retains a full value lien upon completion of the plan.[81] The second option is to return the security to the creditor and treat the amount by which the secured claim exceeds the value of the security as an unsecured claim in the plan.[82] The exception to these rules in chapter 13 is that the debtor may not modify the rights of a holder of a claim secured only by a security interest in real property that is the debtor's principal residence.[83] However, the plan may provide for the curing of any mortgage default over a reasonable period of time.[84]

The ability to cure a mortgage in default by filing a chapter 13 plan is especially useful to the soldier-debtor. In the typical situation, a soldier who owns a house encumbered by a mortgage is unable because of poor financial management or an unexpected expense to make the monthly payments for a short period of time. The lender will normally accelerate all payments and declare the entire mortgage due even though the soldier may be able to resume regular monthly payments. Frequently the soldier is unable to pay the arrearage or refinance the amount of the loan and, therefore, faces the loss of the home. A chapter 13 action may enable the soldier to keep the home by staying the lender's foreclosure action. Under the plan, the soldier can resume monthly payments and spread the arrearage over the thirty-six month period of the plan.

[80] 11 U.S.C.A. § 1322(b)(2) (West Supp. 1985). The value of the secured claim is reduced to the value of the security on the date of the filing of the petition.

[81] *Id.* § 1325(a)(5)(B). The debtor must provide adequate protection to the holder of a secured claim by making payments at least equal to the monthly depreciation of the security.

[82] *Id.* § 1325(a)(5)(C).

[83] *Id.* § 1322(b)(2).

[84] *Id.* § 1322(b)(5).

The Discharge of Debts

Upon completion of the plan the debtor obtains a discharge of all debts included in the plan.[85] Chapter 13 results in the discharge of many debts that are not dischargeable in a chapter 7 proceeding. The only debts excepted from the chapter 13 discharge are alimony and child support obligations,[86] long-term obligations which extend beyond the plan period,[87] and obligations given priority status, such as tax claims.[88]

In addition to the standard discharge, chapter 13 provides for a "hardship discharge." If the debtor cannot complete payments under the plan, the bankruptcy court may still grant a discharge, but only if:

(1) the debtor's failure to complete the payments was due to circumstances beyond his or her control,

(2) the amount the debtor has paid the holders of unsecured claims is more than they would have received in a chapter 7 liquidation proceeding, and

(3) modification of the plan by lowering the monthly payment is not practicable.[89]

The necessity for using this hardship discharge provision often arises when the debtor loses his or her job or becomes seriously ill and is unable to work for an extended period.

In contrast to the ability of the debtor to pursue a hardship discharge is a new provision provided by the Bankruptcy Amendments Act which permits creditors to seek modification of the plan if the debtor's financial condition improves substantially during the period of the plan.[90] Prior to this change the debtor could, but was not required to, request modification of the plan payment if his or her income increased during the period of the plan. On the other hand, the debtor may also take advantage of this new modification provision by requesting a decrease in the plan payment if his or her financial position worsens.

The Advantages of Chapter 13

The soldier contemplating bankruptcy should be advised by the legal assistance officer of the significant advantages of filing a chapter 13 petition under the new code.[91] These advantages for the soldier include:

1. The ability to retain all property while completing the plan. A common example is the soldier who is facing the repossession of an automobile by a finance company. Under chapter 13 the soldier may modify the rights of the finance company without losing the car.

2. The extension of the automatic stay provision to co-debtors for consumer debts.

3. The possibility of obtaining a "hardship" discharge if the soldier's financial situation deteriorates.

4. The fewer debts that are excepted from discharge under chapter 13.

5. The knowledge that the soldier is paying a portion of the debts owed over a three year period. This is one of the most important advantages because the chapter 13 plan satisfies both the debtor's moral obligation to fulfill financial obligations and his or her need for the discipline of a repayment plan.

Conclusion

The recent implementation of a completely revised bankruptcy system provides the soldier experiencing financial difficulties an effective way to seek legal relief from severe financial distress. The relief may come in the form of a successful chapter 7 liquidation or chapter 13 repayment action. Military commanders and judge advocates are well aware that the military profession is not one of the most lucrative. This is especially true for our younger enlisted soldiers who must daily resist "hard-sell" tactics which

[85] *Id.* § 1328(a).

[86] *Id.* § 1328(a)(2).

[87] *Id.* § 1328(a)(1). A home mortgage is an example of a long-term obligation.

[88] *Id.* § 1322(a)(2). The plan must provide for the full payment of all claims entitled to priority under 11 U.S.C. § 507.

[89] *Id.* § 1328(b).

[90] *Id.* § 1329(a).

[91] The Bankruptcy Amendments Act requires the bankruptcy clerk to explain to a bankruptcy petitioner the benefits of chapter 13 and that under chapter 13 the debtor may be able to pay all or a portion of his or her debts. 11 U.S.C.A. § 342(b) (West Supp. 1985).

are prevalent in our society and must also contend with frequent, costly geographical relocations. Bankruptcy may be the only way for the soldier to save a car, a home, and, in some cases, a marriage. It is unreasonable to expect the soldier experiencing a financial crisis to be able to devote 100% to the job. On the other hand, a person who obtains a fresh financial start after a bankruptcy discharge may become a very productive and valuable soldier.

Multiplicity Under the New Manual for Courts-Martial

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I. Introduction

There is both good news and bad news about multiplicity under the new Manual for Courts-Martial. The good news is that the new Manual appears to incorporate the relatively simple rule of *Blockburger v. United States* that offenses are separate where each requires proof of a fact or element which the other does not.[1] This is in contrast to the extremely confusing rules of *United States v. Baker* and its progeny that charges are multiplicious if the elements of one offense are necessarily embraced by the elements of another or are fairly embraced by the allegations under another.[2] The bad news is that the apparent meaning of the pertinent Rules for Courts-Martial in the new Manual is not interpreted clearly by the Discussion and Analysis of these Rules, and the actual meaning has not yet been interpreted definitively by the courts of military review of the Court of Military Appeals.[3] Thus, there is not yet any clear, authoritative guidance for applying the general, flexible provisions of the new Manual for Courts-Martial to determinations of multiplicity at the trial level. There are, however, indications that the Court of Military Appeals will continue to follow *United States v. Baker* and that the question of multiplicity may ultimately be resolved by the Supreme Court.[4]

Three questions immediately arise from this continuing confusion regarding multiplicity. First, to what extent must *United States v. Baker* still be followed? Second, to what extent may *Blockburger v. United States* now be followed? Third, in the event of conflict, which rule or combination of rules should be followed? Trials under the new Manual for Courts-Martial will have to address these questions. Pending resolution by changes to the new Manual or by decisions of the appellate courts, the counsel and judges at each trial will have to resolve these questions for themselves as the law of the case. It is not clear whether *Baker* must still be followed or whether *Blockburger* may now be followed.[5] Thus, caution dictates a conservative, combined approach to questions about multiplicity under the New Manual during this period of

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[1] 284 U.S. 299, 304 (1932).

[2] United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983); United States v. Cox, 18 M.J. 72 (C.M.A. 1984); United States v. DiBello, 17 M.J. 77 (C.M.A. 1983); United States v. Glover, 16 M.J. 397 (C.M.A. 1983); United States v. Allen, 16 M.J. 395 (C.M.A. 1983); United States v. Holt, 16 M.J. 393 (C.M.A. 1983); United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983); United States v. Doss, 15 M.J. 409 (C.M.A. 1983). The Court of Military Appeals has acknowledged the confusion in military justice regarding multiplicity. *See, e.g.*, United States v. Baker, 14 M.J. at 364-70 (Fletcher, J.); *id.* at 370-71 (Everett, C.J., concurring), *id.* at 371-76 (Cook, J., dissenting). *See also* United States v. Doss, 15 M.J. at 410, 414. As recently as 31 May 1984, the court reaffirmed its view that there was confusion in this area of the law in comments from the bench during oral argument in United States v. Zubko, 18 M.J. 378 (C.M.A. 1984).

[3] A detailed discussion of the multiplicity provisions of the new Manual for Courts-Martial is contained in section II *infra*.

[4] A detailed discussion of the position of the Court of Military Appeals and the posture of the law on multiplicity is contained in section III *infra*.

[5] *See* discussion in sections III and II A–E *infra*, respectively.

uncertainty.[6] The analysis that follows is offered to facilitate the clear, thoughtful resolution of questions about multiplicity under the new Manual for Courts-Martial.

II. The Provisions of the New Manual for Courts-Martial

A. General

The 1984 Manual for Courts-Martial,[7] which was effective on 1 August 1984, contains general, flexible provisions with respect to multiplicity for charging, findings, and sentencing. The pertinent Rules for Courts-Martial[8] are Rules 307(c)(4) as to charging, Rule 907(b)(3)(B) as to charging and findings, Rule 906(b)(12) as to sentencing, and Rule 1003(c)(1)(C) as to sentencing. These Rules essentially follow the constitutional requirements set forth by the United States Supreme Court in *Blockburger v. United States*.[9] The Discussion, however, accompanying each of these Rules essentially follows the more restrictive requirements set forth by the United States Court of Military Appeals in *United States v. Baker*.[10] The Analysis at Appendix 21 of the Manual of each of these Rules essentially says "take your pick"[11] In interpreting the provisions of the new Manual, it is important to note that only the Rules are binding; The Discussion and Analysis are intended for guidance only. The Rules are prescribed by the President pursuant to his power over procedural matters; the Discussion and Analysis are provided by the drafters of the new Manual as secondary and supplemental materials, respectively. The Rules create rights and responsibilities; the Discussion and Analysis do not.[12]

B. Charging

Rules 307(c)(4) and 907(b)(3)(B) pertain to charging multiple offenses. Rule 307(c)(4) provides only that all known offenses may be charged at the same time and that each specification shall state only one offense. The Discussion of this Rule provides, in pertinent part:

> What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.... There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. *In no case should both an offense and a lesser included offense thereof be separately charged.*[13]

Rule 907(b)(3)(B) provides, in pertinent part: "A specification may be dismissed upon timely motion by the accused if ... [it] is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and

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[6] *See* discussion in sections II F and IV *infra*.

[7] Manual for Courts-Martial, United States, 1984 [hereinafter cited in text as the new Manual and in footnotes as MCM, 1984].

[8] MCM, 1984, Rules for Courts-Martial [hereinafter cited in text as Rule and in footnotes as R.C.M.].

[9] *See, e.g.*, R.C.M. 1003(c)(1)(C) ("offenses are not separate [for sentencing and, by implication, for all lesser purposes] if each does not require proof of an element not required to prove the other"). *See Blockburger*, 284 U.S. at 304.

[10] *See, e.g.*, R.C.M. 307(c)(4) discussion ("[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges"). *See Baker*, 14 M.J. at 365.

[11] See MCM, 1984, 1984, Analysis of Introduction, para. *b*(1), at A21-3 (citing Judge Cook's dissent in United States v. Baker, 14 M.J. at 373); *but see* R.C.M. 1003(c)(1)(D) analysis, at A21-63 (citing *United States v. Baker* generally).

[12] *See* MCM, 1984, Preamble, para. 4, at I–1 and I–2; MCM, 1984, Analysis of Introduction, *History*, at A21–1, and paras. *b*(1)–(2), at A21–3. *See also* Uniform Code of Military Justice art. 10 U.S.C. §836 81982) [hereinafter cited as UCMJ.]

[13] R.C.M. (307(c)(4) discussion, at II–31 [emphasis added]. R.C.M. 307(c)(4) discussion is essentially unchanged from para. 26*b* of the 1969 Manual for Courts-Martial as to multiplicity. The provisions of the Rule related to charging all known offenses are "less restrictive than the former and traditional military practice," but the provisions of the Discussion related to multiplicity are not "less restrictive." *See* MCM, 1984, R.C.M. 307(c)(4) discussion, at A21–20.

should be dismissed in the interest of justice."[14] The Discussion of Rule 907(b)(3)(B) provides:

> A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicious if the disorderly conduct consists solely of the assault. *See also* R.C.M. 1003(c)(1)(C).
>
> Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.[11]

The new Manual does not fully define when an offense is a lesser included one or identical. Part IV of the new Manual (Punitive Articles) sets forth some commonly included offenses, but not all necessarily included offenses, and not any fairly embraced offenses. The most pertinent multiplicity provision is Rule 1003(c)(1)(C) which provides that offenses are not separate if they are not elementally separate, and thus implies the converse as well: that offenses are separate if they are elementally separate.

C. Findings

Rule 907(b)(3)(B) and its Discussion apply equally to the determination of multiplicity for findings. Any motions to dismiss offenses as multiplicious for charging could certainly be renewed upon findings when the contingencies of fact (though not of law) are resolved. Additionally, specifications "describ[ing] substantially the same misconduct in . . . different ways . . . may be multiplicious. . . ."[12] Again, the terms in the Rules are not fully defined and thus dismissal seems permissive, not mandatory.

D. Sentencing

The most significant provisions of the new Manual with respect to multiplicity are those applicable to sentencing because offenses that are separate for the ultimate determination of sentencing are, by necessary implication, also separate for the lesser determinations of findings and charging. Rule 1003(c)(1)(C) provides:

> When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided [as to conspiracy], offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense

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[14] R.C.M. 907(b)(3)(B) is based upon MCM, 1969, paras. 26*b*, 74*b*(4), and 76*a*(5); United States v. Gibson, 11 M.J. 435 (C.M.A. 1981); United States v. Stegall, 6 M.J. 176 (C.M.A. 1979); United States v. Williams, 18 C.M.A. 78, 39 C.M.R. 78 (1968). *See* R.C.M. 907(b)(3)(B) analysis, at A21–51. The language of R.C.M. 907(b)(3)(B) appears to broaden the scope of "exigencies of proof" by extension beyond findings "through trial, review, and appe[al]." There is some support for this interpretation. *See* United States v. Robinson, 18 M.J. 635, 636 (N.M.C.M.R. 1984); United States v. Davis, No. 823529 (N.M.C.M.R. 29 Oct. 1982) (unpublished), *petition denied*, 15 M.J. 279 (C.M.A. 1983). However, if multiplicity is the only issue in the case, following this interpretation may unnecessarily prolong the appellate process. In such a case, the interests of finality of judgment and judicial economy might better be served by early dismissal of charges that are multiplicious for findings. The language of this Rule also suggests that dismissal of multiplicious specifications might be waived under Military Rule of Evidence 103 for failure to make a "timely motion." However, the Court of Military Appeals expressly rejected this interpretation in United States v. Huggins, 17 M.J. 345 (C.M.A. 194) (summary disposition). R.C.M. 907(b)(3)(B) analysis cites pre-*Baker* case law *(Gibson, Stegall,* and *Williams)*; former Manual provisions restricted by *Baker* (MCM, 1969, paras. 26*b* and 74*b*(4)); and a former Manual provision distinguished by *Baker* as applicable to sentencing but not findings (MCM, 1969, para. 76*a*(5)). *See* United States v. Baker, 14 M.J. at 367–70. The Analysis does not cite *Baker* itself. Absent an express rejection of *Baker*, this should not be viewed as rejection in keeping with the evident intent of the drafters as to much matters. *See, e.g.*, MCM, 1984, Analysis of Introduction, para. *b*(2), at A21–3. *See also* R.C.M. 906(b)(12).

[11] R.C.M. 907(b)(3)(B) discussion, at II–115.

[12] *Id.*

carrying the greatest maximum punishment.[13]

The Discussion of this Rule provides:

> The basis of the concept of multiplicity in sentencing is that an accused may not be punished twice for what is, in effect, one offense. Offenses arising out of the same act or transaction may be multiplicious for sentencing depending on the evidence. No single test or formula has been developed which will resolve the question of multiplicity.
>
> The following tests have been used for determining whether offenses are separate. Offenses are not separate if one is included in the other or unless each requires proof of an element not required to prove the other. For example, if an accused is found guilty of escape from confinement... and desertion ... which both arose out of the same act or transaction, the offenses would be separate because intent to remain permanently absent is not an element of escape from confinement and a freeing from restraint is not an element of desertion. However, if the accused had been found guilty of unauthorized absence instead of desertion, the offense would not be separate because unauthorized absence does not require proof of any element not also required to prove escape.
>
> Even if each offense requires proof of an element not required to prove the other, they may not be separately punishable if the offenses were committed as the result of a single impulse or intent. For example, if an accused found guilty of larceny ... and of unlawfully opening mail matter ... the mail bag for the purpose of stealing money in a letter in the bag, the offenses would not be separately punishable. Also, if there was a unity of time and the existence of a connected chain of events, the offenses may not be separately punishable, depending on all the circumstances, even if each required proof of a different element.[14]

The Analysis of this Rule states that:

> Subsection (1)(C) is based on the first 3 sentences and the last sentence of paragraph 76*a*(5) of M.C.M., 1969 (Rev.). *See Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Washington*, 1 M.J 473 (C.M.A. 1976). *See also Missouri v. Hunter*, ___ U.S. ___, 51 U.S.L.W. 4093 (1983); *United States v. Baker*, 14 M.J.361 (C.M.A. 1983). The discussion is based on paragraph76*a*(5) of M.C.M., 1969 (Rev.). As to the third paragraph in the discussion, *see e.g.*, United States v. Posnick, 8 U.S.C.M.A. 201, 24 C.M.R. 11 (1957). *cf. United States v. Stegall*, 6 M.J. 176 (C.M.A. 1979). As to the fourth paragraph in the discussion, *See United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978); *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977); *United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Burney*, 21 U.S.C.M.A. 71, 44 c.M.R. 125 (1971).[15]

The most significant provisions of the new Manual with respect to multiplicity are also the most significant example of the confusing trichotomy among the Rules, Discussion, and Analysis, *i.e.*, the Rules follow *Blockburger*, the Discussion follows *Baker*, and the Analysis cites both. Bearing in mind that only the Rules create rights and responsibilities, it could be concluded (absent authoritative guidance to the contrary) that the President intended that the rule of *Blockburger* be followed. Paragraph *b*(2) of the Analysis of the Introduction of the new Manual provides some apparent guidance to the contrary but as a whole is neither clear nor authoritative: "the placement of matter in the Discussion (or the Analysis), rather than the [R]ule, is [not] to be taken as disapproval of the precedent ...; rather, ... the continuing validity of the precedent will depend on the force of its rationale, the doctrine of stare decisis, and similar jurisprudential considerations."[16] These general considerations are discussed below in sections II E and III.

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[13] R.C.M. 1003(c)(1)(C), at II–147.

[14] *Id.* discussion, at II-148.

[15] *Id.* analysis, at A21–63.

[16] MCM, 1984, Analysis of Introduction, at A21–3.

E. Interpretation

Multiplicity, within the substantive limits of the Constitution as set forth in *Blockburger v. United States*, is a procedural matter over which the President has the power to prescribe (and thus change) rules pursuant to Article 36 of the Uniform Code of Military Justice (UCMJ). The extent of the President's power as commander-in-chief pursuant to Article III, Section 2 of the Constitution is very broad.[17] The power of the Court of Military Appeals is limited in this area when the executive provisions at issue meet the requirements of the UCMJ.[18] The court must follow the intent of the President—express and implied—in interpreting executive provisions.[19] Consequently, the court must accept the rules established by the President for determining multiplicity, absent some constitutional infirmity.[20]

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[17] In United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), the court examined (among other things) the extent of the President's power to prescribe procedural rules for courts-martial "in the exercise of his responsibilities as commander-in-chief under Article III, Section 2 [of the United States Constitution]...." The court, through Chief Judge Everett, stated:

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial....
>
> The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the ... defect[s] in ... court-martial ... procedure ...

Id. at 380–81 (footnote and citations omitted).

[18] In a separate concurring opinion in *Matthews*, Judge Fletcher examined the extent of the power of the Court of Military Appeals to act with respect to the procedural rules prescribed by the President. He stated:

> Article 36, UCMJ, 10 U.S.C. §836, provides that the President by regulation may prescribe modes of procedure in cases before courts-martial. Oftentimes the procedures prescribed are incorporations or modifications of past practices enshrined in old service manuals or vintage military law hornbooks. *E.g., United States v. Davidson*, 14 M.J. 81, 85 (C.M.A. 1982). Article 36 also requires that these modes of procedure "may not be contrary to or inconsistent with" the statutory provisions of the Uniform Code of Military Justice. *See* Hearings on H.R. 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess., reprinted in *Index and Legislative History, Uniform Code of Military Justice* 1014–19, 1061–64 (1949).... To the extent that these executive provisions of military law, technical in nature, conflict with or fail to meet the demands of the Code, this Court must also act to accomplish Congress' will. *Noyd v. Bond.* [395 U.S. 683, 694–96 (1969)]; H. Moyer, *Justice and the Military* §2:507 (1972), and cases therein.

United States v. Matthews, 16 M.J. at 383 (footnote omitted). Conversely, where executive provisions *do* meet the demands of the Code, it is neither necessary nor appropriate for the court to change them.

[19] In United States v. Clark, 16 M.J. 239 (C.M.A. 1983), the court acknowledged the limits of its own powers of judicial interpretation. Judge Cook, with Judge Fletcher concurring, stated: "We must take the law as we find it and interpret it according to our best judicial judgment; we are not free to create new law in the guise of judicial interpretation." *Id.* at 242. The principal opinion also noted that:

> Although there have been amendments to the Uniform Code of Military Justice since 1978, Congress has not chosen to change the statutory provisions pertinent here. In light of the ... interpretation by this Court ... Congress' failure to change the statutory scheme must be viewed as acceptance of that interpretation. *United States v. Washington*, [1 M.J. 473 (C.M.A. 1976)], and cases cited therein.

Id. at 241 (footnote omitted). In a separate, concurring opinion, Chief Judge Everett reluctantly agreed. *Id.* at 242.

By analogy, this applies to presidential amendments of regulatory provisions as well. The converse of this rule is that where the President *has* amended regulatory provisions in light of interpretation by the court and *has* changed the regulatory scheme, this must (or at least should) be viewed as rejection of that interpretation. Accordingly, the presidential amendments to the procedural rules concerning multiplicity in the new Manual for Courts-Martial constitute acceptance of the constitutional requirements set forth by the Supreme Court in *Blockburger v. United States* and constitute rejection of the more restrictive rules set forth by the Court of Military Appeals in *United States v. Baker.*

[20] In *Baker*, Judge Cook stated in his dissenting opinion:

> [I]n the ... Uniform Code of Military Justice, ... Articles 36(a) and 56, 10 U.S.C. §§836(a) and 856, respectively, Congress expressly delegated *to the President* the authority to establish procedures and to define the limits of punishment in courts-martial. Pursuant to that delegation, the President duly established ... the test to be utilized in determining separability of [offenses for] punishment—the so-called *"Blockburger"* or "elements" test. Nowhere in the Uniform Code of Military Justice does it appear, either expressly or by implication, that this Court has the authority to make rules with respect to sentencing which either supplement, impinge upon, or override the rules established by the Executive. *See* Article 67, UCMJ, 10 U.S.C. §867. Therefore, absent some constitutional infirmity, the rules established by the President for determining multiplicity questions are the rules which this Court must accept and apply.

14 M.J. at 372–73. By necessary implication, this applies to findings as well.

The Rules for Courts-Martial regarding multiplicity in the new Manual are procedurally within the President's authority to prescribe rules under Article 36 of the UCMJ and are substantively within the limits of the Constitution as stated in *Blockburger v. United States*. Thus, there is no constitutional infirmity, and the Court of Military Appeals should accept them. The pertinent Rules for Courts-Martial appear to follow *Blockburger*, notwithstanding both the Discussion of the Rules (which appears to follow *Baker* but is not authoritative) and the Analysis of the Rules (which contains conflicting citations of authority and thus is not clear as well as not authoritative).[21] Accordingly, the court should follow *Blockburger*, not *Baker*. However, as will be discussed in section III, it appears that the court will continue to follow *Baker*, notwithstanding this interpretation.

F. Solutions

When analysis indicates that offenses are not multiplicious, the solution in response to a motion to dismiss or for other relief is to argue that the offenses are separate, as per the step-by-step approach discussed below in section IV. When analysis indicates that offenses are multiplicious, the best solution is to avoid the problem in the first place by not charging both or all of the multiplicious offenses unless there is a specific justification because of contingencies of fact or law. If the elements of one offense are necessarily included in the elements of another, the two offenses should not, as a general rule, be charged separately. Because the elements of both offenses are necessarily included in the elements of one of the offenses, the government would not, as a general rule, need to charge both offenses separately. The more difficult situation involves the second prong of the *Baker* definition of an included offense, *i.e.*, where the elements of one offense are fairly embraced by the allegations in another. In such a case there may well be (and probably will be) contingencies of fact or law to justify *charging* the offenses separately. A motion to dismiss such offenses could properly be opposed by specifying the contingencies of fact or law which justify the separate charges and by citing Rules 307(c)(4) and 907(b)(3)(B) which authorize such separate charges when necessary to meet the exigencies of proof through trial, review, and appeal. Some problems can be avoided simply by refraining from making surplus allegations of fact when drafting specifications so that otherwise separate offenses do not become multiplicious because the language of one is made to embrace the elements of another. Amending charges by deleting such extraneous language may also be helpful. This would be a "minor change" within the meaning of Rule 603 and could be made by an authorized person before arraignment or by motion to the military judge after arraignment but before findings. Because such a change deletes matter already included, rather than adding new matter not fairly included, it does not prejudice any substantial right of the accused.

Upon findings, the government could counter a motion to dismiss by moving to consolidate, rather than merely dismiss multiplicious specifications, citing *United States v. Huggins*[22] which provides that consolidation is an appropriate remedy under some circumstances. The government could also counter by arguing the continuing exigencies of proof as provided under Rule 907(b)(3)(B), which applies to findings as well as charging. The Court of Military Appeals noted in *United States v. Doss* that the government must be allowed reasonable leeway to deal with exi-

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[21] In *Baker*, a majority of the court held that in the then-current 1969 Manual, the President had not adopted the constitutional requirements set forth in *Blockburger v. United States*. The court then chose, instead, to follow more restrictive requirements based upon its own earlier precedents. *See Baker*, 14 M.J. at 369 (Fletcher, J.); *id.* at 371 (Everett, C.J., concurring). *But see id.* at 372–73 (Cook, J., dissenting).

This action by the court has now been overtaken by events. In the new Manual, the President *has* adopted the *Blockburger* rule. However, he has not expressly rejected the *Baker* rule. *See* section III *infra*. At least one panel of the Navy-Marine Corps Court of Military Review has adopted the interpretation that the multiplicity rules of the new Manual for Courts-Martial follow *Blockburger v. United States*. *See* United States v. Jones, No. 850390 (N.M.C.M.R. 27 Mar. 1985). This issue is also pending before the other panels of the Navy-Marine Corps Court.

[22] 17 M.J. 345 (C.M.A. 1984) (summary disposition). Although *Huggins* involved larceny offenses, there is no reason why the remedy of consolidation is or should be limited to larceny offenses.

gencies of proof.[23] If an offense is dismissed as multiplicious, evidence of that offense may still be admissible on findings as evidence of "uncharged misconduct" under Military Rule of Evidence 404(b) or on sentencing as evidence of other misconduct in aggravation under Rule 1001(b)(4). Such evidence is necessarily part of the same transaction as the other offense(s) with which the accused is charged (a threshold requirement for the finding of multiplicity upon which dismissal is predicated). Thus, the evidence may still be admissible as to the other offense(s) with which the accused is charged and/or convicted if relevant to motive, intent, *etc.*, under Military Rule of Evidence 404(b) or if relevant to related or resulting aggravating circumstances under Rule 1001(b)(4).

