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The Army Lawyer articles are indexed in the Index to Legal Periodicals, the Current Law Index, the Legal Resources Index, and the Index to U.S. Government Periodicals.

Address changes for official channels distribution: Provide changes to the Editor, The Army Lawyer, TJAGSA, 600 Massie Road, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or e-mail: stroncj@hqda.army.mil.

Issues may be cited as Army Law., [date], at [page number].

Periodicals postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

The Power to Prosecute: New Developments in Courts-Martial Jurisdiction

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Introduction

At the heart of any court-martial lies the requirement of jurisdiction—the power of a court to try and determine a case and to render a valid judgment.[1]

—*David A. Schlueter*

Before the military can flex its judicial muscle, there must be proper court-martial jurisdiction. In general, three prerequisites must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.[2] The first two requirements are the focus of this article.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense or the status of the accused at the time of trial.[3] These litigious issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense.[4] If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a service member at the time the offense is committed, subject matter jurisdiction is satisfied.[5] Personal jurisdiction, however, focuses on the time of trial: can the government put the *habeas grabus*[6] on the accused and court-martial him?[7] The answer is yes, so long as the accused has proper status—that is, if the accused is a service member at the time of trial.[8] At first blush, these jurisdictional concepts seem rudimentary, but recent jurisdiction cases reveal that these concepts are not as simple as they appear.

This article first discusses developments in subject matter jurisdiction—the interesting trend of applying a service connection requirement to capital cases[9] and the possibility of a jurisdictional gap when faced with a fraudulent discharge scenario.[10] The focus then shifts to personal jurisdiction, addressing two new cases that relate to terminating jurisdiction.[11] Finally, this article briefly reviews other jurisdiction cases which are unrelated to subject matter and personal jurisdiction, but which nonetheless affect the law in this area.[12]

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1. David A. Schlueter, Military Criminal Justice: Practice and Procedure § 4-1 (2d ed. 1987).

2. Manual for Courts-Martial, United States, R.C.M. 201(b)(1)-(5) (1995) [hereinafter MCM]. *See also* Schlueter, *supra* note 1, at 112.

3. *See generally* Eva H. Hanks, Elements of Law 18 (1994).

4. MCM, *supra* note 2, R.C.M. 203; Solorio v. United States, 483 U.S. 435 (1987) (holding that subject matter jurisdiction is contingent upon the status of the accused—in other words, whether the accused was a member of the armed service at the time of the offense charged, and not whether there was a service connection).

5. *Solorio,* 483 U.S. at 451.

6. Taken from the Latin word *habeas* (to have) and the fictitious Latin term *grabus* (grab); commonly cited as the authority for the government to "grab" the accused and to ensure his presence at trial.

7. UCMJ art. 2 (West 1995); MCM, *supra* note 2, R.C.M. 202.

8. MCM, *supra* note 2, R.C.M. 202 analysis, app. 21, at A21-9. Generally, court-martial jurisdiction over a person begins at enlistment and ends at discharge. In order to satisfy personal jurisdiction, the offense and the court-martial must occur between these two defining periods. If, however, the accused is discharged after the offense, but before the court-martial, jurisdiction is lost.

9. *See generally* Loving v. United States, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring); United States v. Curtis, 44 M.J. 106 (1996), *rev'd per curiam,* 46 M.J. 129 (1997); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

10. *See* United States v. Reid, 46 M.J. 236 (1997).

11. *See* United States v. Vanderbush, 47 M.J. 56 (1997); United States v. Guest, 46 M.J. 778 (Army Ct. Crim. App. 1997).

12. *See*, *e.g.*, United States v. Turner, 47 M.J. 348 (1997); United States v. Sargent, 47 M.J. 367 (1997). A recent case relevant to a properly convened court-martial, but not discussed in this article, is *United States v. Vargas*, 47 M.J. 552 (N.M. Ct. Crim. App. 1997), which holds that a court-martial convened by one commander, with charges referred by a successor-in-command, was properly convened and had jurisdiction over the accused.

Subject Matter Jurisdiction: The Service Connection Undertow

In 1969, the Supreme Court limited the reach of court-martial jurisdiction by requiring a connection between the accused's military duties and the crime.[13] Not only did the government have to show proper status (in other words, that the accused was subject to the UCMJ when the offense was committed), but it also had to establish a nexus between the crime and the military.[14] Eighteen years later, however, this limitation ended.

