

therefore, stops as to the crime charged at the time the plea of guilty is accepted" and Article 31, Code, is not applicable to extenuation and mitigation hearings "except where evidence could be produced that would give rise to a charge being laid to a different crime." *Id.*, at 358. This case has been widely read to allow for an inquiry of the accused in order to fulfill the requirements for the admission of records of nonjudicial punishment.

The Supreme Court in *Estelle v. Smith*, \_\_\_ U.S. \_\_\_, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), held that the Fifth Amendment protections against self-incrimination are as applicable during sentencing in a capital case as they are in the findings or guilt phase. This holding is based, in part, upon the gravity of the decision to be made during the penalty phase of a capital case. While the Supreme Court has applied different rules and standards to capital cases than to noncapital cases, the language in *Estelle v. Smith* may be broad enough to apply to criminal cases generally.

Thus, the continued use of "Mathews inquiries" may be unwise, especially since recourse to such an inquiry should be necessary in only a few cases. See *United States v. Taylor*, SPCM 15697, slip op. at 3-4 n. 4 (ACMR 3 September 1981). First, *United States v. Mack*, 9 M.J. 300 (CMA 1980), eliminated the need for a "Mathews inquiry" if the record of nonjudicial punishment was properly completed. Second, some omissions from the form may not render the form inadmissible. See *United States v. Haynes*, 10 M.J. 694 (ACMR 1981). Further, if there is no objection to the exhibit, there is no need for the military judge to inquire further since the lack of objection constitutes a waiver under Military Rule of Evidence 103(a). *United States v. Beaudion*, 11 M.J. 838 (ACMR 1981). Thus if the form is not complete (*Mack* does not control), the omission is substantial (see *Haynes*), and the defense objects to the document, the use of a Mathews inquiry will probably not cure the defect anyway.

## Criminal Law News

*Criminal Law Division, OTJAG*

### "Clear Injustice" under AR 27-10

Recently, relying on paragraph 3-20, AR 27-10, a commander set aside five records of NJP imposed during the years 1969 to 1972 and directed their filing in the Restricted (R) fiche of the individual's OMPF. He set aside the NJP because the punishment imposed would, under today's regulatory provision, be classified as "minor punishment."

This office opined that such removal was not in accordance with regulatory provisions for two reasons. First, paragraph 3-15b, AR 27-10, C20, which allows a commander imposing minor punishment an alternative in deciding the filing of the NJP is applicable only to those punishments imposed after 20 May 1890. Second, the provisions of paragraph 3-20, AR 27-10, allowing for a set aside when the punishment has resulted in a "clear injustice," are also inapplicable to this case. To allow a com-

mander to take this action, based on the circumstances of this case, would be tantamount to allowing him to circumvent the intent of the regulation. It was the opinion of this office that a commander has no authority, under paragraph 3-20, AR 27-10, to set aside an Article 15 on the basis that its proper filing, pursuant to a valid Army Regulation, creates what he perceives to be a "clear injustice." DAJA-CL 1981/8632.

**Taxicab Services Cannot be Stolen, U.S. v. Abeyta, SPCM 15438, \_\_\_ M.J. \_\_\_ (ACMR, 2 Sep 1981)**

The US Army Court of Military Review opined, expressly overruling *United States v. Brazil*, 5 MJ 508 (ACMR 1979), that taxicab services cannot be stolen in violation of Article 121, UCMJ. The court held that the terms "money, personal property, or article of value,"

as used in Article 121, were not meant to encompass items not having a corporeal existence. Alternatives available for the theft of taxicab services, or other services, may be found under Article 134 as obtaining services under false pretenses or dishonorably failing to pay just debt. See, form specifications 138 and 148, Appendix 6c, MCM; Paragraph 4-138 and 4-148, DA Pam 27-9, Military Judge's Guide.

#### Effective Date of *Kalscheuer* Decision

On 17 August 1981, the United States Court of Military Appeals issued its decision in *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981). In that case the court opined

that any delegation of the authority to authorize searches is invalid, except delegations to military judges or military magistrates. The case is discussed in Note, *Recent Case—Delegation of Authority to Authorize Searches*, *The Army Lawyer*, Sept. 1981, at 25.

The effective date of the *Kalscheuer* holding is 27 August 1981, not 17 August 1981. The authority for this is a recent criminal law message, 191400Z Aug 81, DAJA-CL 1981/8727, for SJA, subject: Delegation of Authority to Authorize Searches. The court's mandate is normally issued ten days after the date of a decision.

### Administrative and Civil Law Section

#### *Administrative and Civil Law Division, TJAGSA*

**Soldiers' and Sailors' Civil Relief Act—The tolling of the statute of limitations is automatic, *Bickford v. United States*, Ct. Cl. No. 372-79c.**

The plaintiff, a former JAGC Captain of the Regular Army, unsuccessfully challenged the validity of the Excess Leave Program under which he attended law school. He argued that the Secretary of the Army was without authority to deny him pay and allowances during his three years in law school. One issue was whether the statute of limitations precluded his claim.

The Government argued that under the six-year statute of limitations, the Court lacked jurisdiction to entertain plaintiff's claim since

suit was filed more than nine years after his claim first accrued. The Court disagreed.

The SSCRA (50 U.S.C. App. § 525) states in part: "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service . . . whether such cause of action or the right or privilege to institute such service. . . ." The Court held that by the express terms of the SSCRA the tolling of the statute of limitations is unconditional. The only critical factor is military service: once that circumstance is established, the period of limitation is *automatically* tolled for the duration of service for *all* servicemembers.

### Judiciary Notes

#### *U.S. Army Legal Services Agency*

#### **Digest—Article 69, UCMJ, Applications**

In *Jones*, SPCM 1981/5049, the accused contended that the failure of the military judge to consider correctional custody as a viable punishment at his trial by special court-martial was error and, therefore, prejudicial to his substantial rights. According to paragraph 1-5a,

AR 190-34, correctional custody is "[a] form of nonjudicial punishment which includes deprivation of liberty without confinement, authorized by article 15, UCMJ, chapter XXVI, 1969 (Revised) and chapter 3, AR 27-10". It is the view of The Judge Advocate General that courts-martial may not legally impose correctional