The Court of Military Appeals has suggested in several cases that a charge dismissed as multiplicious may be "resuscitated" at a later point in appellate review if warranted by the exigencies of proof.[24] The premise for dismissing an offense because of multiplicity is that all the elements of the offense are embraced within another offense—either explicitly or implicitly. In effect it is a lesser included offense. Thus, the offense remains viable within the greater charge which is found to embrace it, notwithstanding dismissal of the separate charge which originally contained it. Consequently, if the finding of guilty to the greater offense should be set aside, a finding of guilty to the lesser offense could still be affirmed (unless it was specifically affected by the same error affecting the greater offense).

III. The Position of the Court of Military Appeals

Four recent decisions of the Court of Military Appeals suggest that the court is likely to continue to follow *Baker*, notwithstanding any contrary interpretation of the multiplicity provisions of the new Manual for Courts-Martial.[25] These cases, all decided on 20 August 1984, involved questions of multiplicity under the provisions of the 1969 Manual for Courts-Martial. However, they contain prospective language and a comprehensive analysis evidently intended to apply to questions of multiplicity under the provisions of the new Manual. The method of analysis and substantive holdings of these four cases *imply* that the Court of Military Appeals perceives new vitality for *Blockburger* in military law. This probably resulted from the provisions of the new Manual for Courts-Martial (effective only nineteen days before the cases were decided) which follow the rule of *Blockburger* with respect to multiplicity and which authorize direct appeal of Court of Military Appeals decisions to the Supreme Court (which decided *Blockburger*). Thus, even though the provisions of the new Manual were not at issue in these cases, it appears that the decisions in these cases were intended to influence the application of the provisions of the new Manual. Two of the decisions also framed the issue of multiplicity for Supreme Court review, a further indication that the Court was looking to the future in these cases.[26]

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[23] 15 M.J. 409, 412–13 and nn. 5–6 (C.M.A. 1983). Neither Rule 907(b)(3)(B) nor the Discussion and Analysis thereto cite *United States v. Doss*; however all appear to follow *Doss* by allowing the government latitude for the contingencies of proof. The same is true for Rule 307(c)(4) and the discussion and Analysis thereto.

[24] *See, e.g.*, United States v. Zupancic, 18 M.J. 387, 389 (C.M.A. 1984) and the authorities cited therein.

[25] United States v. Zupancic, 18 M.J. 387 (C.M.A. 1984); United States v. Zubko, 18 M.J. 378 (C.M.A. 1984); United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984); United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984).

[26] *See Zubko*, 18 M.J. at 382, n.6, and 383-85; *Zupancic*, 18 M.J. at 390–95 (Cook, J., concurring in part and dissenting in part). The divergence in the federal circuits, the confusion in military law, the potential constitutional conflicts in interpreting the new Manual, and the long-term impact of a decision under the new Manual all suggest that the question of multiplicity under the new Manual may be ripe for decision by the Supreme Court.

On 7 January 1985, the United States Supreme Court reaffirmed *Blockburger* as a rule of statutory construction in federal courts for determining whether Congress intended separate punishment for certain crimes (and by implication separate findings). United States v. Woodward, 105 S. Ct. 611 (1985). The Court held that a currency reporting violation and a false statement offense were separate punishable. The Court reasoned that absent some evidence of legislative intent to the contrary, it may be presumed that Congress intended the offenses to be separated where the offenses are proscribed by separate statutory provisions and the offenses are elementally separate.

The Court of Military Appeals decided a case on 14 January 1985 that appears to follow this rule (without citing it), but

For the first time since *Baker* was decided, the court has reconciled it with *Blockburger*. In *Baker* the court rejected *Blockburger* in determining multiplicity for findings and limited it as only "the minimum requirement for separateness" in determining multiplicity for sentencing.[27] In *Zubko* and the three other recent cases, the court has essentially made *Blockburger* the minimum requirement for determining separateness for findings as well. The court, in *Zubko* and the other three cases, first considered legislative intent and established military practice in determining separateness but applied such a strict standard to these interpretations that they are unlikely to be determinative in most cases. Next, the court considered *Blockburger* for determining separateness, in effect making it the minimum requirement for determining when offenses are separate.[28]

The reconciliation of *Baker* and *Blockburger* derives from the negative language of Rule 1003(c)(1)(C), *i.e.* offenses are *not* separate if they are *not* elementally separate, and from footnote 6 of *Zubko*, *i.e.*, military law defines lesser included offenses in fact as well as in law. If the offenses were not found separate under *Blockburger*, the court then treated them as multiplicious. If the offenses were found to be elementally separate under *Blockburger*, *i.e.*, neither lesser included as a matter of law, the court then tested them to determine if they were factually separate under *Baker*, *i.e.*, neither lesser included as a matter of fact.[29] Thus, the more restrictive requirements of *Baker* appear to be reconciled with the broader constitutional requirements of *Blockburger* by treating *Baker* as supplementing *Blockburger* rather than as an alternative to it. *Blockburger* speaks of both required elements and required facts that must be proven.[30] Accordingly, it may be argued that where specifications contain allegations of fact in addition to the elements required to prove the offense, the additional allegations must also be proven and thus become "required facts" within the meaning of *Blockburger*, rather than mere surplusage. In any event, the method of analysis used in *Baker* and as modified by *Zubko* and the other three recent decisions is still valid, even if the ultimate substantive rule of *Baker* is not valid any longer. Until the issue is authoritatively determined, caution dictates a conservative approach to questions of multiplicity, using

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upon closer examination does not really follow the federal rule. In United States v. Wolfe, 19 M.J. 174 (C.M.A. 1985), the court held that wrongful sale and wrongful concealment of the same property were separate for findings, using language similar to that in *Woodward*. However, footnote 1 of the opinion indicates that the Court of Military Appeals still considers *Baker* to be the determinative rule in courts-martial. Thus, even if offenses are separate as a matter of law, they could still be held multiplicious as a matter of fact if the allegations under one contain language that fairly embraces the elements of the other.

In United States v. Ball, 36 Crim. L. Rep. (BNA) 3229, 3230 (U.S. Mar. 27, 1985), the Supreme Court once again reaffirmed its "consistent ... reli[ance] on the test of statutory construction stated in *Blockburger v. United States* ... to determine whether Congress intended the same conduct to be punishable under two criminal provisions." The Court noted that "[t]he assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend the same conduct to be punishable under two different statutes." *Id.* The Court found that the offense of illegally receiving a firearm in the mail and the offense of illegally possessing the same firearm *necessarily* includes proof of illegal possession of that weapon." 36 Crim. L. Rep. at 3231. The Court examined the legislative history of the statutes at issue and found support for this conclusion. *Id.* The decision shows how the *Blockburger* rule works to find offenses multiplicious in some cases where Congress did not intend them to be separate. *See, e.g.*, United States v. Zubko, 18 M.J. 378 (C.M.A. 1984) (distribution of illegal drugs necessary includes possession of those drugs). Finally, the Supreme Court noted in *Ball* that "in this setting [federal court] ... 'punishment' must be deemed the equivalent of a criminal conviction and not simply the imposition of sentence." 36 Crim. L. Rep. at 3231. This applies only in federal courts where sentences are cumulative (consecutive or concurrent). *Id.* It has no application in courts-martial where there is a single, unitary sentence for all offenses committed. *See, e.g.*, United States v. Doss, 15 M.J. 409, 412–13 (C.M.A. 1983) (conviction and punishment are separate under military law).

[27] 14 M.J. at 370.

[28] *See, e.g., Zubko*, 18 M.J. at 381–82, 383 n.7, 384.

[29] *See Zupancic*, 18 M.J. at 388; *Zubko*, 18 M.J. at 384, 386; *Timberlake*, 18 M.J. at 375–76; *Rodriquez*, 18 M.J. at 368–69.

[30] In *Blockburger* the Supreme Court announced the following rule:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact [a different element or an additional fact] which the other does not....

284 U.S. at 304 (citation omitted).

the *Baker-Zubko* approach.[31] However, it is equally possible (though not recommended) to follow *Blockburger* at this time in the absence of any authoritative determination to the contrary under the new Manual. The negative language of Rule 1003(c)(1)(C) is similar to the negative language of its predecessor provision, paragraph 76*a*(5) of the 1969 Manual, which gave rise to the rule in *Baker*. The language of both these provisions differs from the affirmative language of paragraph 76*a*(8) of the 1951 Manual which clearly followed *Blockburger*.

IV. A Step-By-Step Approach

A. Threshold Requirement

There are two threshold requirements to be met before reaching the question of multiplicity. First, are there multiple offenses? Second, do they all arise from the same act or transaction or what is substantially so? "Transaction" is a flexible term which embraces a group of acts or events logically related to a single course of criminal conduct or related in time, place,and circumstances.[32] If both are *not* met, then there is no question of multiplicity—the offenses are separate. If both *are* met, then the analysis must proceed. These requirements have been set forth by the Court of Military Appeals in *Baker* and its progeny.

There are three distinct phases of trial at which the determination of multiplicity must be addressed if both threshold requirements are satisfied: arraignment, findings, and sentencing.

B. Arraignment

The question of applying the *Blockburger* rule to the allegations of an indictment has been left open by the Supreme Court.[33] Therefore, a narrow reading of the applicable provisions of the new Manual which follow *Blockburger* seems appropriate.

Taken together, the provisions of Rules 307(c)(4) and 907(b)(3)(B) mean that upon timely motion, a separately-charged lesser included offense should be dismissed after arraignment because in no case is such a charge and/or specification necessary to meet any legitimate exigencies. Similarly, a separately-charged identical offense would, as a general rule, appear to be a proper subject for a motion to dismiss at this point in the trial. There is at least one possible exception to this latter "general rule," *i.e.*, where the same conduct is charged both as a violation of a general order under Article 92(1) of the UCMJ and as conduct prejudicial to good order and discipline under Article 134 of the UCMJ *and* the regulation alleged to have been violated under Article 92(1) is new and untested. In such a case, there could well be legitimate doubts that the regulation will be upheld on appeal as a lawful, punitive order upon which disciplinary action may be predicated. If so, this would seem to justify denial of a motion to dismiss. It might also require appropriate limiting instructions in trials before courts composed of members.

C. Findings

The issue to be determined at this stage of trial is not the multiplication of charges *per se* (which is a given at this point if the analysis has progressed this far). Rather, the issue is whether the multiplication of charges is reasonable or unreasonable under the circumstances of the particular case (including contingencies of fact and law).[34]

The next step in the analysis of multiplicity is to consider whether the offenses at issue were intended by Congress to be subject to separate convictions in the same trial when the offenses

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[31] Although the Court's recent decisions under the multiplicity provisions of the old Manual are not technically binding as an interpretation of the multiplicity provisions of the new Manual, it appears that the Court intended these cases to indicate how it will interpret the multiplicity provisions of the new Manual.

[32] *See Rodriquez*, 18 M.J. at 366; *Baker*, 14 M.J. at 366.

[33] Whalen v. United States, 445 U.S. 684, 694 n.8 (1980). *See also* United States v. Zubko, 18 M.J. at 382 n.6.

[34] *See* R.C.M. 307(c)(4) and 907(b)(3)(B). *Cf.* MCM, 1969, paras. 26*b* and 74*b*(4).

arose out of the same act or transaction.[35] Legislative intent determines the questions of multiplicity for findings and sentencing because inherent in the power of Congress to define what constitutes a crime is the power to define what constitutes a separate crime. Actual legislative intent may be expressed in the statute itself, implied in the legislative history of the statute, or inferred from a reasoned analysis of the statute. If the actual legislative intent can be determined in one of these ways in unequivocal terms, then that intent should be followed.[36] The Court of Military Appeals has applied such a strict standard to this question that in most cases it is unlikely that actual legislative intent will be clear enough to determine the issue.[37] If the actual legislative intent is not sufficiently clear, then the statutory provisions at issue should be interpreted in light of authoritative interpretations of military law, existing service customs, and/or common usages.[38] If this interpretation clearly demonstrates the legislative intent, then it should be followed. If the Congress' intent is still unclear at this point, then the statutes should be construed in light of *Blockburger*.[39] If the offenses are not elementally separate under *Blockburger*, then they are not separate.[40] If the offenses are elementally separate under *Blockburger*, it may be argued that they are separate, the converse of Rule 1003(c)(1)(C), but the Court of Military Appeals will likely follow *Baker* at this point for the final determination.[41]

Applying *Blockburger* as a rule of statutory construction appears to be limited by its own terms to situations were offenses are proscribed by different statutory provisions, endowed with different elements, and prohibitive of different criminal objectives. In such circumstances, Congress may be presumed, absent evidence to the contrary, to have intended that the offenses be separate. In *Baker*, the court provided three examples of situations where *Baker*, in effect, applies as a rule of statutory construction: 1) offenses standing in the relationship of greater and lesser offenses; 2) offenses constituting parts of an indivisible crime as a matter of fact for law; and 3) offenses constituting different aspects of a continuous course of conduct prohibited by a single statutory provision. In such circumstances, the Court of Military Appeals has presumed, absent evidence to the contrary, that Congress did not intend for the offenses to be separate. "Evidence to the contrary," in relation to these rules for determining constructive legislative intent, means clear evidence of actual legislative intent—express, implied, inferred, or interpreted. In most cases, such evidence may not exist or, if it exists, may not be sufficiently clear. Thus most cases will have to be resolved by resorting to the confusing rules of construction or the even more confusing tests for multiplicity.

In *Baker*, the court noted the general rule that an accused may be found guilty of multiple offenses arising from the same transaction without regard to whether they are separate, *if* the legislature so intended.[42] However, the court went on to hold that this general rule "is not without exceptions and must be viewed in the context of the Constitution and the Uniform Code of Military Justice."[43] The exceptions generally stated are where the elements of one offense are necessarily embraced by the elements of another or are fairly embraced by the allegations of another.[44]

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[35] *See Zubko*, 18 M.J. at 381; *Rodriquez*, 18 M.J. at 366. The Air Force Court of Military Review discussed legislative intent in depth in United States v. Ridgeway, 19 M.J. 681, 683–87 (A.F.C.M.R. 1984) (larceny and altering public records separate for both findings and sentencing).

[36] *Zubko*, 18 M.J. at 381; *Rodriquez*, 18 M.J. at 366.

[37] *Zubko*, 18 M.J. at 384; *Rodriquez*, 18 M.J. at 368. For example, conspiracy and the substantive offense conspired to have been held separate, but conduct unbecoming an officer and the underlying substantive offense have been held multiplicious. *See* United States v. Wood, 7 M.J. 885 (A.F.C.M.R.), *petition denied*, 8 M.J. 97 (C.M.A. 1979); United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984).

[38] *Zubko*, 18 M.J. at 381.

[39] *Id.* at 382; *Timberlake*, 18 M.J. at 384.

[40] *Zubko*, 18 M.J. at 382; *Timberlake*, 18 M.J. at 374.

[41] *See Zupancic*, 18 M.J. at 389; *Rodriquez*, 18 M.J. at 369. *See also Timberlake*, 18 M.J. at 374. *See, e.g.*, United States v. Wolfe, 19 M.J. 174, 175 n.1 (C.M.A. 1985).

[42] 14 M.J. at 367.

[43] *Id.*

[44] *Id.* at 368–69. *See also Zubko*, 18 M.J. at 382 n.6; United States v. Holt, 16 M.J. 393, 394 (C.M.A. 1983).

Six specific situations have been set forth by the Court of Military Appeals in applying these general exceptions:

(1) Offenses requiring inconsistent findings of fact;[45]

(2) Identical offenses;[46]

(3) Lesser included offenses;[47]

(4) Necessarily included offenses;[48]

(5) Fairly embraced offenses;[49] and

(6) Offenses fairly embraced as integral means.[50]

The court has defined generally when an offense is and is not included within another offense for the purpose of determining multiplicity for findings. In *Baker*, the court stated that an offense is included within another when both are substantially the same so that the allegations and proof of one fairly and reasonable contain the other.[51] In *United States v. DiBello*, the court held that an offense otherwise included in another may still be separate if it contains allegations of an aggravating circumstance which would increase the maximum imposable punishment and which is neither an element of nor an allegation in the other offense.[52] An additional general rule in determining multiplicity for findings set forth by the Court of Military Appeals in *United States v. Holt* is that in most instances multiplicity may be determined without going beyond the language of the specifications.[53] However, in many instances, the court has gone beyond the specifications to look at the evidence notwithstanding this "rule."[54]

Prejudice to the accused as a result of failing to determine multiplicity for findings or determining it improperly may be direct or collateral. Direct prejudice results where an accused may be confused in the preparation or presentation of his defense by the number and complexity of charges or where he may be seen by the fact-finder as a person of bad character, unworthy of belief if he testifies, as a result of exaggerating a single offense into many, seemingly separate crimes.[55] Collateral prejudice results through stigma and damage to the accused's reputation.[56] Other collateral consequences of conviction in federal courts, such as cumulative sentences and sentencing as a habitual offender, do not apply to courts-martial where all findings of guilty are treated as but a single conviction and where the

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[45] United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982); United States v. Marks, 11 M.J. 303 (C.M.A. 1981) (summary disposition); United States v. Pretty, 11 M.J. 153 (C.M.A. 1981) (summary disposition).

[46] *See, e.g.*, United States v. Gibson, 11 M.J. 435 (C.M.A. 1981).

[47] United States v. Stegall, 6 M.J. 176, 177–78 (C.M.A. 1979). *Accord* United States v. Mallery, 14 M.J. 212 (C.M.A. 1982) (summary disposition); United States v. Neverson, 11 M.J. 153 (C.M.A. 1981) (summary disposition). *See generally* Brown v. Ohio, 432 U.S. 161 (1977).

[48] *Baker*, 14 M.J. at 366. *Accord* United States v. Holt, 16 M.J. 393, 394 (C.M.A. 1983); United States v. Doss, 15 M.J. 409, 414 (C.M.A. 1983).

[49] *Baker*, 14 M.J. at 366. *Accord Holt*, 16 M.J. at 394; *Doss*, 15 M.J. at 414.

[50] United States v. Hollimon, 16 M.J. 164, 167 (C.M.A. 1983). *Accord* United States v. Robertson, 17 M.J. 412 (C.M.A. 1984) (summary disposition).

[51] *Baker*, 14 M.J. at 367–68.

[52] In United States v. DiBello, 17 M.J. 77 (C.M.A. 1983), the court held: "[I]n testing for multipliciousness of findings, [a] charge ... is not included within [another] ... charge if [it] contains allegations of an "aggravating circumstance" which is not a necessary element of [the other] charge... and which is not specifically alleged in [the other] charge...." *Id.* at 80 (footnote omitted). The court defined the term "aggravating circumstance" as "one—like duration of an absence or value of property—which would increase the maximum punishment imposable under the Table of Maximum Punishments. *See* para. 127*c*, Manual for Courts-martial, United States, 1969 (Revised edition)." *Id.* at 80 n.8. The court specifically found that a 16-day unauthorized absence and breaking restriction were separate for findings because the duration of more than three days is an aggravating circumstance that increases the maximum punishment imposable. *Id.* at 78.

[53] *Holt*, 16 M.J. at 394.

[54] *See, e.g.*, United States v. Zupancic, 18 M.J. at 392–93 (Cook, J., concurring in part and dissenting in part); United States v. Zubko, 18 M.J. at 381. *See also* United States v. Wood, 19 M.J. 542 (A.C.M.R. 1984).

[55] *Baker*, 14 M.J. at 365; United States v. Middleton, 12 C.M.A. 54, 58–59, 30 C.M.R. 54, 58–59 (1960). *See also* United States v. Sturdivant, 13 M.J. 323, 330 (C.M.A. 1982).

[56] *Doss*, 15 M.J. at 412.

sentence is unitary, not cumulative. There is not necessarily any prejudice to the accused on sentencing as a result of error in determining multiplicity for findings.[57]

Prejudice to the government as a result of failing to determine or improperly determining multiplicity for findings is also a concern. This can give a "freebie" to the guilty accused who is or should be convicted of committing multiple offenses, *i.e.*, dismissal of some of the offenses.[58] This can also add to the frustration of the trial counsel who is tasked with prosecuting multiple offenses, *i.e.*, predicting the contingencies of fact and law. On the one hand, there should be no distortion of the accused's criminal record to his or her prejudice. On the other hand, however, the accused's criminal record should provide an accurate reflection of his or her criminal conduct to inform and protect society and to express society's legitimate moral disapproval.

D. Sentencing

Determining multiplicity for sentencing purposes is the final step in the analysis. As noted above, legislative intent determines questions of multiplicity for both findings and sentencing. Thus, when legislative intent can be clearly determined, it should be followed. As noted above, Article 36 of the UCMJ delegates to the president the authority to "define the limits of punishment in courts-martial." The punitive articles of the UCMJ provide only that offenses proscribed under the Code "shall be punished as a court-martial may direct." Accordingly, it would appear that the rules prescribed by the President under Article 36 pursuant to the express delegation of authority by Congress reflect the intent of Congress with respect to punishment of offenses under the Code. Rule 1003(c)(1)(C), like its predecessor in the 1969 Manual, paragraph 76*a*(5), tells us when offenses are not separate rather than when they are separate, *i.e.*, they are not separate when they are not elementally separate. Impliedly, the converse of this rule answers the question of when offenses are separate, *i.e.*, they are separate when they are elementally separate. However, the Court of Military Appeals declined to follow this rule exclusively under the old Manual and will likely continue so under the new Manual.[59]

Accordingly, there are seven separate tests to be applied in determining multiplicity for sentencing;[60]

(1) Whether each offense requires proof of a real element not required to prove the other (the elements test);[61]

(2) Whether each offense requires proof of an additional fact which the other does not (the facts test);[62]

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[57] *See* United States v. Glover, 16 M.J. 397, 399 (C.M.A. 1983) (holding no prejudice on sentencing where it was clear no shorter term of confinement would have been adjudged even if the offenses had been treated as multiplicious for sentencing); United States v. Allen, 16 M.J. 395, 396 (C.M.A. 1983) (holding no prejudice on sentencing where the offenses were considered multiplicious for sentencing). *But see* United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982) ("overcharging" held to violate due process, resulting in dismissal of all charges).

[58] *See* United States v. Robertson, 17 M.J. 412, 413 (C.M.A. 1984) (Cook, J., dissenting) (summary disposition).

[59] *See, e.g., Baker*, 14 M.J. at 369–70. In *Baker* and its progeny, the court consistently treated *Blockburger* as only "the minimum requirement for separateness" for sentencing. *Id.* at 370. Far from backing-off this view, the court has apparently extended it to findings as well, treating *Blockberger* as a minimum or threshold requirement there also. *See* section III *supra*. In *Baker*, the court noted the general rule that any ambiguity in interpreting punishment rules should be construed in favor of leniency. 14 M.J. at 370 (citing Albernaz v. United States, 450 U.S. 333, 342, (1981)). The present confusion in the law at least qualifies as such an "ambiguity." However, in *United States v. Doss*, the court noted that "the double jeopardy clause [of the Constitution] does not preclude cumulative punishment for offenses which are the same, if the legislature intended to authorize such punishments." 14 M.J. at 411 (citing Missouri v. Hunter, 103 S. Ct. 673, (1983)). Of course, this intent must be clear to be controlling.

[60] United States v. Chisholm, 10 M.J. 795, 798 n.3 (A.F.C.M.R.) *petition denied*, 11 M.J. 368 (C.M.A. 1981) sets forth six of these tests. The seventh test is found in MCM, 1969, para. 76*a*(5), and United States v. Soukup, 2 C.M.A. 141, 7 C.M.R. 17 (1953).

[61] United States v. Yarborough, 1 C.M.A. 678, 5 C.M.R. 106 (1952). *Accord* United States v. Brown, 8 C.M.A. 18, 23 C.M.R. 242 (1957); United States v. McVey, 4 C.M.A. 167, 15 C.M.R. 167 (1954). *See also Blockburger*.

[62] United States v. McVey, 4 C.M.A. 167, 15 C.M.R. 167 (1954). *Accord* United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957).

(3) Whether one offense contains all the constituent elements of another offense (the lesser included offense test);[63]

(4) Whether each offense was committed in a transaction motivated by a single impulse (the single impulse, integrated transaction test);[64]

(5) Whether each offense was committed at essentially the same time and the facts and circumstances surrounding each offense were such as to connect the two or more offenses, making them essentially one integrated transaction (the unity of time; existence of connected chain of events test);[65]

(6) Whether each offense violates a separate societal norm (the societal norm test);[66] and

(7) Whether each offense involves the breach of a separate duty (the separate duty test).[67]

No one of these tests alone is determinative. Rather, each case must be analyzed in its own factual context (not merely the allegations in the specifications) to determine on balance of all the tests whether or not the offenses at issue are separate for punishment.[68] Offenses related in time, place, and circumstances may be sufficiently separate in terms of elements, facts, impulses, societal norms, or separate duties so as to be separately punishable.[69]

Failure to determine multplicity for sentencing or erroneously determining it is not prejudicial *per se*. The test for prejudice is whether it is clear that the error did not result in an increase in the sentence.[70]

V. Conclusion

The Court of Military Appeals, in *Baker* and its progeny, has taken the traditional formulation of lesser included offenses as a matter of law (necessarily included) and enlarged upon it to include fairly embraced lesser included offenses as a matter of fact. This is a fair rule in principle—fairer than either the Constitution or the Code re-

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[63] *United States v. Posnick.*

[64] *United States v. Kleinhans*, 14 C.M.A. 496, 34 C.M.R. 276 (1964). *Accord* United States v. Dicario, 8 C.M.A. 353, 24 C.M.R. 163 (1957). *See* United States v. Pearson, 19 C.M.A. 379, 41 C.M.R. 379 (1970). *See also* United States v. Weaver, 20 C.M.A. 58, 42 C.M.R. 250 (1970).

[65] United States v. Waller, 3 M.J. 32 (C.M.A. 1977); United States v. Irving, 3 M.J. 6 (C.M.A. 1977); United States v. Smith, 1 M.J. 260 (C.M.A. 1976).

[66] United States v. Beene, 4 C.M.A. 177, 15 C.M.R. 177 (1954). *Accord* United States v. Burney, 21 C.M.A. 71, 44 C.M.R. 125 (1971). *see also* United States v. Washington, 1 M.J. 473, 475 n.3 (C.M.A. 1976).

[67] MCM, 1969, para. 76*a*(5); United States v. Soukup, 2 C.M.A. 141, 7 C.M.R. 17 (1953).

[68] *See* United States v. Chisholm, 10 M.J. 795, 798 (A.F.C.M.R.), *petition denied*, 11 M.J. 368 (C.M.A. 1981); United States v. Clarke, 17 M.J. 1055, 1056 (A.F.C.M.R. 1983). *See also* MCM, 1969, para. 76*a*(5). *Accord* MCM, 1984, R.C.M. 1003(c)(1)(C), discussion and analysis thereto.

[69] In United States v. Davis, 18 M.J. 79 (C.M.A. 1984), the Court of Military Appeals distinguished the application of *Baker*. The court held that two related robberies from the same victim were separate:

> First, the two [offenses] were not "[o]ne transaction or what is substantially one transaction." *See United States v. Baker*, 14 M.J. 361, 366 (C.M.A. 1983). Second, the two [offenses] do not "stand in the relationship of greater and lesser offenses"; are not "as a matter of fact . . . parts of an indivisible crime as a matter of civilian or military law"; and are not merely "different aspects of a continuous course of conduct prohibited by one statutory provision."