In 1987, the Supreme Court abandoned the service connection requirement for court-martial jurisdiction with its decision in *Solorio v. United States.*[15] With *Solorio,* the Court made clear that the government only has to show that the accused was subject to the UCMJ at the time of the offense to satisfy subject matter jurisdiction. No other prerequisites exist. This, however, is not the end of the story. A closer look at *Solorio,* and in particular Justice Stevens' concurrence and the results therefrom, reveal the vitality of the service connection limitation in a seemingly settled area of law.

Richard Solorio, an active duty member of the Coast Guard, was convicted of crimes committed while stationed in Juneau, Alaska.[16] The crimes, which were non-capital, were committed off-post and consisted of sexual abuse of two young females.[17] Solorio challenged jurisdiction before the Supreme Court. He argued that there was no service connection between the charged offenses and the military and, therefore, that there was no jurisdiction to bring the matter before a court-martial.[18] The Court, in a six-three decision, held that court-martial jurisdiction existed. Five justices in the majority agreed that court-martial jurisdiction does not depend on the service connection of the offenses charged. Rather, subject matter jurisdiction is determined by the status of the accused at the time of the offense. [19] Since Richard Solorio was subject to the UCMJ at the time of the offenses, jurisdiction vested.

In a concurring opinion, Justice Stevens agreed that court-martial jurisdiction existed.[20] His conclusion, however, was based on application of the service connection test. Applying the service connection test to the facts of *Solorio,* he opined that there was sufficient evidence to link the crimes to the military.[21] He strongly disagreed with the majority's abandonment of the service connection test. Justice Stevens' attachment to the service connection test resurfaced in the Army capital murder case *Loving v. United States.*[22]

In January 1996, *Loving* was argued before the Supreme Court.[23] The defense raised the issue of the constitutionality of the military's capital sentencing scheme. In a unanimous decision, the Court held that the military's capital sentencing scheme was proper.[24] In a concurring opinion in which three other justices joined, Justice Stevens focused on jurisdiction—an issue the defense did not raise with the Court.[25] He seized the opportunity to once again promote his belief in the service connection requirement. He emphasized that *Solorio* was a non-capital case and questioned whether a service connection test still applied to a capital case. He then employed the service connection test in *Loving* and concluded that "the 'service connection' requirement [had] been satisfied."[26] Although it was

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13. O'Callahan v. Parker, 395 U.S. 258, 273 (1969) (holding that a crime tried by a court-martial must be service connected).

14. *Id.* at 267. *See also* Relford v. Commandant, 401 U.S. 355 (1971) (enumerating many factors for courts to consider in determining whether a crime is service connected, for example, proper absence from base, location, committed during peacetime, connection to military duties, status of victim, and damage to military property).

15. 483 U.S. 435 (1987). In *Solorio*, the Supreme Court overrules *O'Callahan v. Parker*, 395 U.S. 258 (1969), abandoning the "service-connection" test, and holds that subject matter jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces. In reaching its decision, the Court defers to the plenary power of Congress to regulate the armed forces. *Id.* at 441.

16. *Id.* at 437.

17. *Id.*

18. *Id.* at 440.

19. *Id.* at 450.

20. *Id.* at 451.

21. *Id.*

22. 116 S. Ct. 1737 (1996).

23. *Id.* Private Loving, an Army soldier who was stationed at Fort Hood, Texas, murdered two taxicab drivers. He attempted to murder a third, but the driver escaped. Loving's first victim was an active duty service member, and his second victim was a retired service member.

24. *Id.* at 1750.

25. *Id.* at 1751 (Stevens, J., concurring).

not the majority's view, Justice Stevens' concurrence in *Loving* has affected military jurisprudence.

Within three weeks of the *Loving* decision, the Court of Appeals for the Armed Forces (CAAF) issued its opinion in *United States v. Curtis*,[27] another military capital murder case. In the first paragraph of the opinion, the CAAF addressed service connection. Even though the defense did not raise this issue, the court made a specific finding that the service connection test was met.[28] In support of this conclusion, the court cited Justice Stevens' concurring opinion in *Loving*.[29]

Similarly, in *United States v. Simoy*,[30] an Air Force capital murder case, the Air Force Court of Criminal Appeals, sua sponte, found a service connection between the murder and the military.[31] The Air Force court also cited Justice Stevens' concurring opinion.[32]

One can only conclude that the military appellate courts are exercising an abundance of caution when addressing the service connection test in capital cases. Neither Congress nor the Supreme Court has limited court-martial jurisdiction to crimes that are service connected. In *Solorio*, the Supreme Court unequivocally put the service connection test to rest. Nevertheless, Justice Stevens remained committed to limited court-martial jurisdiction. As a result, precedent exists to challenge court-martial jurisdiction based on service connection, at least for capital offenses.

