

Note From the Field

Civilian Confinement and R.C.M. 707

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Oh, the life of a trial counsel. Endless hours of boring preparation punctuated by brief moments of pure courtroom exhilaration. But even the best laid plans of the prosecutor can be destroyed in a single Article 39(a) session by a cunning defense counsel who relies on the speedy trial clock to sound its alarm. Quite often, trials are delayed by unforeseen circumstances beyond the government's control. One such situation is the case of the errant accused arrested by civilian authorities after charges have been preferred. The issue the government faces is whether this time in civilian confinement counts as non-excludable delay for R.C.M. 707 purposes. With good accounting procedures and a basic understanding of the law, the government can overcome a motion to dismiss and proceed forward with its case-in-chief.

In the recent case of *United States v. Brown*,¹ an Army officer accused of assaulting a civilian in New Castle, Delaware, deserted his unit and went into hiding for six months in Dover, Delaware. The state police arrested Major Brown on 19 May 1999. During his hiatus, he committed several other criminal acts around the Dover, Delaware, area. Army prosecutors spent several months negotiating with Delaware county and state prosecutors attempting to persuade them to release jurisdiction over these offenses and to release the accused to the custody of the military. Major Brown was released to military control on 16 July 1999. The amount of time spent in civilian confinement totaled fifty-nine days. In an Article 39(a) session, the accused's defense counsel moved to dismiss the assault

charge and its specifications for violating the rule requiring the government to bring an accused to trial within 120 days after preferring charges.² The time between preferring and arraignment, including time spent in civilian confinement, totaled 159 days.

According to Rule for Courts-Martial 707, accused shall be brought to trial within 120 days after preferring of charges.³ All periods of time covered by pretrial delays approved by a military judge shall be excluded when determining whether the period has run.⁴ A military judge's decision to grant a delay may be for the purpose of allowing time to secure the availability of an accused to stand trial.⁵ An accused makes himself "unavailable" for trial by court-martial if he is held in a state confinement facility pending trial on civilian charges.⁶ The military is not responsible for confinement by civilian authorities on civilian charges.⁷ This rule applies even in situations where "the accused is initially confined by military authorities for military offenses but released by the military to civilian authorities for civilian offenses."⁸

An accused should not receive a windfall for his own misconduct. The decision to grant a delay after charges have been referred rests solely in the discretion of the military judge; however, the United States Court of Appeals for the Armed Forces (CAAF) now directs military judges to consider both legal and equitable grounds in deciding how to categorize delays.⁹ Diligent trial counsel should initiate a dialogue with civilian juris-

1. *United States v. Brown*, No. 9901186 (Army Ct. Crim. App. filed Feb. 1, 2000).

2. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(a)* (1998) [hereinafter MCM].

3. *Id.*

4. *Id.* R.C.M. 707(c).

5. *Id.* R.C.M. 707, discussion.

6. *United States v. Bramer*, 43 M.J. 538, 545 (N.M. Ct. Crim. App. 1995); *aff'd* 45 M.J. 296 (1996). In *Bramer*, a civilian judge refused to release the appellant on bail prior to the state's prosecution, thus, the court logically reasoned, the appellant could not be available for trial until the state court issues were resolved.

7. *See, e.g., United States v. Garner*, 39 M.J. 721 (N.M.C.M.R. 1993); *United States v. Bragg*, 30 M.J. 1147 (A.F.C.M.R. 1990); *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).

8. *Bramer*, 43 M.J. at 547.

9. *United States v. Thompson*, 46 M.J. 472 (1997). The CAAF in *Thompson* went so far as to allow for the possibility of after-the-fact excludable delays, but frowned upon this as a general rule. The factors the court considered in denying an R.C.M. 707 motion were based upon equitable considerations. The court concluded that, had the judge granted the motion, the remedy would have been a dismissal without prejudice. In essence, the judge simply avoided another delay in moving the case to trial.

dictions in negotiating the release of service members upon learning of an arrest. State courts may be willing to dismiss charges when military prosecutors show an interest in incorporating smaller civilian offenses into a larger court-martial, such as in the case of Major Brown.¹⁰ Given the state of the law, a military judge will undoubtedly grant a reasonable delay in a case in order to secure the accused's presence at trial.

The most important thing to remember is that it is essential to get all delays approved in writing by the either the convening

authority or the military judge, depending on what stage the charges are at when the accused absents himself. It is the prosecutor's responsibility to sustain the initiative and move the case. Any delay not excused by the convening authority before referral or by the military judge post-referral is counted against the R.C.M. 707 120-day timeline. In light of this, a diligent trial counsel must exert his best efforts to secure the presence of an accused at trial, and ensure that all delays are well documented.

10. Consolidating various state charges into a court-martial has both benefits and detriments. Consolidating charges allows the military to exercise jurisdiction over all offenses, promotes judicial economy, and allows all offenses to be considered in sentencing concurrently. Consolidation, however, also includes economic costs to the government that would not otherwise exist—such as the cost of transporting and housing a variety of civilian witnesses for potentially minor offenses. These factors need to be considered in the decision making process used to determine whether to seek jurisdiction over nonmilitary offenses of the accused.