Id. at 79. Thus, if multiple offenses do not arise from the same act or transaction, punishment may be imposed for each offense. *Baker*, 14 M.J. at 366, 369. Alternatively, if the offenses are elementally separate, factually and legally divisible, and separately proscribed, then punishment may also be imposed for each offense. *Id.*

In another recent case, United States v. Cox, 18 M.J. 72, 74 (C.M.A. 1984), the Court of Military Appeals held that the related offenses of sodomy and indecent liberties with the same victim were separate for all purposes because the offenses were elementally separate and because there was no congressional or presidential guidance to the contrary. The single impulse test was not even discussed in *Cox*. This means that the single impulse test is less significant than elemental separateness and legislative/executive intent.

[70] United States v. Cox, 18 M.J. 72 (C.M.A. 1984); United States v. Glover, 165 M.J. 397 (C.M.A. 1983); United States v. Allen, 16 M.J. 395 (C.M.A. 1983); United States v. Holt, 16 M.J. 393 (C.M.A. 1983). *See also* United States v. Hasting, 461 U.S. 499 (1983) (even constitutional error may be harmless); UCMJ art. 59(a).

quires.[71] However, it is an extremely confusing rule in application—often unfair, or at least unpredictable and inconsistent, in results.[72]

In cases under the new Manual, counsel and judges at trial can mitigate these results by addressing questions of multiplicity in a clear and thoughtful manner. This will also provide a thorough record for review, so that counsel and judges on appeal can do likewise.

Recent decisions of the Court of Military Appeals strongly indicate that the question of multiplicity may ultimately be resolved by the Supreme Court. If so, it is entirely possible that the court may adopt the *Baker* rules rather than reject them. In either event, clear and thoughtful application of the rules—albeit confusing rules—is necessary to balance the rights of individuals with the legitimate interests of society. Otherwise, as Justice Powell noted in *Stone v. Powell*, there will be a "disparity in particular cases . . . contrary to the idea of proportionality that is essential to . . . justice."[73] The volume of multiplicity litigation on appeal and the amount of judicial resources it requires are significant, even if the effect in a particular case is not significant. Thus, economy as well as proportionality dictates resolution of the current confusion in multiplicity. The recent changes to the Manual for courts-Martial coincide with a recent change to the membership of the Court of Military Appeals. Although the "multiplicity majority" on the court remains unchanged,[74] it may not remain unaffected. Accordingly, the time as well as the issue may be ripe for renewed interest.

During oral argument in *United States v. Isaacs*, Judge Cox asked questions concerning whether the Court should abandon the rule of *United States v. Smith*, which in essence "require[es] trial judges and appellate courts to enter the factual morass of every . . . case to resolve . . . what is and is not multiplicious."[75] Withdrawing from this "factual morass" will require more than just overruling *United States v. Smith*; it will require overruling *Baker*, the court's seminal decision on multiplicity. The court should do this because the rule of *Baker* was unnecessary and inappropriate at the time it was decided[76] and because it has been proven to be unworkable in the time since it was decided.[77]

Simply stated, the court in *Baker* created a confusing new rule that charges are multiplicious if the elements of one offense are necessarily embraced by the elements of another or are fairly embraced by the allegations under another. This was in contrast to interpreting or accepting the simple rule of *Blockburger* that offenses are separate when each requires proof of a fact or element which the other does not. The *Baker* majority justified this by asserting that the President

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[71] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932), UCMJ art. 79. *Cf.* United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).

[72] *See* United States v. Zupancic, 18 M.J. at 391–93 (Cook, J., concurring in part and dissenting in part).

[73] 428 U.S. 465, 490 (1976).

[74] Newly appointed Judge Cox replaced Judge Cook who was the lone dissenter in most multiplicity cases. Thus the multiplicity majority of Chief Judge Everett and Judge Fletcher remains unchanged.

[75] 19 M.J. 220 (C.M.A. 1985) (argued on 11 December 1984, referring to United States v. Smith, 1 M.J. 260, 262 (C.M.A. 1976) (Fletcher, C.J., concurring)).

[76] *Baker*, 14 M.J. at 371–73 (Cook, J., dissenting). *See Blockburger*, 284 U.S. at 304; UCMJ art. 79. *cf.* United States v. Duggan, 4 C.M.A. 396, 399–400, 15 C.M.R. 396, 399–400 (1954). The *Duggan* definition of a lesser-included offense which broadened Article 79 of the UCMJ is unnecessary and inappropriate with respect to the double-jeopardy principles embraced in Article 44 of the UCMJ, which are the underpinnings of the concept of multiplicity. Accordingly, the court should overrule Duggan as well as *Baker*. *Cf. Zubko*, 18 M.J. at 382–83 n.6. The Court of Military Appeals may have taken a tentative first step in the direction of abandoning the rule of *Baker* in *United States v. Isaacs*, where Chief Judge Everett noted: "[T]his Court cannot assure that all maximum penalties will be entirely proportionate. Instead, to some extent we must rely on sentencing and reviewing authorities to see that servicemembers receive fair and equitable punishment." 19 M.J. at 223. By implication, this includes findings as well. Compared with the Chief Judge's concurring comments in *Baker*, this may signal a significant change. "I do not choose to repudiate almost three decades of precedent—now reflected in [the multiplicity provisions of M.C.M., 1969]—in order to return to the simplicity of the *Blockburger* rule. . . ." 14 M.J. at 371 (Everett, C.J., concurring) (footnote omitted).

[77] United States v. Zupancic, 18 M.J. at 391–93 (Cook, J., concurring in part and dissenting in part). The court itself has acknowledged the continuing confusion and mess in multiplicity in military law—implicity and explicitly. *See, e.g.* United States v. Baker, 14 M.J. at 364–70 (Fletcher, J.), *id.* 370–71 (Everett, C.J., concurring); *id.* 371–76 (Cook, J., dissenting); United States v. Doss, 15 M.J. at 410, 414; United States v. Zubko, 18 M.J. 378 (C.M.A. 1984) (comments from the bench during oral argument on 31 May 1984).

had not adopted the constitutional requirements of *Blockburger* in the 1969 Manual, which has now been rescinded. The court then chose instead to follow more restrictive requirements based upon its own earlier precedents. Notable among these precedents was *United States v. Duggan* in which the court broadened the definition of a lesser-included offense under Article 79 of the UCMJ from "necessarily included" to "substantially . . . fairly, and . . . reasonably [included]."[78] This enlargement of the UCMJ definition of a lesser-included offense was unwarranted and thus the rule in *Baker*, derived from it, was also unwarranted.[79]

The rule in *Baker* was unnecessary because the existing rule established by the President could and should have been interpreted to be consistent with the requirements of the Constitution *(Blockburger)* and the requirements of the UCMJ (Article 79) and need not have been interpreted otherwise. As Judge Cook noted in dissent in *Baker*, "pursuant to [the authority expressly delegated by Congress], the President duly established . . . the ["*Blockburger*" or "elements"] test to . . . determin[e] separa[teness] of [offenses for] punishment. . . . [A]bsent some constitutional infirmity, the rules established by the President for determining multiplicity questions are the rules which [the] Court must accept and apply."[80] By necessary implication this includes findings as well as sentencing.

The rule in *Baker* was inappropriate because the limits on the court's powers of judicial interpretation preclude "creat[ing] new law in the guise of judicial interpretation."[81] In *United States v. Matthews*, Chief Judge Everett noted "[t]he great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences. . . ." and Judge Fletcher implied that the court's power to act with respect to procedural rules prescribed by the president that *do* meet the demands of the UCMJ is limited.[82] Interpretation of the provisions of the new Manual strongly implies that presidential changes to the current multiplicity rules constitute rejection of *Baker* and ratification of *Blockburger*, at least under the current multiplicity rules if not the previous multiplicity rules.

The well-intentioned motive of the court in *Baker* may have been to create a new rule, fairer than either the Constitution or the UCMJ required. However, the statutory duty of the court is limited to interpreting whether existing rules are unfair when measured in terms of the requirements of the Constitution and the UCMJ.[83] Accordingly, the rule of *Baker* was unwarranted at the time it was decided; in the time since *Baker*, it has proven to be unworkable. The force of its rationale has been blunted by the confusion in its application—an unpredictable and inconsistent rule is fair to no one. The volume of litigation on this court-created issue is literally clogging the wheels of military justice.[84] Limited judicial resources that should be devoted to adjudicating the substantial rights and liabilities of soldiers, sailors, airmen, and Marines are diverted instead to the "morass" that is multiplicity under military law. As Judge Cook noted in his dissent in *United States v. Zlotkowski*, "surely this Court has better uses of its time than pondering [multiplicity] which is little better than debating how many angels can dance on the head of a pin"[85] Not just this court but all our military courts have better uses for their time. Concomitantly, all our military service members have a right to expect their courts to devote their time to these more substantial pursuits. The confusion and mess in multiplicity are well-recognized. In the more than two years since *Baker* was de-

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[78] 4 C.M.A. 396, 399–400, 15 C.M.R. 396, 399–400 (1954).

[79] *Cf. Zubko*, 18 M.J. at 382–83 n.6.

[80] *Baker*, 14 M.J. at 372–73.

[81] United States v. Clark, 16 M.J. 239, 242 (C.M.A. 1983) (Cook, J., with Fletcher, J., concurring); *accord id.* at 242 (Everett, C.J., concurring [reluctantly]).

[82] 16 M.J. at 380–81 (Everett, C.J.); *id.* at 383 (Fletcher, J., concurring).

[83] *See* United States v. Clark, 16 M.J. at 242. *See also* United States v. Lowry, 2 M.J. 55, 57–58 (C.M.A. 1976) (and authorities cited therein); UCMJ art. 67(d).

[84] Statistics of the Appellate Government Division of the Navy-Marine Corps Appellate Review Activity indicate that multiplicity is at issue in 60% of the cases appealed. Multiplicity is often the sole issue raised on appeal. There can be as many as 29 separate elements to the determination of multiplicity in a single case. Even the hearsay rule, confusing as it is within its 29 exceptions, is clearer than multiplicity. *Cf.* Mil. R. Evid. 802, 803(1)–(24), 804(b)(1)–(5).

[85] 15 M.J. 320, 321 (C.M.A. 1983) (summary disposition).

cided, the quagmire has become worse, not better. The solution to the problem is to abandon the rule that created it—not merely because it is confusing but because it is unwarrantedly confusing. The balance between simplicity and fairness and the commensurate burden upon the military justice system has been determined by the Congress and the President with the requirements of the Constitution tion and the UCMJ. That determination should be respected and the contrary rule of *Baker* should be abandoned.

The Advocacy Section

TRIAL COUNSEL FORUM

Trial Counsel Forum

Trial Counsel Assistance Program, USALSA

Contents

This month's Trial Counsel Forum features Part II of MAJ Thwing's two-part article on preparing a child abuse case for prosecution. Part I discussed the interaction of trial counsel with the medical and social work communities. Part II addresses the administrative and investigative strategies trial counsel should adopt for the successful prosecution of a child abuse case.

Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases

Major James B. Thwing
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Part II

> This doesn't mean they're innocent . . . It means I didn't prove they were guilty. This means we live in a society that does not believe children.[1]

Understandably, the pivotal concern in every criminal case involving a child victim is the child. Ironically, when criminal offenses such as murder, rape, aggravated assault, or sexual assault are committed against children, they are relegated to reports of "suspicious infant death," "incest," "child abuse," and "molestation." This result may be caused by the difficulty the adult

[1] Lamar, *Disturbing End of a Nightmare; The Scott County Sex-Abuse Cases Draw to a Confusing Close*, Time Magazine, Feb. 25, 1985.

mind has in comprehending and coping with the devastating nature of these offenses. In the criminal process, this result is symptomatic of an error common to criminal cases involving child victims: delegating proof of the case to the child. Too often, prosecutors, as well as law enforcement authorities, measure the feasibility of a successful prosecution of a child abuse case on the ability of the child to survive the criminal process. Focusing on the victim, however, results in a lack of investigatory precision and a loss of evidentiary support for the case.

Rule 2: Focus on the Offense

Rule 1, understand the framework, was discussed in Part I of this article. The key to establishing investigatory precision and evidentiary support of a child abuse case is to focus on the offense.

Although the term "child abuse" encompasses a wide range of criminal activity, the scope of these cases narrows to two types: physical abuse cases and sexual abuse cases. Physical abuse cases almost always have these properties: (1) the victim is usually less than five-years-old; (2) there is usually a history of prior physical abuse; (3) the perpetrator is usually a parent; (4) the report of abuse is usually generated by medical authority; and (5) the case is usually defended on the basis of accident or alibi. Sexual abuse cases almost always have these properties: (1) the victim, because of youthful age or relationship to the perpetrator, is rarely a cooperative witness; (2) there is usually a history of prior sexual abuse; (3) the report of abuse is usually transmitted to a close friend or trusted authority; (4) the perpetrator is usually a member or close friend of the family; and (5) the case is usually defended by attacking the victim's credibility. These properties provide a framework within which trial counsel can establish investigative direction before and during the development of a criminal case.

One area of concern in both types of child abuse cases that trial counsel should be aware of is that these cases rely almost exclusively on circumstantial evidence because it is unlikely in either type of case that the victim will testify in court. Consequently, trial counsel must provide special guidance to investigators for obtaining and preserving all evidence which is logically relevant to either type of child abuse case. The specific evidentiary aspects of this guidance will be discussed below under Rule 3.

Another common concern in physical and sexual child abuse cases is the limited opportunity for investigation. Because the suspect in these cases is usually the victim's parent, trial counsel must make clear to investigators that time is of the essence. Investigators should be made aware that there will be few opportunities to obtain and preserve vital evidence. The windows of opportunity that will be open require full exploitation. For example, a critical point in either type of case is the moment of complaint. Whether the complaint is voiced by an injury or by a statement to a confidant, the essence of the complaint needs to be fully explored because this may be the last time the victim will be truly available. The crime scene, which may be developed either from the parent's account of the physical injury (usually made at the time the child is admitted to the hospital) or the victim's statements alleging sexual abuse, must be immediately and fully investigated. Failure to properly investigate the crime scene is a common deficiency in both types of child abuse cases.

An additional factor common to physical and sexual abuse cases is a prior history of abuse. Medical personnel must examine the child for prior injuries while treating an injury. Examining the exterior of the child's body is important; but this examination should also include a full interior body examination. Physicians should be instructed to assume that the child has been previously injured. Similarly, investigators should look for any records which would indicate that the child has been injured previously or that the accused had previously engaged in similar activity with other children. Furthermore, investigators should inquire into the background and credibility of the victim and the accused. These inquiries should be accomplished before subjective influences such as loyalty, anger, and disbelief influence a witness' testimony. The evidentiary underpinnings of each of these requirements are discussed under Rule 3.

It is clear that when investigating these types of cases, all evidence obtained must be preserved

using the best available techniques. Investigators should be prepared to use these techniques before a child abuse case develops. For example, since photographic evidence is so vital in physical abuse cases, investigators must use quality photographic equipment and film which will produce accurate color photographs. Trial counsel, should be aware of the law enforcement agency's capabilities in this regard and recommend improvements where necessary. Another example is taking witness statements. Investigators should be advised to avoid summarizing witness statements even when these statements appear to be cumulative. Instead, investigators should have witnesses provide detailed written and sworn statements. The importance of this requirement will be discussed in Rule 3. Similarly, physicians who are likely to be involved in either physical or sexual child abuse cases should be advised of the extreme importance of recording their observations of all observable injuries to the child regardless of the age of the injury. Medical records containing detailed observations become vital supports at trial for photographic evidence and the foundation for medical and forensic expert testimony.

Trial counsel who provide full investigative guidance before the development of child abuse case will help maximize investigational flexibility while concomitantly providing him or herself the opportunity to fine-tune that advice during the developing stages of an actual case. It will also allow trial counsel as opportunity to promptly rectify problems that may interfere with the case such as jurisdiction, spousal privileges when both parents are suspects, and privacy or confidentiality of medical records.

Rule 3: Assume the Victim Will Be Unavailable for Trial

When a child too young to talk is the victim of physical or sexual abuse, or is murdered, trial counsel obviously has no choice in determining whether to proceed to trial without the testimony of the victim. As discussed previously unavailability should be presumed in every case involving a child who is the victim of a criminal offense. Trial counsel is then compelled to view the case as provable only by circumstantial evidence. With this perspective, evidence that might be overlooked becomes crucial. Likewise, trial counsel become more sensitive to and understand better the logical implications of the evidence. In both physical and sexual abuse cases, there are essentially four areas that trial counsel should be concerned with.

A. Physical Evidence

When the assumption is made that a child who has been physically or sexually abused will not testify at trial, the physical evidence used to record the child's injury becomes even more crucial to the case. This evidence must speak for the victim. It must confirm not only the fact of injury, but must also establish intent and rebut possible defenses such as accident. For instance, consider a case involving a child who has been severely scalded. The mother admits the child to the hospital claiming the child accidentally jumped into a bath tub filled with hot water. Unquestionably, the medical reports describing the burns would be essential evidence in establishing the seriousness of the injury, and photographic evidence would be important in depicting the extent of the burns and possible patterns created by the burns. Should x-rays of the child's body be taken? Should photographs of scars or bruises be taken? Without the child's testimony to explain how he or she was burned, trial counsel's ability to overcome the mother's plausible account of the injury would be severely limited. If, however, the child's body was x-rayed and evidence of healing or healed bone fractures was discovered, such evidence may be relevant not only to establish intent[2] but also to rebut the defense of accident.[3] Additionally, well-developed photographic evidence depicting patterned scars (caused by a jeweled belt, electric cord, or hanger) or various healing bruises would greatly assist in establishing intent and rebutting the defense of accident. Thus, the logical implications which flow from physical injuries are many and

[2] Gilligan, *Uncharged Misconduct*, The Army Lawyer, Jan. 1985, at 1, 12. *See also A Compendium of Course Materials on Child Abuse and Neglect*, National College of District Attorneys, Aug. 1977, at 6–18, for explanation of bone fractures evidencing intentional breaking.

[3] Gilligan, *Uncharged Misconduct*, The Army Lawyer, Jan. 1985, at 1, 9.

trial counsel, investigators, and medical personnel must recognize these logical implications and collect the kind of physical evidence which will speak fully for the victim. Of course, this also applies to cases involving sexual abuse.

Physical examination and the collection of evidence which may provide critical evidence showing the existence of a sexual assault or rape of a young child is also commonly overlooked for the same reason many prosecutors lose child abuse cases: the age of the victim is deemed an adequate substitute for corroborative evidence. Children who have been raped often bear evident signs of rape, even if the act of rape was remote in time from the complaint. A simple physical examination will often reveal signs of vaginal infection and penetration, including anal penetration.[4] In some cases, venereal diseases have been detected in female child victims. Trial counsel should be aware of these possibilities and insure that investigators and medical personnel understand the necessity for developing this evidence. Investigators and medical personnel also must insure that such evidence, if developed, is preserved by detailed medical reporting, drawings, and, when feasible, photographs. Such evidence speaks eloquently for the victim and is essential for rebutting attacks on the victim's credibility.

Another key concern for trial counsel in assessing available physical evidence is the crime scene itself. As discussed above, failure to investigate the crime scene is a frequent deficiency found in both physical and sexual child abuse cases. Consider, for example, a child who is admitted to a hospital with a severely fractured skull; the father claims the child accidentally fell from a crib. Even though the crime scene is set by the father, it provides valuable evidence to the prosecution. Photographs depicting the location of the crib and its dimensions would clearly demonstrate a number of facts: whether the child possessed sufficient strength to climb over the crib; whether the crib was of such height that a fall from it could account for the injury; and whether the surface under the crib could have aggravated the injury. Often, because the crime scene is not investigated, the accused has complete freedom to construct facts about the injury making the theory of accident a plausible defense.

This same investigational requirement applies to cases involving sexual abuse. Many child psychiatrists agree that children, especially young children, are incapable of fictionalizing sexual abuse.[5] Details which establish a crime scene provided by a child who has been sexually abused should be thoroughly investigated. Young victims of sexual abuse in the *McMartin* case during the ongoing preliminary hearing in Los Angeles, California, complained that several of the teachers in the McMartin Day Care Center sacrificed animals, such as rabbits and turtles, as examples of what might happen to the children if they told their parents of the sexual misconduct. Nearly one year after these complaints were made, the *parents* of the victims asked permission to excavate the area around the day care center to determine whether evidence of the remains of these animals could be located.[6] This is a clear example of the prosecution's failure to assess the importance of extremely valuable corroborative evidence.

B. Documentary Evidence

Relying on the testimony of a child abuse victim creates substantial vulnerabilities for trial counsel on other substantive issues. For instance, if the victim refuses to testify, how will jurisdiction over the offense be established? What evidence will establish the identity and age of the child? Consider the issues that surface when the accused is the victim's sole parent and the defense of alibi is raised. What evidence is available to provide investigative direction towards excluding the possibility of injury by someone other than the accused? Would prior medical records showing similar injuries or symptoms of prior abuse be helpful as evidence to establish intent or as rebuttal to mistake, accident,

[4] *In re* J.W.Y., 363 A.2d 674, 678 (D.C. App. 1976); Baxter v. State, 360 So. 2d 64 (Ala. Crim. App. 1978); Annot., 76 A.L.R. 3d 163 (1977).

[5] Berstein & Cowan, *Children's Concepts of How People Get Babies*, 46 Child Development 77–91 (1975).

[6] Los Angeles Times, Mar. 18, 1985, at B6, col. 5.

or alibi? By assuming that the victim will not testify, documentary evidence, often overlooked in criminal cases involving children, can provide key answers to these questions.

Two documents that can help establish answers to several of these key questions are Standard Forms (SF) 558 and 600. Standard Form 558 is used by all military medical treatment facilities to record data relevant to the identity and care of patients admitted on an emergency basis. The admitting receptionist or emergency room nurse is required to complete the form which is designed to obtain specific information regarding the patient's age, date and time of admission, reasons for admission, identity of the person or persons seeking admission of the patient, and military sponsor of the patient. Standard Form 600 is a non-emergency admissions document and contains the same data as SF 558 and is also used as a chronological record of all outpatient treatment. The usefulness of either of these documents to trial counsel in lieu of the testimony of a child abuse victim should be evident. Even if the data contained on either of these forms was provided by the accused and the reasons for admitting the child falsified, (*e.g.*, "child hurt by falling from crib in government quarters"), it is quite unlikely that the data concerning the child's age, identity, and location of injury would be false. The additional information provided by these documents, *i.e.*, the identity of the person seeking admission of the patient and the time and date of the admission, also would be extremely valuable evidence for investigation and trial purposes.

In cases involving the death or aggravated assault of a child who is a dependent of in-service parents or a sole parent, the possibility that the child was injured while under some other person's care is a frequent problem. A document which can prove extremely valuable in resolving this issue is Department of Army (DA) Form 5305-R (Statement of Understanding and Responsibility). Paragraphs 5–35 and 5–36 of Army Regulation 600–70[7] require that commanders counsel all pregnant service members, in-service couples having custody of one or more children under age eighteen, and single member sponsors of one or more children under age eighteen regarding their military obligations and requirement for care of their children. Enlisted personnel below the grade of E–7 and officers with less than three years active duty service who have custody over children under the age of eighteen are required to document those persons designated to care for these children during duty hours, alerts, field duty, roster duty, and periods of temporary duty. This information is to be documented on DA Form 5305–R and filed in the unit files. It is clear that this document would be a highly valuable investigative tool to determine whether the child victim was injured while under the care of a person other than a parent. A document which can be used as a source for establishing the existence of a prior history of child abuse within a family is DA Form 4461–R. This form is a reporting form for confirmed cases of child abuse filed by the Family Advocacy Case Management Team (FACMT) as required by AR 608–1.[8] Once a case of intra-family physical or sexual child abuse has been confirmed by the FACMT, a comprehensive report of the FACMT's findings and recommendations, as well as all documentation pertaining to the case, is filed at the treating installation. Upon transfer of the child's military sponsor to another installation, the file must be sent to a central repository location at Fort Sam Houston, Texas. The requirement for filing this report has existed since April 1983. In a case of intra-family child abuse, the investigation should include an attempt to determine whether the child victim or other children of the family have been victims of intra-family abuse. The procedures for retrieving DA Form 4461–R are outlined in AR 608–1, paragraph 7–10. Both DA Forms 5305–R and 4461–R would be beneficial to trial counsel during the investigation and trial of a physical or sexual child abuse case. Trial counsel should also know the extent to which the requirements for the filing of these forms are being met. This would be an important matter for consideration in establishing a framework for the prosecution of criminal cases involving child victims as discussed in Part I of this article, in the May 1985 issue of *the Army Lawyer*.

[7] Dep't of Army, Reg. No. 600–20, Personnel—General (Interim Change No. 101, 15 Sept. 1982).

[8] Dep't of Army, Reg. No. 608–1, Personal Affairs—Army Community Service Program, para. 7–13 (15 June 1983) [hereinafter cited as AR 608–1].

D. Testimonial Evidence (Hearsay)

In recent years, cases construing Military Rule of Evidence 803, especially 803(2)[9] and 803(4),[10] and Rule 804(b)(5)[11] have given new life to many criminal cases involving child victims by admitting the victim's out-of-court statements at trial. This same relief has been granted in federal [12] and state courts[13] where similar rules of evidence are available. These rules and the decisions applying them are not merely mechanisms for resuscitating cases that go awry because the victim refuses to testify or is otherwise unavailable. Rather, they establish evidentiary guidelines which, when satisfied by precise investigative action, result in an assured basis for admitting vital out-of-court statements, whether or not the victim's in-court testimony will be available.

Cases determining the admissibility of evidence under the "residual hearsay" exceptions of rules 803(24) and 804(b)(5) have established two paramount guidelines which apply in equal fashion to each of the hearsay exceptions of Rule 803; for evidence to be admissible under these exceptions, it must be shown to possess circumstantial guarantees of trustworthiness and must be sustained by reliable corroborative evidence.

Consider *United States v. Hines*[14] where the accused was charged with committing various indecent acts with two of his step-daughters. Shortly after the accused was arrested for these offenses, he voluntarily confessed to the allegations. On the day of trial, the two step-daughters and their mother (each an eye-witness to the several allegations against the accused) refused to testify. Although they honored their subpoenas and were each properly sworn as witnesses, they refused to obey the military judge's order to testify. The accused's wife refused to testify because she believed it to be in the best interests of her family and her husband. The eldest step-daughter stated that her refusal to testify was in the best interests of her sister and brother. The youngest daughter stated that her refusal to testify was because she loved her dad and wanted him to stay in the house. Even so, the accused was convicted on the basis of three pretrial statements by the step-daughters and their mother and the accused's confession.

The central issue in *Hines* was whether the three statements admitted into evidence at trial were admissible as residual hearsay under Rule 804(b)(5). In resolving this issue favorably to the government, the Air Force Court of Military Review concluded that these statements contained circumstantial guarantees of trustworthiness and

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[9] United States v. Arnold, 18 M.J. 559 (A.C.M.R. 1984); United States v. Urbina, 14 M.J. 962 (A.C.M.R. 1982); United States v. Cox, 11 M.J. 795 (A.F.C.M.R. 1981)

[10] United States v. White, CM 444355 (A.C.M.R. 31 Oct. 1984); United States v. Deland, 16 M.J. 889 (A.C.M.R. 1983).