Subject Matter Jurisdiction: A Jurisdictional Gap Remains

Fortunately, in non-capital cases, the law regarding subject matter jurisdiction is settled: if the accused is subject to the UCMJ at the time of the offense, subject matter jurisdiction is satisfied.[33] The rule seems simple, but what if the accused commits misconduct after a fraudulent discharge?[34] Is there subject matter jurisdiction over the offenses? At first blush, it appears that subject matter jurisdiction is satisfied. After all, if the discharge is based on fraud, the discharge does not exist. Since there is no discharge, the accused remains in a military status.[35] Since the accused is in a military status at the time of the offense, subject matter jurisdiction is, therefore, met. A closer look at the courts' treatment of this issue, however, reveals that logic may not always prevail.

This year, the CAAF decided *United States v. Reid*,[36] a fraudulent discharge case. The court addressed the procedural requirements necessary to prosecute such a case. Wrapped up in the facts, however, was the issue of asserting court-martial jurisdiction over post-fraudulent discharge misconduct. A brief review of the facts and the procedural issues in the case is helpful.

While pending a medical discharge, Specialist Reid was apprehended for possession and distribution of marijuana.[37] The command quickly took action to stop Reid's discharge.[38] The command's efforts notwithstanding, Reid managed, through fraud, to finagle a separation from the Army—"complete with a Certificate of Discharge and more than $8,000.00

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26. *Id.*

27. 44 M.J. 106 (1996). *Loving* was decided on 3 June 1996, and *Curtis* was decided on 21 June 1996.

28. *Id.* at 118. The court states: "The offenses were service connected because they occurred on base and the victims were appellant's commander and his wife." *Id*.

29. *Id.*

30. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

31. *Id.* at 601 (stating that "the felony murder was service-connected because it occurred on base and the victim was an active duty military member").

32. *Id.* The majority also cites *Relford v. Commandant*, 401 U.S. 355 (1971). *See supra* note 14 and accompanying text.

33. Solorio v. United States, 483 U.S. 435 (1987).

34. UCMJ art. 83 (West 1995). Article 83a(2) states: "Any person who . . . procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation shall be punished as a court-martial may direct." *Id.*

35. MCM, *supra* note 2, R.C.M. 202 discussion. Court-martial jurisdiction normally continues even if the service member's completion of an enlistment or term of service has expired. Jurisdiction will continue until delivery of a valid discharge certificate or its equivalent or until the government fails to act within a reasonable time after the person objects to continued retention. *See* United States v. Poole, 30 M.J. 149 (C.M.A. 1990) (holding that there is no constructive discharge when a service member is retained on active duty beyond the end of an enlistment, even if the accused protests the retention).

36. 46 M.J. 236 (1997).

37. *Id.* at 237.

38. *Id.* The process of suspending favorable personnel action (such as an honorable discharge) pending court-martial action is called "flagging." *See* U.S. Dep't of Army, Reg. 600-8-2, Suspension of Favorable Personnel Actions (Flags) (1 Mar. 1988).

in severance pay."[39] Approximately thirty days later, Reid was apprehended and returned to his unit.

Shortly thereafter, the command preferred charges. The charged offenses related to: (1) misconduct occurring before the fraudulent discharge,[40] (2) the fraudulent discharge itself,[41] and (3) misconduct occurring after the fraudulent discharge.[42] Pursuant to a pretrial agreement, Reid pleaded guilty to the fraudulent discharge and to the crimes which occurred before and after the fraudulent discharge.[43] On appeal, the Army court affirmed the fraudulent discharge conviction, but reversed the other convictions because the government failed to follow proper procedures.[44] Based on Article 3(b) of the UCMJ,[45] the service court determined that a two-step trial process is required: first, a court-martial must convene to determine the guilt or innocence on the fraudulent discharge offense; then, if there is a conviction, a second trial may be convened to try other offenses. This year, the CAAF agreed with the Army court's interpretation of Article 3(b).