[11] United States v. Ruffin, 12 M.J. 952 (A.F.C.M.R. 1982); United States v. Barror, ACM 24607 (A.F.C.M.R. 15 Mar. 1985).

[12] United States v. Nick, 604 F.2d 1202 (9th Cir. 1979). In *Nick*, a three-year old boy was sexually assaulted by his babysitter. When the mother arrived to pick the boy up he was asleep with his pants unzipped. Later, the mother questioned the boy. The child responded that the babysitter had "stuck his tutu in my butt." The ninth circuit upheld the district court's admission of the mother's testimony concerning the child's out-of-court statements on the grounds that such statements were within the excited utterance exception to the hearsay rule in Rule 803(2) of the Federal Rules of Evidence. In Haggins v. Warden, 715 F.2d 1050 (6th Cir. 1983), a statement made one hour after the incident by child sex abuse victim was held to be admissible. The court held that physical factors such as shock, pain, and unconsciousness may prolong the period during which the risk of fabrication exists to an acceptable minimum.

[13] People v. Ortega, 672 P.2d 215 (Colo. App. 1983). Statement by a four-year-old boy to mother and police officer one day following sexual assault was held to be admissible. The court held that latitude was acceptable in temporal proximity in recognition of a child's tender years because a child is not adept at reasoned reflection and concoction of fabricated stories. In People v. Woodward, 175 N.W.2d 842 (Mich. App. 1970), the court held that a six-year-old sodomy victim's statements made in a hospital shortly after the attack and in response to a policewoman's questions were admissible because they were deemed to be within the *res gestae* of the offense. In State v. Roy, 333 N.W.2d 398 (Neb. 1983), the court held that a two-year-old sexual abuse victim's answer of "daddy" made in response to emergency room nurse's question, "Who hurt you?", was admissible as an excited utterance. In State v. Poston, 302 N.W.2d 638,641 (Minn. 1981), the court held that it was proper for a mother to have been permitted to testify regarding her six-year-old daughter's nightmares in which she fought and scratched and said, "Ray, stop. Stop it, Ray. Stop it." In Goldade v. State, 674 P.2d 721 (Wyo. 1983), the court held that while statements attributing fault were generally not admissible under 803(4), the testimony of a nurse that the declarant stated, "My mother beat me" following the question, "How did you get those bruises?", was admissible because the court reasoned that it was vested with the responsibility to address the most pernicious social ailment which affects society: child abuse.

[14] 18 M.J. 729 (A.F.C.M.R. 1984).

were reliable. The court determined that the circumstantial guarantees of trustworthiness were established by (1) the fact that each statement was typewritten, sworn to by the declarant, and signed; (2) testimony of the government agents which demonstrated that the statements were taken following extensive interviews designed to affirm the accuracy of each statement; (3) the fact that each statement was against the pecuniary interests of the respective declarants; and, (4) each statement attached a significant societal stigma to its maker. In determining reliability, the court found that (1) none of the declarants recanted their testimony; (2) witnesses testified to the reputation for truthfulness of each of the declarants; (3) there was no evidence presented of a motivation to fabricate; (4) a family friend and a neighbor testified that "things weren't right" in the family during the periods of the alleged sexual abuse; and (5) the accused voluntarily confessed to each act of misconduct alleged in the witness statements.

Hines illustrates perfectly the importance of technical precision in the investigation of a child abuse case. For example, consider what would have resulted in *Hines* had the statements of the witnesses not been typewritten, sworn, and signed. This is a matter that trial counsel should discuss with investigators before the development of a criminal case involving a child victim and should be closely monitored after such a case develops. *Hines* also demonstrates that evidence which is necessary for one purpose actually may be equally or more important for another purposes. For example, it was vital for trial counsel to establish the "unavailability" of the witnesses in *Hines* to properly introduce the witness statements under Rule 804(b)(5).[15] Obtaining their in-court refusal to testify was one way of accomplishing this requirement. Clearly, the witnesses could have simply stated their refusal to testify without more. Yet, developing their reasons for refusing to testify and their failure to recant their pretrial statements furthered the basis for admitting the statements. This form of testimony from a victim should be developed in the investigative process, especially if there is a strong indication that the victim will not be geographically available for trial. Finally, *Hines* illustrates the necessity of investigative foresight. Consider the importance of the testimony provided by the character witnesses and the witnesses who testified that "thing weren't right" in the Hines family. Unquestionably, this testimony would have been important to establish the victim's credibility at trial if it became relevant to the issues in the case.[16] Using the same form of testimony to establish the admissibility of the pretrial statements reflects a pretrial perspective which could have been gained only by anticipating the non-availability of the victim's testimony at trial and resourcefully applying the guidelines of the rules of evidence.

E. Testimonial Evidence (Expert)

In recent years, expert testimony has proven to be indispensable to successful child abuse prosecutions. In his article, *Prosecution of Child Abusers*[17] LTC Adrian Gravelle comments: "For battered child cases, the technique is almost too simple: lock the suspect into his or her story and then demolish the story by expert testimony."[18] This is excellent advice when a child has been physically injured and the accused has attempted to establish accident as the basis for the injury. What can be done if the accused makes no statement or, when, as quite frequently happens, there is more than one suspect? Consider also the problem frequently encountered when the treating physician has limited experience in the field of child abuse and is capable only of rendering an opinion regarding the extent and nature of the injury. In a physical abuse case, this testimony would be helpful to establish whether the injury caused death or amounted to grievous bodily harm, but would be of little value to establish intent or rebut a defense such as accident.

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[15] Mil. R. Evid,. 804(b) specifically provides that statements which satisfy the criteria of Rule 804(b)(5) are admissible if the declarant is unavailable as a witness. The definition of "unavailability" and the proof necessary to establish unavailability is set forth in Rule 804a).

[16] *See* United States v. Everage, 19 M.J. 189 (C.M.A. 1985); United States v. Meyers, 18 M.J. 347 (C.M.A. 1984). Trial counsel should note that the tenor of cross-examination may provide a basis for bolstering the credibility of a witness. This is an important consideration where the defense plans to attack the credibility of the victim without putting the accused on the stand to testify.

[17] Gravelle, *Prosecution of Child Abusers*, Trial Counsel Forum, July 1984, at 2.

[18] *Id.* at 7.

Similarly, a physician may offer valuable testimony that a child showed signs of vaginal penetration or anal infection but not be able to link these signs to sexual abuse. Clearly, in each of these situations additional expertise is necessary. Trial counsel must anticipate this need in each case and insure the availability of expert testimony.

There are many medical experts who have proven to be extremely valuable in cases involving the physical abuse of children. Pediatric physicians specializing in child development are able to testify as to "failure to thrive syndrome."[19] This is a form of child abuse which exists when a child with no known organic disease fails to reach normal stages of physical growth. The value of this testimony was demonstrated in *State v. Loebach*[20] where Dr. Robert ten Bensel, a leading authority in child abuse, testified that the cause of death of a three-year-old victim was intentional infliction of injury. As part of his expert conclusion, he testified,

> The baby had not thrived and there were no organic reasons for this disclosed by the autopsy. The baby was in the 95th percentile by weight when born, but only in the 10th percentile at death; it was in the 95th percentile by height when born, but only in the 50th at death.[21]

Such testimony would be extremely valuable as a basis for charging an accused with cruelty and neglect under an assimilated state statute. This is one strategy available to trial counsel where the suspicion of physical abuse centers on both the service member and the spouse and where the failure to thrive is one of the factors of the physical abuse. Trial counsel should consider this month's reader note which discusses a similarly related approach.

Diagnostic radiologists are extremely valuable experts in establishing the cause and dating the occurrence of bone fractures.[22] Such testimony proved critical in *State v. Wellman*[23] where the accused was charged with three counts of aggravated assault against a young boy. Each of the assaults allegedly occurred at different times. The accused testified that he had not abused the child and that all of the injuries were the result of accidents. The accused's brother and two other relatives testified that they saw the defendant with the child on many occasions and observed no mistreatment of the child by the accused. A diagnostic radiologist with a pediatric subspeciality testified that, in his opinion, the fractures of the child's bones were non-accidental: "[B]oth the arm and leg fracture were unusual fractures caused by "severe twisting force" and not by falls ... and he was medically certain that they did not occur spontaneously or accidentally."[24]

In *Aldridge & Aldridge v. Mississippi*,[25] a husband and wife were charged with the felonious abuse and battery of their infant daughter. The states' evidence consisted chiefly of the testimony of medical experts who had either examined the infant or had x-rays made of the infant. Neither of the appellants testified or presented any evidence. Both were convicted and sentenced to fifteen years confinement. The expert testimony which was critical in this case was provided by a radiologist. He testified that:

> [T]he x-ray revealed two fractures to the right ankle. The injury was a bucket handle fracture within a week old. [Another x-ray] showed two fractures of the left wrist, again of the bucket handle variety. Both bones of the left wrist had been fractured and there was also a healing area up the left forearm which possibly indicated a third earlier fracture to the wrist. These fractures would have been a month old. A bucket handle fracture results from a shearing or twisting force.[26]

A much broader area of expert testimony that has developed in physical abuse cases and which has received acceptance by nearly every jurisdiction in the United States is "battered child

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[19] Asendorf v. M.S.S., 342 N.W.2d 203 (N.D. 1983).

[20] 310 N.W.2d 58 (Minn. 1981).

[21] *Id.* at 59.

[22] Brown, Fox, & Hubbard, *Medical and Legal Aspects of Battered Child Syndrome*, 50 Chi.-Kent L. Rev. 45 (1973).

[23] 341 N.W.2d 561 (Minn. 1983).

[24] *Id.* at 563.

[25] 398 So. 2d 1308 (Miss. 1981).

[26] *Id.* at 1310.

syndrome."[27] In *State v. Mulder*,[28] the Washington State Supreme Court defined "battered child syndrome:"

> The medical diagnosis is dependent upon inferences, not a matter of common knowledge, but within the area of expertise of physicians whose familiarity with numerous instances of injuries accidentally caused qualifies them to express with reasonable probability that a particular injury or group of injuries to a child is not accidental or is not consistent with the explanation offered therefor but is instead the result of physical abuse by a person of mature strength.[29]

In *Bludsworth v. State*,[30] the defendants argued that evidence of bruises and a bite-mark on the body of the child victim was incompetent because it had not been established that either defendant was responsible for the injuries. The court affirmed the admission of the evidence based on expert testimony concerning "battered child syndrome" stating: "Admissibility of the bite mark and other bruise evidence does not depend on connecting either defendant to the infliction of the injury. It is independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than, accidentally injured on the day in question.[31]

In the military services, forensic pathologists assigned to the Armed Forces Institute of Pathology are specially qualified to testify regarding "battered child syndrome." Additionally, they are experts on almost every form of injury and can provide expert testimony regarding the timing and cause of physical injuries and frequently can identify the exact manner in which the injury was inflicted.[32]

In recent years, expertise has been developed within the fields of sociology and psychology concerning sexual child abuse, especially intra-family sexual abuse. Several state courts[33] and, most recently, the Court of Military Appeals[34] have permitted expert testimony regarding what has been termed by one commentator as "sexually abused child syndrome."[35] Such testimony has been used to establish whether the victim manifests symptoms of child sexual abuse and whether the child can be considered credible. Even so, such testimony depends heavily upon strong evidentiary support and the availability of a highly qualified expert, as illustrated in *State v. Maule*.[36] In this case, the accused was charged with the statutory rape of two girls, ages five and eight. The girls complained that the accused had inserted his fingers in their vaginas. The accused maintained that these allegations were fabricated, testifying that he had been infected with pinworms when he was a child and was merely checking the girls' rectal area for signs of pinworms. The accused's doctor confirmed that the accused had been infected with pinworms. At trial, a social worker who had been treating the girls was called as a witness. She testified that she had worked with victims of sexual abuse for five years and that nearly half her case load of about 750 victims included children under age sixteen. She testified that:

> [T]he majority [of cases] involve a parent-figure, a male parent-figure, and of those cases that would involve a father-figure, biological parents are in the majority. The great majority of cases involved abuse over an extended period of time as opposed to a

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[27] *See* United States v. Bowers, 660 F.2d 527 (5th Cir. 1981); People v. Bledsoe, 681 P.2d 291 (Cal. 1984); Bowers v. Maryland, 389 A.2d 341 (Md. 1978); Minnesota v. Durfee, 322 N.W.2d 778 (Minn. 1982); Baker v. Mississippi, 455 So. 2d 770 (Miss. 1984); Missouri v. Brown, 660 S.W.2d 694 (Mo. 1983); North Carolina v. Wilkerson, 247 S.E.2d 905 (N.C. 1978); State v. Best, 232 N.W. 2d 497 (S.D. 1975); United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1981).

[28] 629 P.2d 462 (Wash. App. 1981)

[29] *Id.* at 463.

[30] 646 P.2d 558 (Nev. 1982)

[31] *Id.* at 559.

[32] Reader Note, *Winning the "Unfounded Case"—Use of Expert Medical Opinion*, Trial Counsel Forum, Aug. 1983, at 16.

[33] State v. Kim, 645 P.2d 1330 (Hawaii 1982); State v. Carlson, No. C3–84–1779, (Minn. Ct. App. 1985); State v. Middleton, 657 P.2d 1215 (Or. 1983).

[34] United Sates v. Snipes, 18 M.J. 172 (C.M.A. 1984).

[35] Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, printed in Legal Representation of the Maltreated Child 70, 82 (National Association Counsel for Children 1979).

[36] 667b P.2d 96 (Wash. App. 1983).

single incident and that both Kimberly and Denise exhibited characteristics during their interviews consistent with those of sexually abused children.[37]

While the Washington State Court of Appeals determined that the social worker was properly qualified as an expert in the field of child sexual abuse, the court held that "the record does not show [that] the underlying facts or data are of a type 'reasonably relied upon by experts in the particularly field.' There is no evidence that [the social worker] conducted any statistical study or that any other expert in the field made such a study."[38] Those underlying facts which the court concluded were not reasonably relied upon then by child abuse experts are clearly so today and include: fatigue, bed-wetting, irregular sleep patterns, nightmares, and memory disturbances.[39] A child with any of these symptoms would likely have a history of medical treatment. Surely the child's mother would be able to confirm the presence of these symptoms. Investigating these possibilities should be a routine action by trial counsel involved with a case involving the sexual abuse of a young child.

Experts in this field now also agree that older girls who have been sexually abused exhibit certain patterns: runaway, truancy, involvement with drugs, drop in academic performance, and promiscuity.[40] Interestingly, these factors seem to work to the detriment of the victim because they discourage trial counsel from undertaking a prosecution and provide credence to an accused's argument that the victim is not worthy of belief. Trial counsel must provide advice which will fully develop this background. School counselors, teachers, and nurses, as well as the victim's friends and relatives, should be consulted to obtain the history of the victim's behavior in this regard. When a trial counsel has been able to establish this special expertise and the factual basis underlying the expert's opinion, the testimony has proven to be crucial, especially in cases where the victim has recanted her pretrial statements or refused to testify.[41]

Viewed from this perspective, expert testimony can be used to establish a basis for charging, intent in physical abuse cases, the credibility of the victim in sexual abuse cases, and to rebut defenses such as alibi and accident.

Rule 4: Preserve the Victim's Testimony

There are several stages during the course of an investigation of a "child abuse" case where trial counsel must take an active role in preserving the victim's testimony. The first stage of this process, as discussed above, includes preserving the victim's testimony by taking written, sworn statements and by tracing the victim's testimony through other percipient witnesses. There are two other stages of the investigation where trial counsel may have an opportunity for preserving the victim's testimony: after charges have been preferred and during the formal Article 32[42] investigation .

Rule for Courts-Martial 702(a)[43] provides that a deposition may be ordered after preferral of charges whenever there are exceptional circumstances in the case and it is in the interests of justice that the testimony of a witness be taken and preserved for use at an investigation under Article 32 or a court-martial. This is the preferred method of preserving the victim's testimony for four reasons: (1) it is clear that a deposition is intended for cross-examination; (2) it narrows the scope of the inquiry to the victim; (3) it provides the accused with the requisite constitutional protections; and (4) it can be effected before the victim is exposed to the trauma of delay, family pressure, and public embarrassment. The deposition should be videotaped to protect the prosecution from a later claim by the defense that it was denied the opportunity to have the victim's demeanor assessed by the fact-finder. Rule for Courts-Martial 702(g)(3) specifically provides that a deposition may be recorded by videotape. This does not require an elaborate production; the video camera simply needs to be

[37] *Id.* at 98.

[38] *Id.* at 100.

[39] Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse (1981).

[40] Child Sexual Abuse: Incest, Assault, and Sexual Exploitation at 6–8 (National Center on Child Abuse and Neglect 1981).

[41] State v. Middleton, 657 P.2d 1215 (Or. 1983).

[42] Uniform Code of Military Justice art. 32, 10 U.S.C.§832 (1982) [hereinafter cited as UCMJ].

[43] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 702(a) [hereinafter cited as R.C.M.].

focused on the victim during the course of the deposition.

Until recently, it was not clear whether testimony rendered at an Article 32 investigation was admissible as "former testimony" under Rule 804(b)(1). Indeed, the eventual use of Article 32 testimony at trial as former testimony seemed to be controlled by defense counsel's pronouncement at the Article 32 investigation that his or her motivation in questioning a witness was solely for purpose of discovery and not cross-examination. The drafter's analysis of Military Rule of Evidence 804(b)(1) suggested that this pronouncement would govern whether Article 32 testimony was admissible at trial as "former testimony."[44] In *United States v.Hubbard*,[45] the Army Court of Military Review held that testimony of a witness at an Article 32 investigation was admissible as former testimony despite the argument that defense counsel would have questioned the witness differently at trial had the witness been available. The court held that: "The motive of an opponent to the admission of former testimony may be determined by an objective examination of his conduct in light of the circumstances at the time of the former testimony."[46]

In *United States v. Connor*,[47] the Navy-Marine Court of Military Review concluded that the drafter's analysis of Rule 804(b)(1) was "of little persuasive value"[48] in determining the issue of admissibility of Article 32 testimony as former testimony at trial. Regardless of defense counsel's motivations at the Article 32 investigation, the court found that "defense counsel had unlimited opportunity to cross-examine" the witness.[49] Moreover, the court found that the fact that other questions could have been asked the witness at trial did not negate the existence of an opportunity or motive to cross-examine at the Article 32 investigation.[50]

Even though this issue requires clarification by the Court of Military Appeals, it is vital that trial counsel take action to preserve a child victim's testimony rendered at an Article 32 investigation. Such testimony must be taken verbatim either by audio-tape or by a court-reporter. If taken by audio-tape and later transcribed, the tapes must be carefully preserved.[51] At the outset of the Article 32 investigation, trial counsel should notify defense counsel that the victim's testimony at the Article 32 investigation will be recorded verbatim for possible use at trial and outline the reasons why.

In both types of child abuse cases, trial counsel must be sensitive to the needs of the victim and insure that the proceedings are conducted in a manner consistent with the gravity of the issues in the case. Unquestionably, child abuse cases require trial counsel to develop a special relationship with the victim to comprehend the child's trauma caused by being thrust into the public arena of family court, foster care, and criminal proceedings. Yet trial counsel *must not* become the child's or the parent's partisan advocate on issues such as whether, when, or how the defense will have access to or question the victim. Such forms of "advocacy" have needlessly imperilled child abuse cases by protracting the proceedings and have exposed trial counsel to allegations of "prosecutorial misconduct." At trial, such a claim may provide the defense with a basis for arguing that trial counsel should be disqualified.[52]

Rule 5: Maintain a Record

Most child abuse cases require time to develop the evidence necessary for a successful prosecution. Additionally, as discussed above, a child may be involved in other proceedings which may further delay the criminal proceedings. Therefor, it is absolutely essential that trial counsel maintain a careful record of activities that transpire in the case to assist him or her in resolving three issues which commonly pose problems at trial: speedy trial, discovery, and witness unavailability.

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[44] Mil.R.Evid. 804 analysis.

[45] 18 M.J. 678 (A.C.M.R. 1984)

[46] *Id.* at 682.

[47] NMCM 841585 (N.C.M.R. 30 Oct. 1984).

[48] Id. slip. op. at 11.

[49] Id. slip. op. at 12.

[50] *Id.*

[51] R.C.M. 914 discussion and analysis.

[52] Jameson v. Strom, 17 M.J. 809 (A.C.M.R. 1984). *See also* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); United States v. Enloe, 15 C.M.A. 256, 261, 35 C.M.R. 228, 233 (1965).

Rule for Courts-Martial 707 provides that the accused must be brought to trial within 120 days after notice to the accused of preferral of charges or imposition of restraint. Rule for Courts-Martial 304 provides an expansive definition of restraint which includes any condition which directs a person to do or refrain from doing specified acts. In most child abuse cases, an accused will be restricted from the household or from contact with the victim. Trial counsel must be aware of any event that triggers this rule, particularly when it appears that evidence such as photographs and lab reports, and coordination with expert witnesses will require substantial periods of time to develop. Every action taken in developing this evidence should be documented in written form and not left to memory. Special attention should be given to documenting the unavailability of witnesses during the investigation or on the scheduled date of hearings or trial. Periods of time for requested defense delays, written or unwritten, should be carefully recorded. The compilation of such a record will be of great assistance to trial counsel in responding to an allegation that the accused was denied a speedy trial.

Discovery in a child abuse case is also of special importance. Frequently, at the outset of these cases, trial counsel is served with an expansive request for discovery by defense counsel. Even though critical evidence may not be available then, trial counsel must insure that during the course of the investigation all evidence made discoverable by Rule for Courts-Martial 701 is provided to the defense and that this is carefully recorded. Also important are the discovery rules in Military Rules of Evidence 304(d)(1), 803(24), and 804(b)(5). Rule 304(d)(1) requires trial counsel to provide notice to the defense of *all* statements, oral or written, made by the accused which are relevant to the case, known to the prosecution, and within the control of the armed forces. Often, trial counsel overlook the need to provide notice of the accused's exculpatory statements. Rules 803(24) and 804(b)(5), the "residual hearsay" exceptions, have specific notice requirements. The admissibility of evidence under these rules hinges upon pretrial notice.[53] Because the successful prosecution of child abuse cases frequently depends solely upon this form of evidence, trial counsel must insure that these notice requirements are satisfied. Finally, trial counsel must be aware of the implied discovery requirements surrounding the use of "uncharged misconduct" under Rule 404(b). Rule 404(b) is silent on the issue of notice; however, Rule for Courts-Martial 701 makes clear that the names of witnesses, documents, reports, and photographs to be used in the case-in-chief must be provided to the defense after preferral of charges. Consequently, evidence of uncharged misconduct to be used as evidence to establish intent requires pretrial notice. Here again, trial counsel must carefully document his or her actions in complying with these requirements.

The importance of former testimony and residual hearsay evidence have been discussed already. To be admissible under Rule 804, the prosecution must prove that the witness is unavailable. In most child abuse cases this proof is established by the witness' in-court refusal to testify[54] or refusal to attend the trial.[55] In either case, trial counsel must insure that the witness has been properly subpoenaed. Trial counsel must never accept a witness' oral representation that he or she will refuse to attend the trial. While trial counsel's efforts to gain the attendance of witnesses need not be futile, they must be reasonably calculated to assure attendance.[56] If a subpoena is used, it must be accurate and complete. A subpoena is complete when notice of the order of appearance is accompanied by funds necessary to assure the presence of the witness.[57] By overlooking this latter requirement, trial counsel would find it extremely difficult to argue that all reasonable efforts have been made to assure the attendance of the witness.

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[53] Mil. R. Evid. 802 (24) provides, among other things, that "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant. Mil. R. Evid. 804(b)(5) contains the identical requirement.

[54] United States v. Hogan, 16 M.J. 549 (A.F.C.M.R. 1983). Trial counsel must ensure that the military judge's inquiry is more than a "perfunctory effort to obtain the testimony of the witness."

[55] United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983).

[56] *Id.* at 1013.

[57] See UCMJ art. 47(a)(2).

Issues such as speedy trial, discovery, and witness unavailability, are easy targets for defense counsel at trial. They can create havoc for an unprepared trial counsel and may be so disruptive as to establish a reasoned basis for excluding crucial evidence such as residual hearsay and uncharged misconduct.[58] Trial counsel can easily counter these issues by preparing and organizing the case around a record which demonstrates with particularity all pretrial activities, documents all efforts made in providing required matters of discovery, and records the efforts made to obtain the attendance of essential witnesses.

Conclusion

Criminal cases involving child victims, once a rarity for Army trial counsel, are now, unfortunately, commonplace. Even more unfortunate is the fact that these cases are increasing.[59] As these cases develop, more complex issues can be expected. For instance, recently a child psychiatrist testifying for the defense in a case involving the sexual abuse of a four-year-old boy stated:

> The root problem lies in the methods used by law enforcement and social service agencies that investigate allegations of sexual abuse of children. Current methods actually amount to a teaching experience for the child. Children learn the responses adults want and then give them. The so-called indicators of child sex abuse have no scientific basis.[60]

It is not difficult to visualize what developments will grow out of this form of testimony in the future.

Trial counsel will be at the forefront of these developments and rightly so. Few authorities at Army installations are equipped to bring these complex issues into focus as are trial counsel. The methodology set forth above is designed to assist trial counsel in this regard. It is not intended nor considered to be an exclusive analysis of every possible issue involving child abuse. Rather, this methodology is intended to be a working framework within which trial counsel can use their knowledge and experience to fashion lasting remedies to stem the tide against child abuse.

[58] Mil. R. Evid. 403 provides, among other things, that relevant evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay or waste of time.

[59] Army Times, Apr. 8, 1985, at 10, col. 1.

[60] State v. Barkman (Berrien County Circuit Court, Michigan) (available Mar. 28, 1985, LEXIS, Nexis Library, Wires file).

Corroboration of Confessions

Many trial counsel and military judges are becoming increasingly confused about the meaning of Military Rule of Evidence 304(g), which governs the corroboration of confessions and admissions. This note will discuss two issues surrounding this confusion: the type and quantum of evidence necessary to corroborate an admission or confession; and the need to independently corroborate the identity of the accused as the perpetrator.

The confusion surrounding the type and quantum of independent evidence necessary to corroborate a confession or admission is illustrated by the ongoing Government appeal of *United States v. Poduszczak*.[1] LTC Poduszczak, a nurse anesthetist at Kenner Army Hospital, Fort Lee, Virginia, was charged with the following course of conduct specifications: (1) stealing Demerol, a controlled substance, from an Army hospital; (2) wrongfully using Demerol; (3) signing false official statements regarding his record-keeping on the amount of Demerol he administered to patients; and (4) dereliction of duty by treating patients while under the influence of Demerol.

[1] United States v. Poduszczak, Misc. Dkt 1985/4, *appeal filed* (A.C.M.R. 5 Mar. 1985).

At trial, the government offered into evidence several admissions and confessions of LTC Poduszczak to various coworkers, superiors, and criminal investigators. These admissions included oral statements that he used Demerol "in the evening after cases," used Demerol that "normally would have been wasted," and used it "intermittently for several years."[2] He admitted taking "300 milligrams" of Demerol, but "not at one time," and "took it in the anesthesia work room in the morning before cases," and "before going home in the afternoon."[3] He admitted taking the drug from the narcotics section of the department, and he "didn't know what was being given and what he was taking."[4] He was taking it prior to and after work.