In reviewing *Reid*, the CAAF relied on the plain language of Article 3(b). The court recognized that, generally, a discharge terminates court-martial jurisdiction. When the discharge is based on fraud, however, Article 3(b) gives the military limited authority to determine court-martial jurisdiction.[46] Before the military can try the accused for conduct other than the fraudulent discharge, there first must be a trial to determine whether the military has jurisdiction. If the accused is convicted of fraudulent discharge,[47] the discharge is no longer valid, and the military has jurisdiction to try the accused for the other offenses. If, however, the accused is acquitted of fraudulent discharge, the discharge is binding, and the military lacks jurisdiction to try the accused for other misconduct. Despite the government's logical and somewhat persuasive arguments of judicial economy and waiver, the CAAF concluded that this two-step trial process was required in such a case.[48]

The court's judgment regarding the procedural issue in *Reid* is not disturbing or surprising. Left unanswered, however, is the issue of whether the military can exercise jurisdiction over offenses committed after the fraudulent discharge.[49] The language of Article 3(b) makes it clear that once an accused is convicted of fraudulent discharge, "he is subject to trial by court-martial for all offenses under [the UCMJ] *committed before the fraudulent discharge*."[50] In dicta, the Army court suggests that once there is a conviction for fraudulent discharge, the discharge is void. The government may then seek to establish

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39. *Reid*, 46 M.J. at 237.

40. *Id*. The pre-discharge offenses were UCMJ arts. 107 (false official statement), 112a (possession and distribution of marijuana), 121 (larceny of government property), 128 (assault consummated by a battery), and 134 (drunk and disorderly conduct).

41. *Id. See also* UCMJ art. 83 (West 1995).

42. *Reid*, 46 M.J. at 237. The post-fraudulent discharge offense was desertion, in violation of UCMJ Article 85. The government's theory was that the accused deserted the day after his fraudulent discharge.

43. *Id*. In accordance with Reid's pleas, the military judge found Reid guilty of fraudulent separation, desertion, making a false official statement, possession and distribution of marijuana, larceny of government property, and assault consummated by a battery.

44. United States v. Reid, 43 M.J. 906 (Army Ct. Crim. App. 1996) (holding that the government failed to follow the two-step trial process required by UCMJ art. 3(b)). *See* Major Amy Frisk, *The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power*, ARMY LAW., Apr. 1997, at 9 (containing a detailed analysis of the Army court's opinion in *Reid*.)

45. UCMJ art. 3(b) (West 1995).

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

46. *Reid,* 46 M.J. at 239.

47. *Id.* The CAAF held that conviction "means more than initial announcement of findings." *Id.* Citing Rule for Court-Martial 1001(b)(3)(A), the court finds that, under UCMJ art. 3(b), a conviction for fraudulent discharge does not occur until a sentence has been adjudged. *Id. See* MCM, *supra* note 2, R.C.M. 1001(b)(3)(A).

48. *Reid*, 46 M.J. at 240. In a concurring opinion, Justice Sullivan recognizes that the "arguments of efficiency, logic, and equity are strong and sane arguments on the side of the Government." *Id*. Regardless, he agrees with the majority that the law is "squarely and decisively" on the accused's side. *Id*.

49. There are myriad scenarios when the military would want to exercise jurisdiction over post- fraudulent discharge offenses. For example, a service member who is fraudulently separated from the military but hangs around the military installation and engages in some form of misconduct that has a direct impact on good order and discipline (for example, larceny in the barracks). The commander has a valid general deterrence interest in seeking justice over the post-fraudulent discharge misconduct.

50. UCMJ art. 3(b) (West 1995) (emphasis added).

jurisdiction over the accused under Article 2.[51] This advice is logical, appealing, and persuasive.

Although the CAAF did not discuss the issue of jurisdiction over post-fraudulent discharge misconduct, one can reasonably predict how it may resolve this issue. Considering the court's reliance on the plain language of the statute, the CAAF would likely hold that the military could not assert court-martial jurisdiction over post-fraudulent discharge offenses. The language in Article 3(b) appears to limit jurisdiction to "offenses committed before the fraudulent discharge."[52] Through omission, it appears that Congress intended to exclude post-fraudulent discharge offenses. Accordingly, the CAAF would likely find that Congress did not intend to extend court-martial jurisdiction to post-fraudulent discharge misconduct.[53] When faced with a case involving post-fraudulent discharge misconduct, government counsel should argue the rationale suggested by the Army court.[54] Defense counsel, however, should rely on the plain meaning of Article 3(b) and the limitation it places on the exercise of court-martial jurisdiction.