To corroborate the admissions and confession at trial, the government introduced evidence proving that LTC Poduszczak had access to Demerol, had the knowledge and ability to handle it, and had the opportunity to take it unobserved.[5] Demerol was his drug of choice which he introduced into the anesthesia department upon his arrival.[6] Expert testimony by anesthesiologists who had examined Poduszczak's charts showed that he charted more Demerol than was appropriate.[7] His logs also showed an unusual amount of Demerol wastage, yet no one ever saw him destroy any Demerol in the normal course of business.[8] The notations of the Demerol log (DA Form 3949) often did not correspond with the amounts of Demerol that were shown to have been given to patients on their anesthesia charts (SF 5178), which indicated a method by which Demerol could be acquired for personal use.[9] Moreover, Mrs. Hassell, a coworker, testified that she became suspicious that LTC Poduszczak was using Demerol, and, to test her suspicions, she tasted one of Poduszczak's syringes which had been labeled as containing Demerol. From her experience, she knew that Demerol tasted bitter. The contents from Poduszczak's syringe, however, tasted salty. She reported her suspicions to her superiors.[10]

The military judge ruled that the admissions and confessions were not admissible because they were not sufficiently corroborated by independent evidence as required under Military Rule of Evidence 304(g). Portions of the judge's rationale follow:

> Yesterday I ruled with respect to three charges. Charges I, III, and IV, that there was no corroboration evidence. Why not? The government's own witnesses say that it is difficult to prove . . . the use of drugs without catching the perpetrator in the act or some technological analysis. . . . Mrs. Hassell suspected a problem. She tried investigating it herself by taking [a] syringe off the cart tasting [of] saline. She sent it to a lab. She switched what she believed to be saline . . . with another syringe that was suspect and she tasted to be saline. There was no evidence that the original syringe had even been mixed. She tried to get to work early to try to catch [respondent] in the act of using narcotics but she did not. She neither saw him mix narcotics nor did she see him waste them. . . .[11]
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> . . . .
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> Obviously they had Demerol records here [and] I could say he used Demerol quite a bit. Other people did use Demerol and I found going throught [sic] the defense records that he used other drugs on a significant basis. Ready access of Demerol enjoyed by the accused, that doesn't prove anything. You need more than just a fact that that's his job. His knowledge of his proper use and usual effects of Demerol, there was no evidence of that, but even assuming that, that's the same as the question before . . . Back to the syringe labeled Demerol in the case where the anesthesia card on 28 February 84, I stated that before.

[2] *Poduszczak*, Record of Trial 917–19 [hereinafter referred to as R].

[3] *Id.* at R. 920.

[4] *Id.* at R. 921

[5] *Id.* at R. 742–51

[6] *Id.* at R. 876.

[7] *Id.* at R. 742.

[8] *Id.* at R. 750.

[9] *Id.* at R. 769.

[10] *Id.* at R. 799–862.

[11] *Id.* at R. 1027.

> What could be inferred by . . . the testimony by Mrs. Hassell [was] that there was saline in there. We also heard . . . testimony that one would not taste it up. Excepting Mrs. Hassell's testimony, that she did taste it, . . . and it tasted like saline, that she knew what Demerol tasted like. The fact that there was saline in the syringe does not tell me anything. And of course they go to the next question, . . . the fact that record entries of 28 February prepared by the accused [have] no entry explaining previous findings regarding the saline syringe. We don't know if this cart was totally prepared. If he took one syringe off or whatever it was, there was no copied evidence concerning the status of that cart at that time. And I believe that was the day she came in especially early so what ever you want to make of that there certainly was not enough to go to court. The fact that no one ever saw the accused mix solutions containing drugs including [D]emerol, I attach no weight to that. The fact that no one ever saw the accused waste narcotics containing [D]emerol.[12]
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> . . . .
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> The fact that the accused introduced [D]emerol to the Department of Anesthesia at Kenner Army Hospital, excepting Major Carr's comments that this occurred, still has no particular meaning. This is his drug of choice. If this is his drug of choice—and with the regulations permitting it, is certainly OK to do it. If somebody else came in and they put in something else, then that drug would come in. There is nothing significant about that. Evidence by the expert on the ease of stealing narcotics including [D]emerol, it's really the same thing. Just because it's easy to do means it's difficult to prove and it requires the government to try harder. If the government established criminality solely with corroboration, they established facts from which one could infer criminality. Such as if he had [D]emerol in his coat pocket after he left work. Criminality would be established by his statement. Because his use of [D]emerol was restricted to the hospital. Then the statement would have been corroborated by that evidence.[13]

The judge's rationale indicates that he applied the incorrect legal standard of proof beyond a reasonable doubt to the independent evidence offered in corroboration. Indeed, this is even more apparent by the judge's preliminary remarks:

> At some point I have to decide whether the evidence shows the incorrect records are mistakes or involve an element of criminality. That's what it comes down to.
>
> . . . .
>
> I've got to know whether the evidence reaches the point of being mistake or criminality. . . .[14]

Only the reasonable doubt standard requires that the evidence "exclude any hypothesis except that of guilt."[15] The above remarks and rationale demonstrate the judge's belief that the independent evidence must exclude any hypothesis of mistake. Indeed, the government's independent evidence could allow a reasonable person to hypothesize that LTC Poduszszak was merely careless in record keeping and that he used and wasted a lot of Demerol. However, proof beyond a reasonable doubt is not the standard enunciated in Rule 304(g).

Rule 304(g), which governs the type and amount of independent evidence necessary to corroborate and admit a confession or admission, provides, *inter alia*:

> An admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may

[12] *Id.* at R. 1030–31.

[13] *Id.* at R. 1032–33.

[14] *Id.* at R. 475–76, 489.

[15] Dept' of Army, Pamphlet No. 27–9, Military Judges' Benchbook, para. 2–29 (May 1982).

> be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

Rule 304(g) further explains that the quantum of evidence "necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of the facts stated in the admission or confession." It "need only raise an inference of the truth of the essential facts admitted." The rule recognizes that the quantum of evidence necessary is "generally slight" and can be either "direct or circumstantial."[16] Moreover, the independent evidence need not negate other permissible inferences.[17] Rule 304(g) was drafted to abolish the old *corpus delicti* rule which required the government to prove independently and to a probability that all the elements of a crime were committed by someone.[18] The purpose of Rule 304(g) is to prevent "errors in convictions based upon untrue confessions."[19]

Using Rule 304(g), and considering the purpose of the rule, the independent evidence introduced against LTC Poduszczak appears sufficient to corroborate his confession and admissions. Ultimately, the Army Court of Military Review will decide this issue and should provide trial counsel and judges with clearer guidance on the meaning of Rule 304(g).

The second issue concerns the need to independently corroborate the identity of the accused as the perpetrator. Under the old 1951 Manual's *corpus delicti* rule, the government did not have to prove this identity but only that the crime was committed by someone. The confession alone could then be used to establish the accused's identity as the perpetrator. The 1969 Manual for Courts-Martial abolished the 1951 Manual's *corpus delicti* rule,[20] relying upon the Supreme Court decisions of *Opper v. United States*,[21] and *Smith v. United States*,[22] which held that the corroborating evidence need only raise an inference of the truth of the essential facts. In both these cases, however, the defendants were prosecuted for crimes in which no tangible *corpus delicti* existed—Opper was convicted of bribery and Smith was convicted of tax evasion. As a result, no *corpus delicti* could be proven and the only way to prove that a crime was committed was by necessarily identifying the perpetrator. Nothing in these two cases was intended to suggest that the identity of the accused must be independently corroborated where a tangible *corpus delicti* has been, in fact, independently established. Indeed, subsequent Supreme Court[23] and federal cases[24] have demonstrated that this was *not* the Court's intent.

Nevertheless, the drafters of the 1969 Manual made it clear that their intent was to create a requirement for independent corroboration of identity even where a tangible *corpus delicti* had been independently shown. They wrote,

> Although both cases involved offenses in which there was no tangible corpus delicti, the Court did not, in announcing its new rule, state that the rule applied only to this type of offense—that is, it did not indicate that the "corpus delicti" rule would continue to be applied to offenses in which there was a "tangible" corpus delicti, if there is, in fact, any real distinction to be drawn... Under the *Opper* and *Smith* rule, corroboration of a confession would supply evidence not only that the offense was committed by

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[16] United States v. Lowery, 13 M.J. 961 (A.F.C.M.R. 1982); Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, 2 Revised Edition, at 27-9 to 27-10 (July 1970). [hereafter cited as Analysis, MCM, 1969].

[17] United States v. Henken, 13 M.J. 898 (N.M.C.M.R.), *petition denied*, 14 M.J. 291 (C.M.A. 1982).

[18] Manual for Courts-Martial, United States, 1951, para. 140*a* [hereafter cited as MCM, 1951].

[19] Smith v. United States, 348 U.S. 147 (1954).

[20] *Compare* Manual for Courts-Martial, United States 1969 (Rev. ed.), para. 140*a*(5) *with* MCM, 1951, para. 140*a*.

[21] 348 U.S. 84 (1954).

[22] 348 U.S. 147 (1954).

[23] Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Calderon, 348 U.S. 160 (1954).

[24] United States v. Opdahl, 610 F.2d 470 (8th Cir, 1979); United States v. Johnson, 589 F.2d 716 (D.C. Cir. 1978); United States v. Daniels, 528 F.2d 705 (6th Cir. 1976); Rodriquez v. United States, 407 F.2d 832 (9th Cir. 1969); United States v. Begay, 441 F.2d 1136 (10th Cir. 1971); Fisher v. United States, 324 F.2d 775 (8th Cir. 1963); Cutchlow v. United States, 301 F.2d 295 (9th Cir. 1962).

> someone but also that it was committed by the accused, which would seem to be a most desirable method of corroboration as to any kind of offense.[25]

As mentioned, this approach has not been followed by the federal courts.[26] Moreover, the Air Force Court of Military Review has elected to disregard the drafters' intent and, instead, has followed the approach of the federal courts.[27] The Army Court of Military Review, however, in *United States v. Loewen*,[28] has followed the drafters' intent and strictly required independent evidence corroborating the identity of the perpetrator regardless of the establishment of a *corpus delicti*. This overly technical approach has caused problems for trial counsel.

As an example, TCAP recently received a telephone call from a trial counsel at Fort Huachuca where the dead body of a female service member had been discovered in a field 200 yards from her barracks. The victim had been missing from her unit for sixteen days prior to this discovery. An AFIP autopsy report concluded that the manner of death appeared consistent with a pattern of rape and homicide (the body was found with the vagina exposed). However, the body was otherwise too badly decomposed to determine whether there was any trace of sperm, fiber, blood, or foreign pubic hairs which would help identify the perpetrator. The accused in the case made several admissions to friends that he had raped and killed the victim. These admissions were made with sincere remorse. Upon interview by CID investigators, the accused rendered a detailed confession. Despite the admissions and confession, and a *corpus delicti*, the trial counsel had no tangible evidence to put the accused at the scene of the crime. Trial counsel was worried that the strict application of *Loewen* would result in the exclusion of the confession and admissions, and the accused's acquittal.

In the future, Army trial counsel must hope that the Army Court of Military Review or the Court of Military Appeals adopt a more flexible interpretation of Rule 304(g) in regard to the requirement to corroborate identity. Indeed, nowhere does Rule 3045(g) expressly state that the identity of the perpetrator must be independently corroborated. What the rule does state, however, is that the "essential facts admitted" must be corroborated. Of course, if an accused states "I murdered X," then it would appear arguable that among the essential facts admitted is the identity of the accused as the murderer. However, what is an essential fact should be interpreted with flexibility to meet the purpose of the rule and the ends of justice, especially where it is independently proven that the crime was committed. Additionally, Rule 102 expressly states that "these rules shall be construed to secure fairness . . . to the end that the truth may be ascertained and the preceedings justly determined."[29] In support of a flexible interpretation of Rule 304(g), consideration should be given to the Supreme Court's statement in *Smith* that "[a]ll elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused."[30]

For these reasons, the Army Court of Military Review should adopt the position that where the *corpus delicti* is established, where no motive to lie is present, and where there is no other evidence to suggest that the confession is untrue,

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[25] Analysis, MCM, 1969, at 27–9 to 27–10.

[26] *See* note 27.

[27] United States v. Baran, 19 M.J. 595 (A.F.C.M.R. 1984); United States v. Pensinger, ACM 24451 (A.F.C.M.R. 1 Nov. 1984).

[28] 14 M.J. 784 (A.C.M.R. 1982). It should be noted that in *Loewen* substantial evidence was introduced to show that the accused was not the perpetrator of the forgery and that he had a motive to falsely confess in order to protect his wife.

[29] Mil. R. Evid. 102. The absurdity of strictly applying corroboration rules can be seen in the case of State v. Ralston, 425 N.E.2d 916 (Ohio 1979) (detailed confession, knowledge only accused could know, and dead body in secluded woods held insufficient.)

[30] *Smith* 348 U.S. at 156. This approach of bolstering the confession to allow the confession followed by the federal courts. United States v. Trombley, 733 F.2d 35 (6th Cir.1984); United States v. O'Connell, 703 F.2d 645, 648 (1st Cir. 1983); Rachlin v. United States, 723 F.2d 1373 (8th Cir. 1983); United States v. Gresham, 585 F.2d 103 (5th Cir. 1978); United States v. Wilson, 436 F.2d 122 (3d Cir.), *cert. denied*, 402 U.S. 912 (1973)

the identity of the perpetrator can be shown through the bolstered confession. Such a position would be consistent with a flexible interpretation of the Military Rules of Evidence and the federal court decisions.

Until the Army court adopts this position or Rule 304(g) is clarified, Army trial counsel must be prepared to independently corroborate the identity of the accused as the perpetrator. Assuming that there is no independent, tangible evidence linking the accused to the crime, this identity can be corroborated through other means. One means to show identity is through the detailed nature of the confession, especially if the facts recited in the confession "dovetail" with the facts of the crime.[31] Additionally, a detailed confession will many times contain facts which only the true perpetrator would know.[32] For example, in the Fort Huachuca case, certain admissions made concerning the victim's death were made prior to the discovery of the body. This fact produces the inference that only someone connected with the crime would have known that the victim was dead. Finally, the trial counsel should try to prove identity through the circumstances surrounding the giving of the confession.[33] If the confessor demonstrates sincere remorse for the crime, this evidence should be used to independently corroborate the fact that he or she is the true perpetrator. In this manner and through continued thorough investigation by the CID, trial counsel will be able, in most case, to corroborate the confession.

[31] United States v. Gresham, 585 F.2d 103 (5th Cir. 1978); United States v. Waller, 326 F.2d (4th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964), United States v. Felder, 572 F. Supp 17 (E.D. Pa.1983); United States v. Grasha, ACM 24056 (A.F.C.M.R. 29 Dec. 1983).

[32] *Felder*, 572 F. Supp at 17.

[33] *Smith*, 348 U.S. at 155 n.3, which states that admissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated. *See also Rachlin; Gresham;* United States v. Wolf, 535 F.2d 476, 478 (8th Cir.), *cert. denied*, 429 U.S. 920 (1976); United States v. McColgin, 535 F.2d 471, 474 (8th Cir.), *cert. denied*, 429 U.S. 853 (1976). *See generally* United States v. Schuring, 16 M.J. 664 (A.C.M.R. 1983); United States v. Shavers, 11 M.J. 577 (A.C.M.R. 1981).

Trial Counsel's Emergency Brake

In an earlier article appearing in *The Army Lawyer*, TCAP discussed the pending government appeal of *United States v. Browers*.[1] At that time we indicated the importance of this appeal for trial counsel. On 10 April 1985, the Army Court of Military Review decided the case in the government's favor and reversed the trial judge.[2] The opinion, written by Senior Judge Wold, vests important powers and responsibilities in the trial counsel. It should be read by everyone practicing before courts-martial.

In *Browers* the Army trial counsel requested a sixteen day continuance until she could obtain two essential witnesses, one of whom had just gone on emergency leave and another who had recently gone AWOL. Based upon that ACMR determined to be irrelevant considerations, the trial judge denied the continuance. Because the two witnesses were the government's only evidence that the crime of lewd and lascivious acts had occurred, the government requested a seventy-two hour continuance to decide whether to appeal the judge's ruling. The judge denied this continuance on the ground that the denial of the earlier continuance was not an appealable order under R.C.M. 908.[3] The trial judge then proceeded to find the accused not guilty. Despite this apparent acquittal, the government proceeded to appeal the judge's earlier ruling.

The Army Court of Military Review announced three important holdings. First, the court held that denial of a continuance could be appealed under Article 62 of the UCMJ because

[1] Galligan, *Government Appeals: Winning the First Cases*, The Army Lawyer, Mar. 1985, at 38.

[2] United States v. Browers, ___ M.J. ___, Misc. Dkt. 1985/1 (A.C.M.R. 10 Apr. 1985).

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908.

the effect of the denial was to exclude evidence which was substantial proof of a material fact.[4] The court pointed out that adopting the effects test should not unduly increase the government's use of its right to appeal. Second, the Army court held that the trial judge abused his discretion by denying the government's request for a continuance to obtain two essential witnesses.[5] The court found that the government acted in good faith and exercised due diligence in trying to obtain the presence of the witnesses whose absences were due to emergency leave and AWOL, factors beyond the government's control. Furthermore, the court stated that the government's request for a continuance was entitled to as much consideration as a defense request for a continuance. Based upon this reasoning, the interest of society in being able to present its case outweighed any inconvenience caused by the delay to the accused and the court's docket.

Third, and most significantly, the trial counsel's request for a delay to determine whether to file notice of appeal automatically interrupted the court-martial proceedings for a period of up to seventy-two hours[6] The court drew the following analogy:

> We find RCM 908 somewhat analogous to the emergency brake on a railroad train. When the cord is pulled, the train immediately stops without debate over whether there is sufficient danger to justify the delay or whether the cord was pulled in good faith. The railroad relies on two things to avoid unnecessary emergency stops: a responsible attitude on the part of the passengers and the threat that persons who abuse the privilege may be ejected from the train.

Thus, the court concluded that the military judge had no authority to force the government to proceed after its request for seventy two hours, and that any actions taken by the military judge after that request were a nullity.[7] Consequently, the trial judge's announcement of a finding of not guilty had no effect, and further proceedings were not barred by the provisions against former jeopardy.

Because trial counsel now have the power to stop the court-martial proceeding for up to seventy-two hours, he or she must be careful to exercise this power responsibly. As Senior Judge Wold warned, "The military justice system has well-developed procedures for bringing professional sanctions to bear on unprofessional conduct."[8]

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[4] Uniform Code of Military Justice art. 62, 10 U.S.C. §862 (1984). *Browers*, slip op. at 10.

[5] *Browers, slip op.* at 12.

[6] *Id.* at 15.

[7] *Id.* at 16 n.10.

[8] *Id.* at 16.

Reader Note

[NOTE: Recently, CPTs Bill Allinder and Randall Hall successfully prosecuted a service member for failing to obtain medical attention for his four-year-old daughter. The conviction was based, in part, upon an assimilated Georgia statute which prohibits cruelty to children. What follows is CPT Allinder's letter describing this prosecution. Immediately following we have reprinted the specification of which the accused was convicted, as well as Section 16–5–70 of the Georgia Penal Code. For a good collection of cases in which failure to obtain medical treatment has resulted in conviction under state child abuse and neglect statutes, see *Annot. 1 A.L.R. 4th 38 (1980).]*

Facts

On 20 September 1984, Sergeant W brought his four-year-old daughter, suffering from a severely burned foot to a local civilian hospital. The burn was approximately one week old, and the doctors felt it had all of the classic signs of an immersion burn. When asked by the doctor how it happened, the child stated, "Daddy held my foot in the water." The State Family and Protective Services, the CID, and the FBI were notified and immediately began an investigation. The burn resulted in gangrene and caused the amputation of four toes. X-rays of the child's entire body revealed a recently broken arm. When the

state took the second child, a five-year-old daughter, from the home, it was discovered that she had massive bruising and broken fingers which she had received in a beating from her mother. The injuries required her hospitalization for five days.

Investigation

The investigation revealed that the four-year-old's burn had actually been inflicted by the mother while Sergeant W was at work. Despite its severity, Sergeant W attempted for a week to treat it himself in order to conceal the injury from authorities. The apparent injuries to the other daughter were the result of a beating administered by the mother using a wooden board. Sergeant W had been present during that beating and watched but took no action to stop it.

Both parents admitted to beating the children in the past using both a leather belt and a wooden board. Most importantly, in preparing the case, pictures were taken of the children, including pictures of the burned foot before surgery.

Problems

The greatest problems encountered during case preparation were due to the age and memories of the children. The child's statement to the doctor concerning the burn was wrong. The child apparently remembered the pain associated with her father soaking it several days after the initial burn.

During interviews with CID and FBI agents, both children provided details of the known offenses and of other possible crimes. At subsequent interviews, the children remembered fewer and fewer details. By the time of the Article 32 investigation, the children remembered few details, were confused about what they did remember, and, because they had been interviewed about the offenses so many times, they cried when asked questions.

Charges

Because the investigation could prove that Sergeant W was not involved in the infliction of the burn, an appropriate charge had to be drafted for the one week delay in seeking medical care. Both accessory after the fact to aggravated assault and the Georgia statute on cruelty to children were considered. Based on the facts in the case, it was decided to charge Sergeant W under the George statute using the Assimilative Crimes Act. The only remaining issue was the malice requirement for the offense. The pictures of the burned foot were invaluable in providing this requirement. The foot was in such a horrendous condition that any claim of ignorance that the child was suffering would appear totally unreasonable.

The Case

Sergeant W pleased guilty to the intentional infliction of mental or physical suffering on his daughter by failing to seek medical care for the burned foot, as charged under the Georgia Code. He also pleaded guilty as a principal in his wife's assault on the other daughter and to assaulting that daughter on various occasions with a leather belt and the wooden board.

In aggravation, the government called the doctor that treated the burn and amputated the toes. The doctor was qualified as an expert on burns and also had an extensive background in treating immersion burns. He testified that, in his expert opinion, there was no doubt that the burn was intentionally inflicted by holding the foot in boiling water. The doctor testified as to the child's condition and to the amount of pain suffered by the child. He covered the amount of pain killers that were given to the child at the hospital and speculated on the pain the child must have suffered during the previous week without such drugs. The pictures of the foot were introduced through the doctor. Information concerning the children's other injuries was included in the stipulation of fact.

The doctor who treated the other child was called and testified as to the extent of her injuries. He testified that the bruising of the child's buttocks was so extensive that the skin was tight and hard due to the blood infusion. The internal bleeding within the bruising was apparently so extensive that it affected the child's blood count. He also testified that the broken fingers were apparently suffered as the child tried to ward off the blows to the buttocks. Finally, the government introduced the wooden board used in the

beating to show the military judge the nature of the instrument used.

Following is the Georgia Cruelty to Children Statute and the specification assimilating this statute.

Article 5
Cruelty to Children

16–5–70. Cruelty to children.

(a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children when he willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.

(b) Any person commits the offense of cruelty to children when he maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.

(c) A person convicted of the offense of cruelty to children as provided in this Code section shall be punished by imprisonment for not less than one nor more than 20 years. (Ga. L. 1878–79, p. 162, §3; Code 1882, §4612h; Penal Code 1985, §708; Penal Code 1910, §758; Code 1933, §26–8001; Code 1933, §26–2801, enacted by Ga. L. 1968, p. 1249, §1; Ga. L. 1978, p. 228, §1; Ga. L. 1981, p. 683, §1.)

Charge

Specification: In that Sergeant W, US Army, Headquarters and Support Company, 1st Battalion, 29th Infantry, 197th Infantry Brigade (Mechanized) (Separate), did, at Fort Benning, Georgia, an installation under military control, between 11 September 1984 and 20 September 1984 maliciously cause T.W., a child under the age of 18, excessive physical and mental pain, by failing to obtain necessary medical treatment for the burned foot of the said T.W., in violation of Title 16, Section 16–5–70, of the Official Code of Georgia and Title 18, Section 13, United States Code.

The Advocate
A Journal for Military Defense Counsel

THE ADVOCATE FOR MILITARY DEFENSE COUNSEL

Submitted by the United States Army Defense Appellate Division

Contents

An Innocent Man: The Accused Who Passes the Polygraph

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When an accused maintains his innocence in the face of substantial evidence of guilt, a military defense counsel is faced with a dilemma. Even if a finding of guilty seems a certainty, military counsel cannot permit an accused to plead guilty or, more importantly, to enter into a

pretrial agreement if the accused privately insists he is not guilty. Some defense counsel in this situation routinely ask the accused to take a polygraph examination. As a practical matter, counsel should first utilize a private polygraphist to administer the polygraph examination at the accused's expense. The government may request a second test administered by the Criminal Investigation Division (CID), or an accused without financial resources may request the services of the CID polygraphist. When a government polygraphist is used, the defense counsel should be present during the examination because following the examination the CID polygraphists will interrogate the accused under oath in an attempt to elicit a confession.

If deception is indicated, the defense counsel should sit down with the accused and frankly discuss the status of the case. Occasionally, however, the results will indicate no deception when the accused protests his innocence. The defense counsel should bring these results to the convening authority's attention and attempt to have the charges withdrawn. If the convening authority persists in referring charges to court-martial, the defense counsel will want to call the polygraphist as an expert witness to testify that the polygraph demonstrates that the accused's explanation of events is credible. Although in my opinion polygraph evidence may be admissible under the Military Rules of Evidence, some judges deny counsel's attempts to lay a foundation and rule that polygraph evidence is *per se* inadmissible. This article will discuss why the military judge should permit the defense counsel an opportunity to demonstrate that the polygraph evidence should be admitted.

I. The Judge's Discretion

Determination of whether or not a witness qualifies as an expert rests largely within the discretion of the trial judge. This discretion, while broad, is not limitless. Therefore, the trial judge's decision will be overturned on appeal if the decision constituted plain error.[1] A judge who applies an incorrect legal standard has committed plain error and the judgment is subject to reversal.[2]

In ruling that the defense may not call experts to lay a foundation for the admission of polygraph evidence, the trial judge is not exercising discretion in deciding to exclude evidence. Instead, he or she presumes that polygraph evidence is inadmissible and denies the defense the opportunity to lay a foundation concerning the procedure's reliability and relevance. This failure to exercise discretion is itself an abuse of discretion.

Decisions in the federal circuits currently are in conflict on the question of admissibility of polygraph evidence,[3] but the fact that a diversity of opinion exists regarding the reliability of a scientific test does not call for a *per se* rule of inadmissibility.[4] By denying the defense an opportunity to lay a foundation on the question of admissibility of both the polygraph test and the qualifications of the polygraphist, the military judge fashions a *per se* rule of exclusion. The ruling forecloses the possibility of establishing, for instance, that these tests results are valid.[5] Fashioning a *per se* rule forecloses the possibility that technological breakthroughs or innovations will be considered in the future to qualify a scientific technique for admission into evidence.[6] By refusing to exercise his or her discretion and relying upon a *per se* rule of exclusion, the military judge errs.

II. The Frye Test Should Not Govern the Admissibility of Polygraph Evidence

Formerly, the introduction of polygraph evidence was prohibited by paragraph 142*e* of the 1969 Manual for Courts-Martial. The prohibition

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[1] Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12 (6th Cir. 1975), *cert. denied*, 382 U.S. 980 (1966).

[2] Miley v. Delta Marine Drilling Co., 473 F.2d 856, 858 (5th Cir.), *cert. denied*, 414 U.S. 871 (1973).

[3] *See* Annotation, Modern Status of Rule Relating to Admission of Results of Lie Detector (Polygraph) Test in Federal Criminal Trials, 43 A.L.R. Fed. 68 (1979).

[4] *See* Simon Neustadt Family Center v. Bludworth, 641 P.2d 531, 536 (1982); United States v. Bothwell, 17 M.J. 684 (A.C.M.R. 1983).

[5] *See* State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975) (New Mexico permits polygraph evidence if the trial judge is satisfied these factors are met).

[6] J. Reid & F. Inbau, Truth and Deception, The Polygraph ("Lie Detector") Techniques 395–98 (2d ed. 1977) indicates that in fact the polygraph has experienced an increasing reliability rate in uncovering evidence of truthfulness or

was derived from the *Frye* test[7] With the enactment of the Military Rules of Evidence as the standard governing evidentiary admissibility, the concept of outright exclusion of polygraph evidence was discarded and the precedential value of the *Frye* test made uncertain.[8] The *Frye* test was fashioned sixty years ago when the District Court for the District of Columbia created a special rule for excluding a systolic blood pressure deception test.[9] In addition to meeting the traditional requirements of relevancy and propensity to prove a relevant fact, the *Frye* test held the proponent of scientific evidence to a general acceptance standard, *i.e.*, admission of evidence embodying a scientific principle or technique was contingent upon a threshold burden of showing a general acceptance within the scientific community of that principle or technique.[10]

The obvious difficulty with applying this standard is that probative and reliable evidence is excluded if the principle or technique is innovative, lacks a proven track record, or if differing schools of thought exist as to its acceptance within the scientific community. Given these deficiencies, growing dissatisfaction with the *Frye* test has led to its modification or rejection in many jurisdictions.

Even courts which invoke *Frye's* general acceptance principle in theory do not do so in practice. For example, a Florida District Court of Appeals, while purporting to embrace the *Frye* general acceptance principle, accepted novel scientific evidence consisting of a test developed expressly for the detection of a derivative of succinic acid in the body tissue of the murder victim. Prior the time of trial, it was not believed possible to detect succinic acid in body tissue.[11]

In *United States v. Stifel*,[12] the court permitted an expert witness to testify at a murder trial where the victim had been killed by an exploding device sent through the mail. The expert identified the source of bomb fragments through a new technique known as "neutron activation analysis. "Although the procedure was novel and repudiated by "three well qualified experts who attacked [the] test procedures as inadequate", the court upheld admission of the evidence stating: "Appellant's witnesses' criticisms of [the] test methods were fully developed before the jury and were appropriate for the body's consideration. Such rebuttal went to the weight of [the] testimony—not to its admissibility."[13]

In military practice, the Army Court of Military Review examined the standard for admission of scientific evidence in *United States v. Bothwell*.[14] The court applied a three-part test to determine whether scientific evidence is sufficiently reliable to be admitted. First, the validity of the underlying scientific principle must be established. Next, the application of the technique must be valid. Finally, the technique must have been applied in a proper manner in the proffered case.

The principles contained in the Federal and Military Rules of Evidence have been applied in practice before state, federal, and military courts. The current test for admission of scientific evidence bears scant resemblance to the general acceptance standard of *Frye*. In the decades since 1923, the standard has shifted from a question of admissibility to a question of the weight to be accorded most scientific evidence. There is no reason to single out polygraph evidence for adherence to the outmoded *Frye* general acceptance standard.

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[7] United States v. Frye, 293 F.2d 1013 (D.C. Cir. 1923).

[8] *See* S. Saltzburg, L. Schinasi, & D. Schlueter Military Rules of Evidence Manual, Rule 702, Editorial Comment, Drafters' Analysis. *See also* Attacking Novel Scientific Evidence, 15 The Advocate 349 (1983).

[9] The modern polygraph measures respiration, galvanic skin response, blood volume and pulse rate. The device utilized in *Frye* was a primitive forerunner of the polygraph. Both devices operate on the assumption that measurable body reactions occur when a person is consciously lying. S. Abrams, A Polygraph Handbook for Attorneys 54 (1977).

[10] McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 8–79, 882 (1982). This article argues persuasively for an abandonment of the *Frye* test.

[11] Coppolino v. State, 223 S.2d 68 (Fla. 1968), *appeal dismissed*, 234 S.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

[12] 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 944 (1971).

[13] *Id.* at 438.

[14] 17 M.J. 684 (A.C.M.R. 1983).

A. Constitutional Considerations

The military judge's reliance on a *per se* rule of exclusion is more restrictive than the *Frye* standard. This is a violation of the appellant's right to due process and a violation of the compulsory process guarantee.

A constitutional barrier exists to applying the general acceptance standard to exclude exculpatory polygraph evidence under certain conditions as two federal court judges found in *Jackson v. Garrison*[15] and *McMorris v. Israel.*[16] Both were *habeas corpus* petitions attacking state convictions. In both cases, the trial judge had denied defense attempts to introduce the results of exculpatory polygraph examinations. The court in *Jackson* held that failure to admit the polygraph evidence when combined with another error had deprived the accused of his constitutional right to a fair trial, while the court in *McMorris* held that due process was violated when a state prosecutor failed to articulate his reasons for refusing to stipulate to the polygraph's admission. Additionally, an Ohio state court found that compulsory process guarantees were violated by the trial judge's exclusion of defense polygraph evidence in *State v. Sims.*[17] The right to present critical, reliable defense evidence has been recognized by the Supreme Court as required by the sixth amendment.[18] For example, if an accused is charged with selling drugs and his defense consists of a denial of involvement, his defense rests upon the relative credibility of witnesses. Informants routinely utilized in drug investigations are often facing charges themselves. These witnesses are of questionable credibility. When the informant is the sole government witness and the accused's denial of involvement is verified by polygraph, refusing to allow this evidence to be presented to the trier of fact is an error of constitutional proportions.

The Court of Military Appeals recently held that when an accused's guilt or innocence hinges on a determination by the fact-finder concerning witness credibility and when the trial counsel's cross-examination was intended to induce the belief that an accused was lying, the accused may call character witnesses to testify concerning his or her credibility.[19] The same rationale should be applied to an expert witness to testify concerning polygraph evidence. When government witnesses have testified that the accused is not credible, or when the only rational inference that can be drawn from government evidence is that the accused is lying, the defense counsel should attempt to introduce polygraph evidence to demonstrate that the accused is credible.

B. The Military Rules of Evidence Provide the Proper Standard for Admissibility

The Military Rules of Evidence provide sufficient evidentiary standards against which to measure the admissibility of scientific evidence. Indeed, Professor Imwinkelried argues that the *Frye* test was impliedly overturned by the adoption of the Military Rules of Evidence.[20] Professor Imwinkelried notes that Rule 402 states that all relevant evidence is admissible unless excluded by the Constitution, the Uniform Code of Military Justice, the Manual for Courts-Martial, the Military Rules of Evidence, or applicable Acts of Congress. Case law is not included as the basis for excluding relevant evidence. Because the *Frye* test for excluding evidence was fashioned by a judicial as opposed to a legislative or executive body, *Frye* has been impliedly overturned by Rule 402.

Rule 401 defines relevant evidence as evidence which has any tendency to make the existence of any fact more or less probable, *i.e.*, of consequence to the determination of the fact in issue. Proof that an accused is telling the truth in giving his or her version of events is relevant. Rule 402 creates a presumption in favor of the admission of relevant evidence. In the case of polygraphs, whether the results of the test make the existence of truthfulness or untruthfulness more probable is evaluated by expert testimony. The danger of scientific evidence of any kind is that the trier of fact will unquestioningly believe the conclusions of an expert witness. Issues going to

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[15] 495 F. Supp. 9 (W.D.N.C. 1979), *rev'd*, 677 F.2d 371 (4th Cir. 1981), *cert. denied*, 454 U.S. 1036 (1981).

[16] 643 F.2d 458 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982) (cited in McCormick, *supra* note 10, at 902–04).

[17] 52 Ohio Misc. 31, 369 N.E.2d. 24 (1977).

[18] *See* Chambers v. Mississippi, 410 U.S. 284, (1973); Washington v. Texas, 388 U.S. 14, (1967).

[19] United States v. Woods, 19 M.J. 349 (C.M.A. 1985).

[20] *See* Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99 (1983).

the truthfulness of witnesses in particular may have a tremendous impact upon the trier of fact. Therefore, the members or the judge must know the accuracy and reliability of the technique and the test giver. Under Rules 401 and 402, questions concerning the validity of the underlying scientific principles and the proper application of the principles may be answered by a qualified expert.[21] Evidence of pertinent character traits are admissible under Rule 404, while Rule 608 allows opinion evidence on the truthfulness of a witness after his or her character for truthfulness has been attacked. Under certain circumstances, these rules permit an assessment of the credibility of witnesses through relevant and probative evidence. Rule 702 allows an expert witness to assist the trier of fact in understanding evidence through his or her expert testimony, while Rule 704 permits opinion testimony which encompasses the ultimate issue to be decided by the trier of fact. The probative value of polygraph evidence must finally be screened against the standard embodied within Rule 403. When the error rate is unknown or unreasonably high, when the proffered expert does not possess expert qualifications, or has failed to properly apply the scientific principles involved, the military judge should, through application of his or her discretionary powers, exclude the evidence.

The procedure implemented within the framework of general relevancy and expert testimony rules offer a unified approach to the admission or exclusion of evidence. The *Frye* test has been so modified and adapted that its application renders confusing and inconsistent results while recourse to the Military Rules of Evidence offers a meaningful and effective alternative. There is no reason to apply a different test to scientific evidence. As new and different forms of scientific evidence are developed and offered at trial, the focus should shift to the weight to be accorded such evidence rather than its admissibility.

Expert witness evidence possessing no greater degree of reliability than that of polygraphs is routinely presented to juries. Psychiatric testimony predicting future dangerousness is recognized as unreliable but is permitted before juries.[22] The Supreme Court has specifically permitted expert witnesses to testify concerning future dangerousness, ruling: "We are not persuaded that such testimony is almost entirely unreliable and that the fact-finder and the adversary system will not be competent to uncover, recognize and take due account of its shortcomings."[23]

Court members function as fact-finders. They assess evidence presented and accord it appropriate weight. Fears that court members will be incapable of taking due account of the shortcomings of polygraph evidence and giving it the weight it merits are unfounded. Court members are capable of assessing polygraph evidence as they would any other expert testimony.

III. Conclusion

A judge commits error by enforcing a judicially-fashioned exclusionary rule which is not supported by precedent and prohibited by Rule 402. A judge commits error by refusing the defense the opportunity to establish the credentials of the expert witness and the probative value and reliability of the proferred test results. The standard to be applied concerning the admissibility of polygraph evidence should be the same as that applied to other forms of evidence under the Military Rules of Evidence. When an accused has no other means of demonstrating credibility, failure to permit polygraph evidence may deprive an accused of the right to present a defense. The evidence should go to the panel for its assessment of the weight to be accorded the polygraph results. The weight to be accorded polygraphs, not the admissibility of the evidence, is the question to be addressed in the adversarial context.

[21] *See* Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. Rev. 187, 203 (1976).

[22] Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

[23] *Id.* at 3397.

Predicting Courts-Martial Results: Choosing the Right Forum

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I. Introduction

How important are the personal characteristics of an accused to those who determine his or her sentence? Do personal characteristics such as race, sex, grade, or intelligence have an impact upon the severity or leniency of a sentence? Are these characteristics weighed differently by court members than by a military judge? These questions are of paramount importance to accused, each of whom possesses a unique set of personal characteristics.

Noted jurists and legal scholars have proclaimed that the military justice system is fairer than its civilian counterpart.[1] One advantage given to a military enlisted accused is that, except at a general court-martial (GCM) referred capital, he or she may elect to be tried by one of three different forums: a military judge alone, a panel composed entirely of officer members, or a panel composed of both officer and enlisted members.[2] The duty of each of these forums is to hear the evidence and determine an accused's guilt or innocence. If the accused is found guilty or pleads guilty, the judge or court members determine what sentence, if any, should be adjudged.

The choice of forum may determine the accused's success at trial. While there are some general feelings among military defense attorneys as to which forum is best for a particular case, there presently exists little hard data to either confirm or rebut these suppositions.[3] This article will present the results of a statistical study undertaken to supply "predictors" for sentences in the different forums—thus providing a logical base for forum choices in future cases. The study found that while the personal characteristics of the accused exert a verifiable effect upon sentence, the wide variety in sentencing results is primarily due to the predilections of the sentencing body itself. The findings suggest that the personal characteristics of the sentencing body are more important than those of the accused.

II. Choice of Forum

Choice of forum has been a significant concern for military defense attorneys since the 1969 revision of the Manual for Courts-Martial first provided the accused the option of trial by judge alone.[4] Several early studies by the Army's Defense Appellate Division noted that bench trials rapidly became the most popular choice of forum.[5] This continues to be true notwithstanding statistics indicating higher conviction rates in

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[1] *See, e.g.*, F. Bailey, For The Defense (1975).

[2] The court-martial panel is not a "jury." Indeed, "the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial." United States v. Kemp, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1975).

[3] *Cf.* studies cited *infra* notes 5 and 10.

[4] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 4 [hereinafter cited as MCM, 1969]. The Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 903 [hereinafter cited as R.C.M.], continues the election of trial by military judge alone and eliminates the requirement that the request be made in writing.

[5] *Judge-Jury Differentials Increase in Contested Cases in Favor of the Accused*, The Advocate, Sept.–Oct. 1971, at 159.

trials by judge alone.[6] Conviction rate, however, is not the critical factor in an informed decision to choose trial by judge or by members. Other factors such as the temperament of the detailed military judge, the track records of sitting courts-martial panels, the facts of a case, and even gut reaction have become important to the defense counsel in advising the accused soldier on which forum to choose. The choice is the soldier's. Often the soldier personalizes the choice: who will react better to me as an individual, a judge or a panel? An accused who is black, married, a sergeant, and who is contesting a larceny charge is more concerned about his chances as an individual than the marginal differences in the overall conviction rates or sentences imposed by the particular forums. Individuals possess discrete personal characteristics; they have been segregated and analyzed by the study. One purpose of the study was to provide individual accused with information to make an intelligent selection of forum.

Most military attorneys believe that the type of forum selected by the accused will affect the court-martial results. For example, many military practitioners believe that the military practitioners believe that the military judge will impose a more lenient sentence on an accused convicted of absence without leave (AWOL) than either an officer or enlisted panel. Absenteeism by soldiers directly affects the unit. Officers, noncommissioned officers (NCOs), and enlisted soldiers must pick up the slack which results when a soldier goes AWOL and may view AWOL as a serious offense. The military judge, on the other hand, is removed from the day-to-day functioning of the unit and is less familiar with the harm caused by an AWOL soldier. He or she probably views AWOL as a relatively minor offense when compared to the other crimes that he or she sees as a military judge. Consequently, a military judge probably will not be overly impressed with the government's arguments that AWOL is a severe offense that merits substantial punishment. Thus, a disparity between the sentence by a military judge and that of an enlisted or officer panel may result from their differing perceptions.

Further differences exist between officer and enlisted panels due to their differing perceptions. The enlisted members appointed to military panels are usually senior NCOs.[7] They feel the impact of the AWOL soldier more heavily than officers because they directly suffer the increase in workload and the additional management and leadership headaches caused by the absence. The officer is more removed from this problem in terms of his or her management or leadership position vis-a-vis the offender. Therefore, the officer probably does not attach as much significance to this offense as the enlisted member does.

While the difference in treatment by the three forums for a crime is interesting, inquiring into how the personal characteristics of an accused affect the amount of confinement adjudged might be more illuminating. The phrase "personal characteristics" is intended to include those measurable, objective attributes of an accused which are independent of the crime the accused is charged with but which are know to the trier of fact. Again, there are certain widely held beliefs by military defense counsel concerning which personal characteristics are important and which ones are not. For example, the grade of the military accused is considered important. The difference in treatment between an accused in the lowest military grade and an accused NCO is thought to be significant, with the severity of the sentence being inversely proportionate to grade.

The issue of whether the accused's race affects the possibility of conviction or the sentence has always been a particularly sensitive one in the military. Racial considerations are clearly impermissible in the criminal process.[8] Racial bias has been the subject of many studies. While some researchers reported findings showing racial effect in sentencing, a number of recent studies have reported that differences in treatment, if pres-

[6] Of the 905 special courts-martial conducted from 1 October 1982 to 30 September 1983, the period of our sentencing study, 419 were contested. The conviction rate for those contested cases which were tried by judge alone was 73.7%, officer panel was 68.8%, and officer and enlisted members was 52.2%.

[7] UCMJ art. 25 provides that a convening authority should detail as court-martial members those who are "best qualified by reason of age, education, training, experience, length of service, and judicial temperament."

[8] Strander v. West Virginia, 100 U.S. 303 (1880).

ent, are not statistically significant.[9] One study analyzed a representative cross-section of Navy-Marine Corps courts-martial processed during 1972 to "address the question of whether blacks and whites receive similar treatment."[10] Significantly, the author concluded that his "data indicates that the application of criminal justice in the sea services is remarkably even with respect to race."[11] Whether each of the three forums is "even" is a matter the study did not address.

Other studies have focused on legitimate reasons for different sentences. Justifiable sentence disparity results form the more serious crimes, the greater degree of culpability, and the presence of aggravating factors. A prior criminal record will also trigger a heavier sentence. These factors are commonly used for constructing determinate sentences in many states.[12] Because education, employment, marital status and good citizenship may have a bearing on both the increased potential of the accused for rehabilitation and decreased potential for recidivism, these factors are at least arguably legitimate additional factors.[13]

Study results suggest that it is difficult, if not impossible, to determine the implicit factors which influence sentencing in discretionary systems. One recent study which focused on a number of sentencing factors in four different urban court systems concluded that "different judges considered different factors with different weights when they sentence."[14] In another study where twenty identical hypothetical cases were distributed to judges in the Second Federal Judicial Circuit there was wide disparity in sentences.[15] The impact of socio-economic factors in the latter study proved erratic. For example, sentences for the high school dropout heroin seller in one hypothetical case were somewhat more severe than for the college graduate heroin seller in a similar hypothetical case, but the difference was not statistically significant.[16] Similar results were encountered in the military study.

It was not expected in this study that wide disparity in sentencing results would be attributable to sentencing bodies in the military. On the contrary, it was anticipated that the impact of personal characteristics on trial results would be easier to assess in the military than in civilian jurisdictions. Few soldiers have lengthy prior offense records because a civilian conviction usually disqualifies a prospective enlistee from military service and soldiers who have constant problems with military discipline may be administratively separated. Moreover, while they come from widely different backgrounds, all soldiers become part of a relatively uniform society where discipline is demanded.

III. Data

Finding the appropriate data for analyzing the effect of personal characteristics of the accused upon court-martial sentencing presented two problems. First, the data had to include detailed information about each military accused found in the sample selected. Second, the sample selected had to be representative of the entire population of military accused.

Fortunately, the services maintain detailed records of courts-martial. After each Army trial, for example, the military judge completes a "Military Judge Case Report," JAG Form 72. This form includes detailed information about the ac-

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[9] W. Rich, Sentencing by Mathematics: An Evaluation of The Early Attempts to Develop and Implement Sentencing Guidelines 120 (1982).

[10] R. Perry, Racial Discrimination and Military Justice vi (1977).

[11] *Id.* at 83.

[12] *See, e.g.*, the Maine Criminal Code. Under a determinate sentencing system, criminal offenses are assigned to a discrete number of categories according to punishment deemed appropriate by the legislature. Proof by the government of specified aggravating circumstances serves to automatically increase the punishment. The sentencing authority, be it judge or jury, has no discretion as to the amount of punishment.

[13] While these factors are racially neutral at face value, they may still have a racially discriminatory effect. It has been suggested, for example, that education should be excluded as a sentencing factor because its presumably close correlation with race will impart racial bias. Rich, *supra* note 14, at 122.

[14] *Id.* at 38.

[15] *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967–68*, 4 J.L. Studies 369 (1975).

[16] A. Partridge, The Second Circuit Sentencing Study 53 (1974).

cused, including grade, sex, race, age, mental group, marital status, and pretrial restraint, and the trial. In use since 1981, the information from these reports is compiled by the U.S. Army Legal Services Agency.

The sample selected for the study was all Army courts-martial for the period 1 October 1982 to 30 September 1983. This sample contained data from over 5000 courts-martial. The statistics chosen for analysis included the following characteristics of each accused: grade, sex, race, education level, mental group, age, marital status, years of military service, pretrial confinement, and adjudged confinement at hard labor.[17] A FORTRAN program was prepared to scan each court-martial case and extract this data. This computer program could also discriminate among types of courts-martial, forums and offenses so that similar courts-martial could be identified and grouped for analysis. For example, all general courts-martial where the accused was convicted of rape could be identified by an officer panel and the important statistics from each could be extracted.

The following groupings were selected for the study: (1) special courts-martial (SPCM) with at least one guilty finding; (2) SPCM with no guilty findings; (3) SPCM with an AWOL guilty finding; (4) general courts-martial (GCM) with a guilty finding for rape; (5) GCM with a guilty finding for robbery; and (6) GCM with a guilty finding for larceny. Each of these groups was further subdivided into the type of forum used. The cases in each group were reviewed and edited to eliminate the nontypical cases.[18]

The rationale for choosing the crimes selected for analysis was prompted by two concerns. The first concern was to pick offenses which were common and traditional to the military environment, yet distinctly different from each other. The second concern was to select offenses which produced a large volume of cases to make the analysis meaningful. These two concerns limited the number of crimes but still enabled enough groups to be identified for a meaningful analysis.[19]

IV. Methodology

Formation of an empirical data base and discussion of data was an important first step in our study. Developing research hypotheses about the interrelationship of this data established the basis for further analysis.[20] The study attempted to verify two general research hypotheses: that the personal characteristics of accused affect courts-martial sentences; and that the effect depends upon both the forum and the crime.

The specific hypotheses analyzed are summarized in the tables following this article. They illustrate the predicted relationships between the

[17] Punishment which a court-martial may adjudge against an enlisted member includes: (1) loss of money (either through a forfeiture of pay and allowances or a fine); (2) loss of liberty (either through restriction to specific limits; hard labor without confinement; or confinement); (3) reprimand; (4) reduction in rank; and (5) a punitive discharge. R.C.M. 1003. For simplicity, this study only looked at the amount of confinement at hard labor adjudged. Therefore, there is a possibility that the results of this study may be misleading. For example, if the accused received a bad-conduct discharge or dishonorable discharge but no confinement, our statistics for this accused would indicate no punishment. Arguably, this is a more severe punishment than a punishment which includes one month confinement but no punitive discharge. However, the rationale for examining only confinement is that in our experience it is rare for a soldier to receive a punitive discharge or other serious punishment and not receive a commensurate amount of confinement.

[18] A nontypical case was defined as a case which had such additional offenses, either by type or number, that the character of the court-martial would be expected to deviate substantially from the selected crime being examined. This deviation would improperly skew any analysis of the group. An example would be a rape case in which the accused was also convicted of murder. In this example, it is impossible to determine which crime, the rape or the murder, produced what part of the sentence adjudged. Therefore, these types of cases were deleted so that our grouping of rape cases would have a conviction for only one primary offense, the rape, and could be properly grouped as only rape cases. In cases where the rape charge was combined with similar offenses or with minor offenses, the case was kept in the group because it was felt that this type of case is a typical rape case.

[19] A problem was encountered in finding crimes with enough officer alone or officer and enlisted panel cases for a statistically valid comparison with the judge alone cases for that crime. A statistically valid comparison usually requires 30 or more cases. Larceny was the only serious felony which had sufficient number of cases under all forums.

[20] Statistical testing methods are discussed in a number of basic tests. *See, e.g.*, L. Ott, W. Mendenhall, & R. Larson, Statistics: A Tool for the Social Sciences 213–15 (1978).

personal characteristics of the accused (independent "predictor" variables) and and the adjudged sentence (dependent variables). Table I presents the predicted effect of the accused's personal characteristics on sentences at special courts-martial. Table II presents the predicted effect at general courts-martial.

In general, the effect of personal characteristics was expected to be higher at a SPCM than at a GCM.[21] At a GCM, the crime itself was expected to be the major consideration for the trier of fact in determining an appropriate sentence. The offenses tried at an SPCM are generally much less serious. Therefore, the trier of fact at an SPCM predictably exercised more discretion in sentencing and placed greater emphasis on the personal characteristics of the accused.

In judge alone trials, it was expected that the judge would be more impartial than a panel and, therefore, less impressed by the accused's personal characteristics. Panels were expected to be partial, with the enlisted panel showing the most partiality.

Following is a discussion of the personal characteristics analyzed and their predicted effect on the severity of the accused's sentence.

A. Grade

The grade of the accused soldiers in the study ranged from E–1 to E–9.[22] It was expected that the higher the accused's grade, the more favorable the sentence for the accused because, generally speaking, a soldier's service record improves with promotion, the quality and quantity of character witnesses increases with grade, and the adverse effects of punishment increase with grade, especially because any confinement automatically reduces the enlisted accused to the lowest enlisted grade.[23] A variation of grade was used to assess the difference between the NCO accused (E–5 to E–9) and the lower enlisted member. In generating this statistic, an accused was treated as either an NCO (given a "1") or as a lower enlisted member (given a "0"). It was expected that those accused who fell into the NCO group would receive more lenient treatment. The rationale for this conclusion is that promotion to NCO rank carries with it a significant increase in respect, responsibility, and privilege.

B. Race

This study characterized soldiers into two racial groups: black soldiers were coded "2" and all other soldiers "1." Race was not expected to have any effect on results because racial integration in the Army has been a fact for many years now and the military is highly sensitive to any complaint of racial bias or discrimination. Therefore, it was predicted that all three forums would reflect that institutional goal.

C. Education

Education was entered as a numerical value corresponding to a soldier's grade completion level. For example, the value for soldiers who completed high school was "12." It was expected that the higher the accused's education level, the more lenient the sentence because it is usually believed that more educated accused have a higher rehabilitative potential. While a counterfeeling surfaced that the more highly educated accused might be held more accountable for his or her crime and, therefore, subject to greater punishment, it was concluded that the bias of more education equals greater rehabilitative potential would prevail.

D. Mental Group

Mental group values ranged from "1" to "5," with "1" representing the most intelligent accused. Mental group refers to the score received by soldiers on their entry examinations. It was expected that the lower the mental group, the more lenient the punishment. The mental group statistic enables a trier of fact to evaluate an accused's intelligence and thus, like education

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[21] During sentencing by either a CM or SPCM panel, the military judge must instruct the panel that the accused's age, good military character,s service record, family difficulties, duration of pretrial confinement, mental scores, education, medals and awards, as well as the nature of the offense, should be considered in arriving at the appropriate sentence. Dep't of Army, Pamphlet No. 27–9, Military Judge's Benchbook, para. 2–37 (May 1982).

[22] Only cases with enlisted accused were used in this study as there were too few warrant officer or commissioned officer cases to make an analysis of those cases meaningful.

[23] UCMJ art. 58a.

level, assess the potential for both future military service and rehabilitation.

E. Age

The accused's age was entered as a statistic. Age was not expected to be a very influential personal characteristic; however, a slight negative effect was predicted for both types of panels. Presumably an increase in maturity would accompany an increase in age and make confinement less attractive.

F. Marital Status

Soldiers were divided into two marital status groups. Married soldiers were coded "1" and single and divorced soldiers were coded "2." Single and divorced soldiers were treated as one category because these soldiers usually have no visible dependents. Married soldiers by definition have at least one dependent. Dependents increase the trier-of-fact's sympathy for the accused and create concern for their plight while the accused serves confinement. Therefore, married accused were expected to receive more lenient sentences.

G. Years of Service

Years of military service reflects the total years of the accused's military service. The longer the service, the greater the affinity the accused probably has for the military and, of course, the greater the investment the military has in the accused. Lengthy service was expected to benefit the accused. As with grade and education, years of service could be a liability if the trier of fact requires a higher standard of performance because a more experienced accused "should know better." However, this feeling was rejected because it was felt that the reward theory would predominate.

H. Performance

A soldier's record of performance was expected to have significant impact on the length of confinement. Because the trier of fact becomes very knowledgable of the accused's achievements, it was anticipated that the stronger performer would be favored over the marginal or poor performer. In searching for an objective way to measure performance, a simple formula was developed relating a soldier's grade to his time in service. Given that good soldiers progress in grade at a given rate, it should be possible to compute a performance factor which measures how "good" the soldier is based on how he or she has been promoted. A simple equation was used to generate such a statistic in this study:

$$PERF = RANK/(YSVC+1)$$

For example, an E–2 with 5 years service has a performance rating of .333(Bad); whereas an E–5 with 3 years service has a performance rating of 1.2(Good).

I. Pretrial Confinement

At the time the data base was collected, pretrial confinement was permissible if the accused's commander believed that the accused was a flight risk or a danger to the community.[24] Pretrial confinement was included as a personal characteristic because this was the only measurement of the commander's assessment of the accused. A decision to place the accused in pretrial confinement demonstrates the commander's lack of confidence in the accused's ability to avoid future misconduct. It was expected that a trier of fact would be influenced by the decision to confine and would, therefore, also have less confidence in the accused's future in the Army. Consequently, a greater punishment was expected when the accused was placed in pretrial confinement.

Pretrial confinement data was entered as two different statistics: PTC—length of pretrial confinement, entered in number of days the accused was confined prior to trial; and PTD—whether PTC was directed or not. The rationale for using two different pretrial statistics was that pretrial confinement depends on several factors, many of which bear no relationship to the accused's personal characteristics. Thus, it was feared that chance and not any objective personal characteristics of the accused determined the length of pretrial confinement. However, length of pretrial confinement does tend to indicate a more aggravated offense because a lengthy period of pretrial confinement probably indicates that the case is

[24] MCM, 1969, para. 20c MCM, 1984, R.C.M. 305 includes the likelihood that the confinee will engage in other serious misconduct as an additional justification for pretrial confinement.

complex and serious. Consequently, it was anticipated that the longer the period of pretrial confinement, the greater the sentence would be. However, neither the length of pretrial confinement nor the commander's mere decision to confine appeared to be a complete statistic standing alone. Therefore, both the length and the decision were considered as separate statistics.

J. Sex

The final predictor, sex, grouped males as "1" and females as "2." We presumed that the military, composed largely of males, would give deference to female soldiers.

The final requirement of statistical testing involved formulating null hypotheses, *i.e.*, hypotheses which contradict the research hypotheses. The general null hypotheses were the personal characteristics have no effect on courts-martial sentences and that, if there is an effect, it *depends* on neither the type of forum nor the type of crime. The specific null hypotheses in this study were that the individual personal characteristics of the accused have either no relationship with the sentence or the opposite relationship from that expected. Each null hypothesis was tested and if it could be rejected with some accuracy, the research hypothesis was accepted. To minimize the possibility of false conclusions, the null hypotheses were not rejected unless the probability that computed relationships were based merely on chance was less than or equal to 5%.[25]

Regression analysis was used to determine the relationship between the predictor variable and the dependent variable. Sentence length and multivariate regression were used to account for the interrelationship among independent variables. In simple regression analysis, values of the dependent variable are predicted from a linear equation:

$$Y^1 = A + BX + e$$

"Y^1" is the estimated value of the dependent variable, "X" is the known value of the independent variable, "B" is the regression coefficient, "A" is the "Y" intercept, and "e" is an error factor. Multivariate regression accounts for several independent variables and produces a longer linear equation:

$$Y^1 = A + B_1X_1 + B_2X_2 + \ldots B_nX_n + e$$

Calculating values for "A," "B," and "E" can be very time consuming if done manually. For this reason, all statistics were kept in computer files and a commercial computer program, Statistical Package for Social Scientists (SPSS),[26] was used to make the necessary computations. In addition to the values defined above, SPSS calculates a standardized regression coefficient for each variable, "BETA." "BETA" is useful in comparing the relative effect of different independent variables and proved especially valuable in presenting the results of our study. SPSS also computes the coefficient of determination, "R2," and the so-called "F-ratio." "R2" is a measure of the total variability of the dependent variable accounted for by all the independent variables in the equation. The independent variables may also be referred to as the predictors. These are the personal characteristics of the accused which are expected to exert an influence upon the severity or leniency of the sentence imposed. The factors which make up "R2" are the factors which explain the variation in the sentences imposed.

The factors which exert an influence upon the imposition of sentences cannot all be quantified. Certain factors are unknown or unmeasured. Perhaps other personal characteristics besides those measured in this study are important to the sentencing authority. Therefore, "R2" refers to the percentage of sentence variance which can be predicted by knowing all of the predictors. For example, if 45% of the sentence variation can be ascertained if the predictors are known, 55% of the sentence variation will be due to unknown or unmeasurable factors. The "F-ratio" indicates whether the observed linear association is statistically significant. To assist in interpreting the tables following the article, the factors which statistically are of great significance are followed by

[25] The "95% confidence level" is commonly accepted as the critical level of statistical significance. *See* Ott *supra* note 25.

[26] N. Nie, C. Hull, J. Jenkins, K. Steinbrenner, & D. Bent, SPSS (2d ed. 1975). "SPSS is an integrated system of computer programs designed for the analysis of social science data. The system provides a unified and comprehensive package that enables the user to perform many different types of data analysis in a simple and convenient manner." *Id.* at 1.

two asterisks, while the factors which are of some statistical significance are followed by one asterisk. Where no statistical significance can be attached to the findings, it appears that this personal characteristic of the accused is of no significance to a sentence body and no asterisk appears.

V. Empirical Findings

Tables III through VII present the results of multiple regression analysis of court-martial sentence predictors. The available data permitted an analysis by forum for all special courts-martial—Tables III and IV). The total number of courts-martial reported follows the heading "N" on the tables. The nature of the offense was not taken into account in analyzing SPCM because the jurisdictional limit of the court sets the punishment limitation rather than the nature of the crime itself. The nature of the offense had to be accounted for when analyzing general courts-martial statistics because of the widely varying maximum punishments permissable at GCMs. Even with the large number of cases used in the sample, the only GCM offense which provided a sufficient number of cases for analysis by forum was larcency (Table V). Judge alone sentencing for AWOL at special courts-martial (Table VI) and for GCM rape, robbery, and larcency convictions (Table VIII) were also analyzed. Tables III and IV both show the analysis results for special courts-martial. Only the method for considering the effect of grade was different. Table III distinguishes between NCOs and lower ranking enlisted members and Table IV considers only pay grade. For an officer panel, increased age was a statistically significant positive predictor of sentence length, while increased length of service and sex (female) were statistically significant negative predictors. Twenty-five percent of sentence length could be predicated by knowing all the predictor variables. For sentence. For sentencing by military judge alone, the fact that a soldier's commander had determined that pretrial confinement was appropriate was a significant predictor. "R2" for both sentencing by judge alone and sentencing by an enlisted panel was only 11% and 16%, respectively, less than the 25% for an officer panel.

The results presented at Table V suggest an entirely different effect of personal characteristics at general courts-martial. While 57% of sentence variation when officer panels sentence soldiers convicted of larceny could be accounted for by the predictors, the only statistically signficiant predictor was mental group. Longer sentences were adjudged for those from lower mental groups. For judge alone sentencing, the only significant predictor was education. Pretrial confinement was not a significant factor in these trials for any forum. Race was statistically significant factor for enlisted panels. Black soldiers received shorter sentences than the other racial group.

Tables VI and VII present the results from analyzing sentencing patterns for judge alone trials involving four crimes. Individual predictors played important roles in determining sentences for rape and robbery. Only with respect to robbery, however, is any systematic pattern in individual predictors revealed. Age, marital status, years of service, pretrial length, and the pretrial confinement decision were all statistically significant predictors of sentence length for robbery. The relatively small number of courts-martial for robbery in the sample, however, suggest that this conclusions should be viewed with caution.

Taken as a whole these results verify the hypotheses that personal characteristics of accused soldiers affect their courts-martial sentences and that the effect depends on both the forum and the crime. The results do not, however, permit any conclusions on whether particular characteristics produce particular results. None of the specific null hypotheses could be rejected. While disappointing from a research point of view, this was not unexpected. Personal characteristics should play only a minor role in determining an appropriate sentence. The personal predilections of individual judges and court members may be more significant than expected. The wide disparity of sentences adjudged cannot be conclusively attributed to any other factor.

VI. Conclusion

This study proves that a mechanical approach to predicting sentencing results based solely upon the personal characteristics of an accused is

not possible at courts-martial. Too many variables enter the equation to be able to predict what sentence the black, married, female service member would receive as compared to a white, older, divorced, male senior NCO if both are accused of the same offense. Nevertheless, one can predict that the officer panel would likely give a lesser sentence to a female service member, whereas an officer-enlisted panel would likely give a lesser sentence to a black service member. It is possible to read too much into a statistical study of this type because one accused could have combined personal characteristics which are treated differently by different types of forums. Apparently, personal characteristics of accused soldiers do not play a systematic role in sentencing by courts-martial. Race, for example, seems to have little effect overall in the military justice system. However, statistically significant results must be obtained to reject null hypotheses and accept research hypotheses. Further analysis of the available data, or analysis of data from other time periods to detect trends, might eventually produce more conclusive results. Also, different categories of data might produce results which are statistically significant. A survey of panels and judges to ascertain the factors which they considered significant in assessing a sentence might prove beneficial in planning further statistical studies. We have preserved the data and the computer program employed in this study and will assist others interested in performing additional studies.

Trying to predict sentencing by courts-martial cannot be done with certainty. Deviations in sentences for the same offense and differences in considering individual characteristics suggest that sentencing guidelines as adopted by many civilian jurisdictions might be appropriate for the military as well.[27] An alternative under consideration by the armed services, judge alone sentencing in all cases, is not supported by the results of this study. Judge alone sentencing produced sentences with as much variation as those imposed by the officer or officer-enlisted panel. If sentence uniformity is the goal, it will not be realized with judge alone sentencing in all cases. Sentence uniformity could best be realized by narrowing the range of possible sentences for a given offense. A determinant sentencing scheme would narrow the variation in sentences adjudged for the same offense by eliminating the arbitrariness factor from court-martial sentencing.

[27] *See* Rich, *supra* note 14.

TABLE I

PREDICTED EFFECT OF PERSONAL CHARACTERISTICS OF ACCUSED ON SENTENCE BY FORUM FOR SPECIAL COURTS-MARTIAL

Individual Predictors	*JUDGE ALONE*	*OFFICERS & ENLISTED*	*OFFICERS ONLY*
Grade (higher)	–	—	—
Rnk (NCO)	*	—	—
Race (black)	*	*	*
Education (more)	–	—	—
Mental Group (lower)	+	+	+
Age (older)	*	*	*
Marital Status (single)	–	—	—
Years Service (more)	–	–	–
Performance (better)	–	—	—
Pretrial Confinement (longer)	*	—	–
Pretrial Decision (confinement)	+	+ +	+ +
Sex (Female)	–	—	—

* No effect
\+ Slight increase
\+ + Significant increase
– Slight decrease
— Significant decrease

TABLE II

PREDICTED EFFECT OF PERSONAL CHARACTERISTICS OF ACCUSED ON SENTENCE BY FORUM FOR GENERAL COURTS-MARTIAL

	JUDGE ALONE	*OFFICERS & ENLISTED*	*OFFICERS ONLY*
	90%	75%	85%
Predictors			
Grade (higher)	*	–	*
Rnk (NCO)	*	–	–
Race (black)	*	*	*
Education (more)	*	*	*
Mental Group (lower)	*	*	*
Age (older)	*	–	–
Marital Status (single)	*	*	*
Years Service (more)	*	–	*
Performance (better)	*	–	–
Pretrial Confinement (longer)	*	–	–
Pretrial Decision (confinement)	*	+	+
Sex (Female)	*	*	*

* No effect
\+ Slight increase
\+ + Significant increase
– Slight decrease
— Significant decrease

TABLE III

SENTENCES BY FORUM CHOICE SPECIAL COURTS-MARTIAL

	ALL SPCMS	*JUDGE ALONE*	*OFFICERS & ENLISTED*	*OFFICERS ONLY*
Mean Sentence (Days)	38.9	39.7	33.5	39.3
Std Deviation	57.2	56.8	57.3	59.6
Predictors (BETA)				
Grade***	.007	.020	–.100	–.045
Race	.012	.009	.039	.054
Education	.011	.020	–.018	–.010
Mental Group	.018	–.015	.152	.166
Age	–.043	–.076	–.228	.446 **
Marital Status	.014	.027	–.125	–.030
Years Service	–.231 **	–.190 *	–.085	–.687 **
Performance	–.038	–.064	–.325 *	.269
Pretrial Length	–.159 **	–.200 **	.241	.041
Pretrial Decision	.242 **	.302 **	–.267	.151
Sex	–.030	–.006	.405 *	–.403 **
N	767	563	96	108
R^2	.11	.11	.16	.25

*** E1 thru E4 = 0 E5 and above (NCO) = 1
** Statistically Significant at > 95%
* Statistically Significant at > 90%

TABLE IV

SENTENCES BY FORUM CHOICE
SPECIAL COURTS-MARTIAL

	ALL SPCMS	*JUDGE ALONE*	*OFFICERS & ENLISTED*	*OFFICERS ONLY*
Mean Sentence (Days)	38.9	39.7	33.5	39.3
Std Deviation	57.2	56.8	57.3	59.6
Predictors (BETA)				
Grade***	−.057	−.037	−.118	−.095
Race	.012	.007	.045	−.046
Education	.013	.023	−.025	−.008
Mental Group	.019	−.014	.146 *	.161 *
Age	−.044	−.079	−.240	.444 **
Marital Status	.012	.025	−.127	−.030
Years Service	−.203 **	−.160	−.100	−.693 **
Performance	−.025	−.051	−.297 *	.274 *
Pretrial Length	−.159 **	−.200 **	.247	.048
Pretrial Decision	.238 **	.299 **	−.270	.142
Sex	.010	−.021	.460	−.335 **
N	767	563	96	108
R^2	.107	.112	.160	.250

*** E1 thru E9
** Statistically Significant at > 95%
* Statistically Significant at > 90%

TABLE V

SENTENCES FOR LARCENY
GENERAL COURTS-MARTIAL—BY FORUM

	ALL GCM	*JUDGE ALONE*	*OFFICERS & ENLISTED*	*OFFICERS ONLY*
Mean Sentence (Days)	538	542	632	419
Std Deviation	560	487	791	424
Predictors (BETA)				
Grade	.07	.14	−.12	−.41
Race	−.11	.03	−.56 **	.42
Education	−.22 **	−.42 **	.23	.09
Mental Group	−.003	−.17 *	.25	.86 **
Age	.11	.09	.10	−.73
Marital Status	−.09	−.02	−.43 *	.23
Years Service	−.16	.005	−.42	.84
Performance	−.02	−.02	−.27	−.09
Pretrial Length	.12	−.03	−.17	.24
Pretrial Decision	−.0004	−.04	.42	−.18
Sex	.09	—	—	−.62
N	155	89	35	31
R^2	.07	.19	.45	.57

** Statistically Significant at > 95%
* Statistically Significant at > 90%

TABLE VI

SENTENCES FOR AWOL
SPECIAL COURTS-MARTIAL—JUDGE ALONE

Maximum Possible Sentence	180 days
Mean Sentence	62 days
Standard Deviation	51 days
Predictors	
Grade	.61
Race	−.26
Education	.04
Mental Group	−.05
Marital Status	−.28*
Years Service	−.38
Performance	−.27
Pretrial Length	.01
Pretrial Decision	−.15
Sex	−.46
N	49
R^2	.21

** Statistically Significant at > 95%
* Statistically Significant

TABLE VII

SENTENCES BY CRIME
GENERAL COURTS-MARTIAL—JUDGE ALONE

	RAPE	*ROBBERY*	*LARCENY*
Max Possible Sentence (Days)	Life	3650	1825
Mean Sentence (Days)	4591	1043	542
Std Deviation	2817	670	487
Predictors			
Grade	.04	.71 *	.14
Race	.29 *	−.26 *	.03
Education	−.04	−.17	−.42 **
Mental Group	−.27	.30	−.17 *
Age	−.15	−.42 **	.09
Marital Status	−.27	.48 **	−.02
Years Service	−.21	.67 **	.005
Performance	.21	−.58	−.02
Pretrial Length	−.17	1.38 **	−.03
Pretrial Decision	.52 *	−.73 **	−.04
N	32	23	89
R^2	.47	.77	.19

** Statistically Significant at > 95%
* Statistically Significant at > 90%

AUTOMATION DEVELOPMENTS

U.S. Army Legal Services Agency

WESTLAW

West Publishing Company has furnished USALSA an advance copy of its contract with the Library of Congress (FEDLINK) covering WESTLAW. USALSA uses this contract to establish the special acquisition and billing procedures with West Publishing Company (JAG Corps Mini-Network).

The FY86 contract for WESTLAW reduces fixed costs but increases user charges as follows:

Cost	*FY85*	*FY86*
Search	$70/hr	$90/hr
MCI Messages	@$1.25	@$1.25
Off-Line Printing	$.02/line	$.02/line
West Print/Mail	$15/request	$15/request
Subscription fee	$20/mo	$0
Training	$0	$0

USALSA will pay the Mini-Network fixed charges, to include FEDLINK fees ($350), training ($2100), and subscription fee ($100).

USALSA is exploring WESTLAW "Block Usage" rates as a means to reduce the hourly search rate. The above rates and charges should be used for preparing your FY86 office budget, however.

Microcomputer Acquisition

In March 1985, the Army announced a major contract with SMS Corporation to supply up to 8800 INTEL microcomputers to activities Army-wide. The proposed policy and procedures make this acquisition mandatory for all Army TDA activities, to include those located overseas. Presumably, SJA offices in TOE units may acquire these devices to perform TDA missions. This will, however, require further clarification.

Draft acquisition procedures are streamlined to acquire these microcomputers quickly. Judge advocate activities acquiring a microcomputer under this contract must prepare an Abbreviated Mission Element Needs Statement (AMENS).

In INTEL Microcomputer is an excellent acquisition for a SJA office because it is:

1. IBM PC compatable (provides flexibility to meet present and future Army and JAGC standards);

2. Likely to be available in offices Army-wide (including many SJA offices);

3. Capable of use for both word and/or data processing functions and is software independent; and

4. Disk and software compatable (to some degree) with the planned TOE equipment (TAACS).

Judge advocate activities are encouraged to discuss office requirements with the local Director of Information Management. Since INTEL microcomputers can be networked together using industry-standard ethernet technology, it would make an excellent office system. The INTEL will also support up to twelve "dumb" terminals for use as attorney or staff work stations. It can be configured with up to 4 MB of RAM and 1,000 MB of storage, which should be sufficient for any SJA office.

TACCS and ULC

The Combat Developments Office of TJAGSA has begun the acquisition process for Tactical Army Combat Service Support Computer Systems (TACCS) and the Unit Level Computer (ULC). These systems are designed to enhance the capability of all TOE legal offices in the Army of Excellence redesign initiative. Proposed distribution would include all corps, divisions, and separate brigades exercising GCM authority as well as those USALSA assets dedicated to TOE units. These would have organic to their TOE either TACCS or ULC computer systems. It is anticipated that once TRADOC approves the TJAGSA initiative, these systems would be placed on the TOE and be fielded in calendar years 1986 and 1987. Further information will be provided when available.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Federal Income Tax Red Flag: Military Service in the Republic of Panama

The following information was provided by Captain George R. Gillette of the Staff Judge Advocate's Office for the 193d Infantry Brigade in Panama, and should be of interest to legal assistance officers.

Two federal court decisions in 1984 determined that under the Panama Canal Treaty of 1977 (T.I.A.S. 10032), U.S. civilian employees of the Panama Canal Commission are exempt from paying United States federal income taxes. *Coplin v. United States*, 6 Cl. Ct. 115 (1984) (currently on appeal to the U.S. Court of Appeals for the Federal Circuit); *Harris v. United States*, 585 F. Supp. 862 (S.D. Ga. 1984) (currently on appeal to the Eleventh Circuit U.S. Court of Appeals). While approximately thirteen previous cases turned in favor of the IRS on that issue, these two most recent rulings are of special interest to legal assistance officers because the treaty provision relied upon by the civilian taxpayers in *Coplin* and *Harris* is almost identical to another provision in the Treaty which covers taxation of U.S. service members and their dependents while stationed in the Republic of Panama. The paragraph relating to taxation of civilians which the plaintiffs relied on in *Coplin* and *Harris* provides:

> United States citizen employees [of the Panama Canal Commission], and their dependents, shall be exempt from *any* taxes, fees, or other charges as a result of their work for the commission. (Emphasis and brackets added). Paragrpah two of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty of 1977.

The analogous paragraph which could arguably exempt U.S. service members (and their dependents in some cases) from federal taxation while in Panama states, in pertinent part:

> Members of the [United States] Forces, or the civilian component and dependents shall be exempt from *any* taxes; fees or other charges on income received as a result of their work for the United States Forces.... (Emphasis added). Paragraph two of Article XVI of the Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977.

Although *Coplin* and *Harris* are under appeal, because of the virtually-identical language of the applicable treaties, legal assistance officers should be aware that service members who have served on active duty in the Republic of Panama during tax year 1982 and later may have been exempt from federal income tax in those years and they should take action to protect their claim to a possible refund of all federal taxes paid on income earned while in Panama. For any year prior to 1982, the statute of limitations imposed by Section 6511(a) of Internal Revenue Code of 1954, as amended, forecloses the service member from any action (unless a protective claim was filed previously and within the allowable time period, *i.e.*, three years from the tax-filing date for the pertinent tax year). Notice could be provided to the proper class of service member through use of daily bulletins, post newspapers, and signs posted in the legal assistance office.

Service members who have been identified as a possible refund claimant should be advised of the IRS statute of limitations and of the need to file a protective claim. If the IRS denies the claim for a refund, that individual has two years in which to sue the United States for the refund (in either the United States Claims Court or a federal district court) measured from the date of mailing of the notice disallowing the claim (I.R.C. § 6532(a)). The two year period can be extended if the Internal Revenue Service agrees (I.R.C. § 6532(a)(2)).

Because of the uncertainty of the right to a refund, legal assistance officers would best serve their client by first protecting any refund claim from the IRS statute of limitations, and by then giving the client the greatest length of time pos-

sible before the service member must decide whether to drop the refund claim or sue the United States. The second objective is in the client's best interest because as more decisions are handed down on this issue, he or she will be better able to evaluate the chances of success at trial should a law suit become necessary. To accomplish both these objectives, it is best initially to advise the taxpayer to file a normal return for the most recent tax year during which military income was earned in Panama but for which no return has yet been submitted, with *no* initial claim for a refund under the treaty. It must then be explained to the taxpayer that he will need to file a "protective claim" on April 15 (using an IRS form 1040X, "Amended US Income Tax Return"), three years from the filing date of the pertinent tax year. For example, if the service member was on active duty and stationed in Panama in 1985, he or she should be advised to file a return for 1985 without mention of the treaty claim. He or she would then need to file the protective claim on April 15, 1989. For tax years 1982–1984, he or she should file the protective claim on April 15, three years after the year the return was filed, *i.e.*, April 15, 1988 for the 1984 tax year, April 15, 1987 for the 1983 tax year, *etc.* With regard to tax year 1981 and prior years, taxpayers are out of luck under the statute of limitations.

By waiting until the last date available to file the protective claim under the three-year statute of limitations, the taxpayer delays as long as possible the deadline by which he or she needs to decide whether to litigate or renounce the claim. Using the 1984 tax year example, if on October 15, 1988, the IRS sent the taxpayer notification of disallowance of a claim for the refund which had been filed on April 15, 1988, the taxpayer would have until October 15, 1990 to make his decision whether to sue. Thus, the client has protected his or her claim for five years and nine months from the end of the pertinent tax year. Following is an example of a "protective claim" prepared by the legal assistance office for the 193d Infantry Brigade (Panama):

CLAIM FOR REFUND WITHOUT REMITTANCE

1. I/We hereby claim a refund of all United States federal income taxes paid or withheld on income earned or received while I/We was/were stationed in the Republic of Panama during tax year 198___. Such taxes were paid or withheld during the months of ___ through ___, 198___.

2. This claim for refund is based upon the provisions of Article XVI of the Agreement in Implementation of Article IV of the 1977 Panama Canal Treaty which grant exemption to members of the Forces, civilian component and dependents from payment of any taxes, fees or other charges on income received as a result of their work for the United States Forces or for any of the facilities referred to in Articles XI or XVIII of this Agreement. It is also based upon the precedential decisions construing analogous language in Article XV of the Agreement in Implementation of Article III of the 1977 Panama Canal Treaty; these decisions are those orally rendered in *Coplin v. United States*, No. 517–81T, U.S. Claims Count (8 March 1984) and *Harris v. United States*, U.S. District Court. S.D. Georgia (20 March 1984). However, I/We do not desire remittance of this refund until such time as the Internal Revenue Service acquiesces in these interpretations.

3. This claim for refund is filed to toll the statute of limitations concerning refunds for taxes paid during tax year 198___. It is not my/our intention to waive interest that may accrue on such refund by requesting no remittance until the Internal Revenue Service allows such refund.

Because the applicable treaty paragraph also excludes from any taxes the income of spouses of service members assigned to Panama who work for AAFES, the commissary, military banking, military social, and atheltic facilities on-post, as well as DODDS schools and military hospitals, care should also be taken to ascertain if the service member's spouse worked and whether the work was conducted on post for a military organization. If so, the refund claim should also include his or her share of federal income taxes.

The final outcome of this issue will probably not be realized for sometime. In the meantime,

judge advocates should be aware of the issue and how to protect those clients who, because of their duty assignments to Panama, could realize a tax savings of thousands of dollars with the mere filing of a protective refund claim.

Army Nonsupport Policy Clarified

Army policy toward service members with regard to support of their family members is a recurring problem for legal assistance attorneys. The applicable regulation, AR 608–99, Support of Dependents, Paternity and Related Adoption Proceedings, is often criticized for failing to give clear-cut guidance for many nonsupport situations, particularly those where multiple family members are concerned.

In the past, support requirements for multiple dependent situations were open to varying interpretations. In the absence of a separation agreement or court order specifying a different amount of support, the regulaiton specified that service members were to provide, at a minimum, an amount of support equal to the amount of the Basic Allowance for Quarters (BAQ) entitlement at the "with dependents" rate. On its face, AR 608–99 appeared to require that in multiple family situations (in the absence of a court order or separation agreement), each set of family members should receive an amount equal to BAQ at the "with dependents" rate. However, some legal assistance offices interpreted the regulation to permit proration of the BAQ amount in multiple family situations.

As the result of a message issued on 15 April 1985 by the U.S. Army Community and Family Support Center, the policy concerning multiple family members situations has been clarified. The date time group of the message is P151400Z, and its text is substantially as follows:

2. General Policy. Service members are expected to provide adequate and continuous support for all family members. Specific support policies are discussed in para. three below. Army command procedures are not fully capable of resolving all disputes between service members and family members over the adequacy or inadequacy of support. The policy specified below sets forth minimum support requirements and will be considered only as an interim measure until the parties resolve their differences by informal agreement, written separation agreement, or in court. Commanders will ensure that service members, when financially capable, provide more than minimum support when the needs of the family so require.

3. Specific Guidance:

A. A service member and spouse who are estranged should enter into a written separation agreement which specifies an agreed-upon level of support. If the parties cannot agree, they should resolve the matter in civilian court and obtain a court order which specifies the amount of support. In such a case, the support provision of the court order controls.

B. In the absence of a court order or agreement, and until such an order or agreement is obtained, the following interim minimum support measures apply:

(1) Single family units.

(A) Family living off post. The service member will provide support in an amount equal to the service member's BAQ entitlement at the "with dependents" rate.

(B) Family living on post. While the supported family is occupying government quarters, the service member will provide an amount equal to the difference between BAQ at the "with" and "without dependents" rate. When the supported family members move off post, support will be provided in an amount equal to BAQ at the "with dependents" rate for the service member's grade.

(2) Multiple-Family Units. In multi-family support situations, the amount of support due to each supported family member will be determined by dividing an amount equal to BAQ at the "with dependents" rate for the service member's grade by the total number of supported family members (including children for whom paternity has been established), with the following modifications: First, any court ordered support will be paid as stated. Second, supported families living on post will receive an amount equal to the difference between BAQ at the "with" and "without" dependents rate for the service member's pay grade. Lastly, any remaining family members will receive a pro-rata share of the BAQ

amount regardless of the amount of support paid to other family members. Following are example situations:

(A) Example 1: A service member is divorced and has three children from that marriage. The service member is required by a court order to pay $300 per month for the children and $100 per month for the former spouse. The service member has remarried and has two more family members (a spouse and a child) living off post. The service member now has a total of five family members whom he or she must support under Army policy (the former spouse does not qualify as a dependent family member under Army support policy). The children by the previous marriage must receive $300 and the former spouse must receive $100 per the court order. The present spouse and child, at a minimum, should receive support equal to 2/5ths of BAQ at the "with dependents" rate for the service member's grade.

(B) Example 2: A service member has one child by a previous marriage. There is no court order for child support and the service member is unable to show that the court granting the divorce had personal jurisdiction over the service member so as to be able to order child support. The service member has remarried and has a spouse and two children living off post. The service member now has a total of four family members which he or she must support under Army policy (the child by a previous marriage and the present spouse and two children). Each family member, at a minimum, should receive support equal to ¼th of BAQ at the "with-dependents" rate for the service member's grade.

(C) Example 3: A service member has two children by a previous marriage. The service member is also required by court order to pay $200 per month for these children. Also, the service member is required to pay $75 per month for support of a child per a judicial decree which has declared him to be the father. He has remarried and has a spouse and three children living on post in government quarters. The service member now has a total of seven family members which he must support under Army policy. The children by his previous marriage must receive $200 per month per the court order. His other child must receive $75 per the judicial decree. The spouse and children of his present marriage, at a minimum, should receive an amount equal to the difference between the BAQ at the "with" and "without dpenedents" rate for the member's grade.

C. Military members members married to one another.

A. In the absence of a court order or separation agreement, an Army service member is not required under AR 608–99 to provide a minimum amount of support to a spouse on active duty in the armed forces.

B. An Army service member, whether or not receiving BAQ based on his or her marriage to another service member, will pay, at a minimum, a prorated share of his or her own BAQ at the "with dependents" rate to the service member having custody of the child(ren) of that marriage if the family is residing off post. If the child(ren) of that marriage is living in government quarters, the Army service member will pay, at a minimum, an amount equal to the differenc between his or her own BAQ at the "with" and "without dependents" rate.

C. Example: An Army service member has an adopted child from a previous marriage. The service member is required by court order to pay $150 per month for this child. The service member is presently married to a spouse on active duty with the Air Force. They have two children from this marriage. The Air Force member and children reside off post. The Army member has a total of three family members which he or she must support. The Army service member, at a minimum, must pay $150 a month to the adopt child per the court order. The children from the present marriage will receive an amount equal to ⅔rds of BAQ at the "with dependents" rate for the Army member's grade.

Virginia Garnishment Laws Amended

In apparent compliance with provisions mandated by the Federal Child Support Enforcement Amendments of 1984, Virginia has amended provisions in the state's garnishment statutes to provide for support arrearages to be deducted from employee wages.

The law was also amended to add the right to collect spousal support arrearages from employee

wages. The statute gives priority to collection of child and spousal support over other types of liens and establishes a civil penalty of up to $1,000 for any employer who discharges, disciplines, or refuses to hire an individual whose salary is subject to a payroll deduction order for child or spousal support. Employers who fail to withhold payments pursuant to a payroll deduction order will be liable for the amount that should have been withheld.

The Federal Child Support Enforcement Amendments of 1984 mandated that states have in place by law or regulation provisions requiring mandatory wage withholding for child support arrearages by October 1, 1985; the Virginia amendments take effect on that date.

Tax News

It is not unusual for parties who are separating or divorcing to agree to have one party live in the family residence while the other retains an interest in the residence and makes payments on the mortgage. A recent tax court case indicates that while such an arrangement is possible, the party who has not been living in the residence may not be able to classify the property as a primary residence permitting that party to later rollover any gain upon a later disposition of the property.

In *Young v. Commissioner of Internal Revenue*, USTC No. 20389–80 (T.C. Memo 1985–127, 3/25/85), the parties were divorced on 31 October 1975. Pursuant to the divorce, Mr. Young granted to his wife an exclusive right to live in the house and a 75% interest in the home. Mr. Young retained a 25% interest in the property and agreed to pay the mortgage, real estate taxes, and insurance on the property until his daughter's education was completed, at which time the parties agreed to sell the residence and divide the proceeds, 75% to Mrs. Young and 25% to Mr. Young. After the divorce, Mr. Young moved into an apartment and later into his second wife's house. In 1976 the parties modified the decree, and Mr. Young conveyed his remaining 25% interest in the home to his former wife in release of alimony obligations. In 1977 Mr. Young and his second wife bought a new home. Mr. Young did not pay tax on the gain on the disposition of his 25% interest in his former residence because he rolled the gain over into the new home he purchased with his second wife.

IRS dened the rollover and assessed the $1401 deficiency. The court explained that the rollover provision would only apply if the home was his "primary residence" at the time of the sale. Whether the home was his "primary residence" depended on all the facts and circumstances of the case. The court further explained that when one is not in possession of the home at the time of sale, exceptional circumstances must be shown for the home to be characterized as a "primary residence." The court felt that because Mr. Young had not been in possession of the home, but rather had granted his former wife exclusive possession of the home and had moved into his new wife's home, he had abandoned the first home as his "primary residence."

Legal assistance officers should be aware that divorcing or separating parties who plan to retain an interest in a home, though not living in the home, may lose the ability to characterize that home as a primary residence for purposes of the rollover provisions of I.R.C. § 1034. This may not, however, be reason to avoid such an arrangement. When negotiating a property division, the parties should recognize the potential tax consequences of a subsequent sale and calculate the potential loss in value of the nonoccupier's interest in the home upon a subsequent disposition of the property. The tax consequences, of course, increase as the amount of gain in the home increases. The amount of gain would depend both on any actual appreciation in the home being sold as well as past gain on former residences which were rolled-over into that home.

Legal Assistance Deskbook and Formbook Distributed

Volumes I and II of the Legal Assistance Officer's Deskbook and Formbook have been distributed to the more than 200 addressees on the worldwide mailing list of the Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA.

This publication, a comprehensive treatment of the six most common areas of military legal assistance practice, totals more than 1,500 pages

and provides "how to" guidance as well as clauses, forms, sample letters and sample pleadings in areas such as nonsupport, powers of attorney, rental property leases, real property contracts, letters of indebtedness, and promissory notes.

For most CONUS installations, this publication was mailed to the staff judge advocate to be disseminated to the legal assistance office. OCONUS distribution, generally involving legal assistance offices at branch offices distant from the staff judge advocate office, was made to the legal assistance office with a letter advising the SJA that the publication had been sent.

Budgeting contraints preclude distribution of more than one copy per legal assistance office. The publication has been forwarded, however, to the Defense Technical Information Center; information on how it may be ordered will be published in the next issue of *The Army Lawyer*.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Senior Judge Advocate Positions

Assignment of Military Law Center commanders and staff judge advocates of ARCOM and GOCOM headquarters in the responsibility of The Judge Advocate General. The selection process set forth at AR 140–10, para. 2–20*h*, calls for the ARCOM or GOCOM commander to forward to The Judge Advocate General the names of at least three nominees for each position. All eligible officers assigned to the USAR Control Group who are located within the ARCOM or GOCOM area must be considered. There have been instances when eligible officers within the geographic vicinity of an ARCOM or GOCOM have been overlooked in the selection process. Thus, to insure that all eligible officers are given an opportunity to be considered for these positions, The Judge Advocate General has directed the semiannual publication of these positions and the termination date of the incumbent's tenure. Tenure for these positions is limited to three years unless exceptional circumstances justify an exception. Interested eligible officers should advise the appropriate ARCOM or GOCOM commander of their interest no later than six months prior to the expiration of the incumbent's tenure.

Army Reserve Commands

First Army

ARCOM	*SJA*	*Vacancy Due*
77	COL F.W. Engel	Feb 88
79	COL J.S. Ziccardi	Sep 85
94	COL L.R. Shuckra	Mar 86
97	COL W.P. George	Aug 85
99	COL J.A. Lynn	Jun 87

Second Army

ARCOM	*SJA*	*Vacancy Due*
81	COL J.T. Gullage	Jan 87
120	COL O.E. Powell	Sep 86 (Extension)
121	COL J.B. Nixon	Apr 86

Fourth Army

ARCOM	*SJA*	*Vacancy Due*
83	COL N.B. Wilson	Oct 87
86	COL G.L. Vanderhoff	Feb 88
88	COL L.W. Larson	Sep 85 (Extension)
123	COL R.F. Greene	Sep 85 (Extension)

Fifth Army

ARCOM	*SJA*	*Vacancy Due*
89	COL D.W. Kolenda	Apr 87
90	COL J.M. Compere	Mar 85
102	COL A.E. DeWoskin	Jun 85
122	LTC J.S. Selig	Apr 86

Sixth Army

ARCOM	*SJA*	*Vacancy Due*
63	COL J.L. Moriarity	Jan 87
96	COL G.G. Weggeland	Aug 85
124	COL T.J. Kraft	Jun 87

Military Law Centers

First Army

MLC	*Commander*	*Vacancy Due*
3	COL A.S. Aguier	Sep 85 (action pending)
4	COL M. Bradie	Feb 86
10	COL J.E. McDonald	Aug 86
42	COL R.L. Kaufman	Jun 87
153	COL P.A. Feiner	May 86

Second Army

MLC	*Commander*	*Vacancy Due*
11	Vacant	
12	COL W.B. Long	May 87
139	COL J.B. Brown	Jan 88
174	COL D.F. Bludworth	Jan 88
213	COL J.E. Baker	Apr 87

Fourth Army

MLC	*Commander*	*Vacancy Due*
7	COL M.R. Kos	Feb 88
9	COL T.P. O'Brien	Apr 87
214	COL T.C. Klas	Feb 86

Fifty Army

MLC	*Commander*	*Vacancy Due*
1	COL C.J. Sebesta	May 86 (Extension)
2	COL R.H. Tips	Apr 86
8	COL C. McElwee	Oct 87
113	COL D.S. Simons	Feb 86

Sixth Army

MLC	*Commander*	*Vacancy Due*
5	COL R.B. Jamar	Mar 85 (action pending)
6	COL J.L. Woodside	Jan 87
78	COL A.L. Fork	Jan 87
87	COL C.A. Jones	Oct 85

Training Division

First Army

TNG DIV	*SJA*	*Vacancy Due*
76	MAJ B.F. McGovern	Jun 87
78	LTC R.R. Baldwin	Oct 85
80	LTC R.H. Cooley	Jul 85
98	LTC D.W. O'Dwyer	Apr 86

Second Army

TNG DIV	*SJA*	*Vacancy Due*
100	MAJ M.K. Gordon	Feb 87
108	LTC B.K. Jones	Jul 87

Fourth Army

TNG Div	*SJA*	*Vacancy Due*
70	COL E.D. Brockman	Feb 86
84	COL J.H Olson	Sep 87
85	LTC G.L. Raysa	Jun 87

Fifth Army

TNG DIV	*SJA*	*Vacancy Due*
95	MAJ J.S. Arthurs	Jul 86

Sixth Army

TNG DIV	*SJA*	*Vacancy Due*
91	COL L. Hatch	Jul 86
104	Vacant	(action pending)

General Officer Commands (Major)

First Army

GOCOM	*SJA*	*Vacancy Due*
352 CA CMD	LTC W.S. Little	Apr 87
353 CA CMD	LTC J.E. O'Donnell	Sep 86
300 SPT GP (AREA)	LTC Bohannon	Oct 86
310 TAACOM	COL J.B. Gantt	Dec 85
220 MP BDE	MAJ A.J. Moran	

Second Army

GOCOM	*SJA*	*Vacancy Due*
412 ENGR CMD	COL J.H. Herring	Dec 88
290 MP BDE	MAJ D. Brace	Oct 85
143 TRANS BDE	COL C.N. Prather	Nov 87
7581 USAG	COL F.V. De Jesus	Apr 86

Fourth Army

GOCOM	*SJA*	*Vacancy Due*
103 COSCOM	COL C.W. Larson	Sep 85 (action pending)
416 ENGR CMD	COL T.G. Bitters	Jun 86
30 HOSP CTR	MAJ H.E. Schmalz	Jul 85
300 MP CMD	MAJ J. Wouczyna	May 86 (Extension)
425 TRANS BDE	LTC R.G. Bernoski	Apr 86

Fifth Army

GOCOM	*SJA*	*Vacancy Due*
377 COSCOM	LTC R.E. Chaffin	Oct 86
420 ENGR BDE	Vacant	
807 HOSP CTR	Maj G.A. Glass	Jul 86

Sixth Army

GOCOM	*SJA*	*Vacancy Due*
351 CA CMD	MAJ J.P. Hargarten	Apr 86
311 COSCOM	COL D.M. Clark	Dec 85 (Extension)
HQ IX Corps	LTC W.K. Fong	Oct 87

Nashville On-Site

The Nashville, Tennessee, On-Site, originally scheduled for 2 and 3 February 1985 and postponed because of snow, has been rescheduled for 3 and 4 August 1985. Location and subjects remain unchanged: the On-Site will be held at Vanderbilt University School of Law, and TJAGSA instructors will teach Administrative Law and Criminal Law. For further information, contact Major Douglas Brace, the on-site action officer, at (615) 256-9999 or Major Thomas McShane at the Guard and Reserve Affairs Department, TJAGSA, (804) 293-6121.

Enlisted Update

Sergeant Major Walt Cybart

Civilianization of MOS 71D

The issue of civilianization of 71D spaces has caused concern throughout the Corps. To assist the field in standardizing responses to this issue, the following information is provided:

1. Potential for space imbalance and adverse impact on rotation base requirement.

According to a recent TRADOC review of the Enlisted Personnel Management System (EPMS), civilianization of enlisted positions is causing some MOS's to become space imbalanced (SIMOS). To preclude a MOS from becoming SIMOS, a Rotation Base Protection Policy was established. Notwithstanding these efforts, two more MOS's (26T, Radio Sys Sp, and 84F, Audio TV Sp) became SIMOS in 1984. MOS 71D is a low density MOS with only 1878 positions (MTOE and TDA) authorized worldwide. Approximately 50% of these spaces are located in line units in overseas commands. Civilianization of any spaces in MOS 71D would adversely affect the turnaround time (TAT) between overseas assignments, particularly in the lower grades where TAT is now 15 months, and would result in MOS 71D becoming a prime candidate for SIMOS.

2. Grade imbalance and adverse impact on career progression requirements.

A recent change to the Standards of Grade Authorization (SGA) for MOS 71D was made to bring the MOS into compliance with the DA Personnel Objective Support System—Enlisted (POSS–E) model for logical career progression. This change resulted in severe overages at grades E5 and E6. The loss of any additional slots would compound the morale and attrition problems caused by these overages. This change to the SGA also created shortages at grades E7 and E8, but it is expected that these spaces will soon be filled via promotion, thereby partially alleviating overages at lower grades.

3. Adverse impact on reenlistment.

Civilianization would most likely have an adverse impact on reenlistment by drawing experienced military personnel from active duty to compete for the civilian positions.

4. Degradation of service and adverse impact on administration of military justice.

The placement of personnel who do not have prior experience in the Army legal field into these highly technical positions could result in severe degradation of the military justice work product and in possible reversals of proceedings by the appellate courts and review agencies. Legal specialists/NCOs are similarly situated with other battalion and company level administrators whose duties require a current military background. Civilianization would be counter to the mandate of the U.S. Court of Military Appeals to improve the administration of military justice. It would take months to train replacements adequately to preclude costly errors in courts-martial processing.

5. Excess expenditure of overtime funds and morale problems.

Positions should be designated military whenever they require unusual working hours or conditions not compatible (or normally associated) with civilian employment. Legal specialists/NCOs are normally required to work more than normal duty hours to accomplish their mission. Courts-martial and board proceedings often continue well beyond normal duty hours; the results of those proceedings must be transcribed and available to convening authorities shortly after completion. Using civilians in the proceedings would result in significant expenditure sof overtime funds and the erratic hours could produce morale problems. Morale problems are also exacerbated with military personnel when they see civilians doing similar jobs, usually at higher pay and under "regular" working conditions.

6. Replacement (recruitment) problems and absence of qualified civilians.

The civilian labor market does not possess requisite skills for duties performed by Legal specialists/NCOs. Adequate civilian training does not exist and the requirement would never be large enough to create a market. The relative isolation and location in low-density population areas of many installations would further hinder recruitment of experienced replacement civilian personnel.

7. Impairment of combat capability and adverse impact on commanders and soldiers.

All combat service support positions should be military if they have tasks which, if not performed, could directly impair combat capability and if personnel may be designated as fillers for MTOE units during contingencies. Legal specialists/NCOs fit both of these AR 570–4 criteria for designation as military positions. The adverse impact would ultimately be borne by commanders and troops who will not receive the timely and efficient legal services required for discipline and morale.

8. Adverse impact on pretrained contingency or wartime augmentation.

Current positions for Legal specialists/NCOs must continue to be designated as military to provide for immediately deployable, pretrained personnel for augmentation of combat, combat support, and combat service support MTOE units.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not eceived a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 1-16 May 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officers Legal Orientation Course (5F-F1).

September 9-13: 15th Criminal Trial Advocacy Course (5F-F32).

September 9-13: 31st Law of War Workshop (5F-F42).

September 16-27: 105th Contract Attorneys Course (5F-F10).

September 23-27: 7th Legal Aspects of Terrorism Course (5F-F43).

October 8-11: 1985 Worldwide JAG Conference.

October 15-20 December 1985: 108th Basic Course (5-27-C20).

October 21-25: 4th Advanced Federal Litigation Course (5F-F29).

October 28-1 November 1985: 17th Legal Assistance Course (5F-F23).

November 4-8: 81st Senior Officers Legal Orientation Course (5F-F1).

November 12-15: 21st Fiscal Law Course (5F-F12).

November 18-22: 7th Claims Course (5F-F26).

December 2-13: 1st Advanced Acquisition Course (5F-F17).

December 16-20: 28th Federal Labor Relations Course (5F-F22).

January 13-17: 1986 Government Contract Law Symposium (5F-F11).

January 21-28 March 1986: 109th Basic Course (5-27-C20).

January 21-31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F47).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12–15: 22nd Fiscal Law Course (5F–F12).

May 19–6 June 1986: 29th Military Judge Course (5F–F33).

June 2–6: 84th Senior Officers Legal Orientation Course (5F–F1).

June 10–13: Chief Legal Clerk Workshop (512–71D/71E/40/50).

June 16–27: JATT Team Training.

June 16–27: JAOAC (Phase II).

July 7–11: U.S. Army Claims Service Training Seminar.

July 7–11: 15th Law Office Management Course (7A–713A).

July 14–18: Professional Recruiting Training Seminar.

July 14–18: 33d Law of War Workshop (5F–F42).

July 21–26 September 1986: 110th Basic Course (5–27–C20).

July 28–8 August 1986: 108th contract Attorneys Course (5F–F10).

August 4–22 May 1987: 35th Graduate Course (5–27–C22).

August 11–15: 10th Criminal Law New Developments Course (5F–F35).

September 8–12: 85th Senior Officers Legal Orientation Course (5F–F1).

3. Civilian Sponsored CLE Courses

September 1985

5: SBT, Organizing & Managing the Small Law Office, Lubbock, TX.

6: GICLE, Family Law, Atlanta, GA.

6: SBT, Organizing & Managing the Small Law Office, Fort Worth, TX.

6: GICLE, Taxation for the General Practitioner, Albany, GA.

9–11: FPI, Practical Environmental Law, Williamsburg, VA.

10: BLI, Legal Aspects of Data Processing Contracts, San Francisco, CA.

12: SBT, Organizing & Managing the Small Law Office, Dallas, TX.

12–13: PLI, Estate Planning Institute, San Francisco, CA.

13: SBT, Organizing & Managing the Small Law Office, Tyler, TX.

13: GICLE, Taxation for the General Practitioner, Atlanta, GA.

13–14: GICLE, City-County Attorneys Institute, Athens, GA.

15–10/4: NJC, General Jurisdiction—General, Reno, NV.

15–20: NJC, Probate Court Proceedings—Specialty, Reno, NV.

18–20: SBT, Office Practice, Fort Worth, TX.

18–21: GICLE, Bridge-the-Gap, Atlanta, GA.

19: SBT, Organizing & Managing the Small Law Office, San Antonio, TX.

19–20: PLI, Managing the Small Law Firm, New York, NY.

19–20: PLI, Managing the Medium-Sized Law Firm, New York, NY.

19–20: PLI, Managing the Large Law Firm, New York, NY.

19–21: PLI, Product Liability of Manufacturers, New York, NY.

20: GICLE, Motion Practice, Savannah, GA.

20: SBT, Organizing & Managing the Small Law Office, Houston, TX.

20–21: SBT, Legal Assistant—Estate Planning, Dallas, TX.

20–21: NCLE, Real Estate, Lincoln, NB.

22–27: NJC, Alternative Dispute Resolution—Specialty, Reno, NV.

23–25: FPI, Proving Construction Contract Damages, Washington, D.C.

26: SBT, Marshalling Evidence & Pre-Trial Discovery, El Paso, TX.

26–27: DRI, Government Liability, Chicago, IL.

27: SBT, Marshalling Evidence & Pre-Trial Discovery, Amarillo, TX.

27: GICLE, Motion Practice, Atlanta, GA.

27: SBT, Organizing & Managing the Small Law Office, Austin, TX.

27–28: SBT, Legal Assistant—Estate Planning, San Antonio, TX.

29–10/3: NCDA, Trial Strategy & Tactics, Denver, CO.

29–10/4: NJC, Medical-Scientific Evidence—Graduate, Reno, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the April 1985 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letter AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS- ADC-84–1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/JAGS–ADC–84–2 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/JAGS–ADC–84–3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS–ADC–84–4 (180 pgs).

AD B086937	Criminal Law, Evidence/ JAGS–ADC–84–5 (90 pgs.)
AD B086936	Criminal Law, Constitutional Evidence/JAGS–ADC–84–6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS–ADC–84–7 (75 pgs).
AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B078095	Fiscal Law Deskbook/JAGS–ADK–83–1 (230 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/ JAGS–ADA–84–1 (266 pgs).
AD B077739	All States Consumer law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/JAGS–ADA–85–1 (129 pgs).
AD B077738	All States Will Guide/JAGS–ADA–83–2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/JAGS–ADA–85–2 (56 pgs).
AD B087847	Claims Programmed Text/ JAGS–ADA–84–4 (119 pgs).
AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/ JAGS–ADA–84–6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS–ADA–84–7 (76 pgs).
AD B087774	Government Information Practices/JAGS–ADA–84–8 (301 pgs).
AD B087746	Law of Military Installations/ JAGS–ADA–84–9 (268 pgs).
AD B087850	Defensive Federal Litigation/ JAGS–ADA–84–10 (252 pgs).
AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations JAGS–ADA–84–12 (321 pgs).
AD B087745	Reports of Survey and Line of Duty Determination/JAGS–ADA–84–13 (78 pgs).
AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Military Justice Instructor Certification

The new AR 350–212, Training, Military Justice, effective 28 May 1985, requires that all judge advocates conducting required military justice training for officers and officer candidates be certified by TJAG. Staff Judge Advocates of offices providing required military justice training to officers and officer candidates are requested to submit the names of judge advocates who have attended local methods of instruction or instructor training courses and are conducting required training to HQDA (DAJA–PT), WASH DC 20310–2206. These officers will be certified as qualified and a notation placed in their career management file. Questions regarding this requirement should be directed to Major Ross at PPTO, OTJAG.

3. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 27–10	Military Justice		15 Mar 85
AR 930–4	Army Emergency Relief		1 Apr 85
DA Pam 27–17	Procedural Guide for Article 32(b) Investigating Officer		15 Mar 85
UPDATE 4	All Ranks Personnel Update		1 Apr 85
UPDATE 2	Finance Update		20 Mar 85

4. Articles

Ayers, *Beyond Truth-in-Lending-Federal Regulation of Debt Collection*, 16 St. Mary's L.J. 329 (1985).

Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U.L.J. 383 (1985).

Coolley, *RICO: Modern Weaponry Against Software Pirates*, 5 Computer/L.J. 143 (1984).

Gold, *Limiting Judicial Discretion To Exclude Prejudicial Evidence*, 18 U.S.D.L. Rev. 59 (1984).

Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemna of Mental Abnormality and Intoxication Defenses*, 53 Fordham L. Rev. 221 (1984).

Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not To Be Enticed or Induced to Crime by Government and Its Agents*, 7 W. New Eng. L. Rev. 1 (1984).

Sinclair, *Law and language: The Role of Pragmatics in Statutory Interpretation*, 46 U. Pitt. L. Rev. 373 (1985).

Spencer, *Motor Vehicles as Weapons of Offence*, Crim. L. Rev., Jan. 1985, at 29.

Timbers & Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 Cornell L. Rev. 403 (1985).

Comment, *Grandparental Right to Visitation and Custody: A Trend in the Right Direction*, 15 Cum. L. Rev. 161 (1984–1985).

Comment, *Admissibility of biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 Wake Forest L. Rev. 391 (1984).

Note, *Closing the* McCarty-*USFSPA Window: A Proposal for Relief From* McCarty-*ERA Final Judgments*, 63 Tex. L. Rev. 497 (1984).

Note, *Computers in the Courtroom: Using Computer Diagnosis as Expert Opinion*, 5 Computer/L.J. 217 (1984).

Note, *Conditional Objectives of Conspiracies*, 94 Yale L.J. 895 (1985).

Note, *Drawing the Line on Constitutional Torts:* Chappell v. Wallace 17 Conn. L. Rev. 221 (1984).

Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983–84, 73 Geo. L.J. 225 (1984).

The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 Cornell L. Rev. 446 (1985).

By Order of the Secretary of the Army:

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