Personal Jurisdiction: Terminating Court-Martial Jurisdiction

Not only is proper status essential at the time of the offense, it is also necessary at the time of trial. The accused must be subject to the UCMJ at the time of the court-martial.[55] If not, the military lacks personal jurisdiction to prosecute the accused. Generally, court-martial jurisdiction terminates upon discharge. Discharge occurs when there is: (1) delivery of a valid discharge certificate, (2) final accounting of pay, and (3) completion of a clearing process.[56] In *United States v. Guest*[57] and *Smith v. Vanderbush*,[58] the military appellate courts dealt with the question of when a valid discharge terminates court-martial jurisdiction.

Beyond the "Four Corners" of the Discharge Certificate

In *Guest*, the Army Court of Criminal Appeals considered the commander's intent in determining a valid discharge. Prior to entering a terminal leave status, Specialist Guest received a courtesy copy of his discharge certificate, cleared the Army, and arranged for his final accounting of pay.[59] While on permissive leave, but prior to his expiration of term of service (ETS), Guest's command attempted to recall him because of discovered misconduct.[60] Guest ignored the recall. He eventually was apprehended, but not until after his ETS.[61] Upon return to military control, Guest was convicted of drug use and other crimes.[62] At trial and on appeal, Guest challenged jurisdiction, arguing that he was discharged prior to the date of trial, and therefore, at the time of trial, he was not subject to the UCMJ.[63] Specifically, Guest reasoned that on the date of his ETS, he possessed a discharge certificate, had undergone a clearing process, and had made arrangements for his final accounting of pay. He argued that he was, therefore, properly discharged on the date of his ETS.[64]

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51. United States v. Reid, 43 M.J. 906, 910 (Army Ct. Crim. App. 1996). Article 2(a)(1) provides jurisdiction over members of the regular component, including those who are awaiting a discharge after the expiration of their terms of service. UCMJ art. 2(a)(1) (West 1995).

52. UCMJ art. 3(b).

53. *See* Senate Comm. on Armed Services, Establishing a Uniform Code of Military Justice, S. Rep. No. 486, at 8 (1949), *reprinted in* Index and Legislative History: Uniform Code of Military Justice 1950, at 1236 (1950) ("Subdivision (b) . . . provides that a person who obtains a fraudulent discharge is not subject to this code for offenses committed during the period between the date of the fraudulent discharge and subsequent apprehension for trial by military authorities.").

54. *Reid*, 43 M.J. at 910. *See also supra* note 51 and accompanying text.

55. *See* MCM, *supra* note 2, R.C.M. 202(a).

56. *See id.* R.C.M. 202(a) discussion. *See also* United States v. Batchelder, 41 M.J. 337 (1994); United States v. Howard, 20 M.J. 353 (C.M.A. 1985); United States v. Scott, 29 C.M.R. 462 (C.M.A. 1960); United States v. King, 37 M.J. 520 (A.C.M.R. 1993).

57. 46 M.J. 778 (Army Ct. Crim. App. 1997).

58. 47 M.J. 56 (1997).

59. *Guest*, 46 M.J. at 779.

60. *Id.* at 780. Guest was suspected of drug use and distribution. He was administratively flagged by his command (his personnel records were annotated to reflect suspension of favorable personnel actions), and his commander directed him to report to his first sergeant for further instructions. Instead of reporting to the first sergeant as directed, Guest absented himself from his unit.

61. *Id.* The accused's effective date of discharge was 20 January 1995, but he was not apprehended until 15 March 1995.

62. *Id.* at 779. Specialist Guest was convicted by general court-martial of attempted murder, desertion terminated by apprehension, reckless driving, wrongful use of cocaine, endangering human life by discharging a firearm, carrying a concealed weapon, and communicating a threat.

63. *Id.*

The Army court determined that Guest was not discharged.[65] In reaching this conclusion, the court looked to the intent of the commander (the separation authority). Guest's commander did not intend the courtesy copy of Guest's discharge certificate to serve as an official discharge certificate;[66] hence, the command did not deliver to Guest a *valid* discharge certificate. The court's consideration of intent, a factor outside of the "four corners" of the discharge certificate, is an influential element to consider when faced with a valid discharge issue.[67]

Whose intent is relevant? It seems that only the commander's[68] intent would be pertinent. After all, a discharge is a unilateral action on the part of the government. The commander produces the discharge certificate and permits the final accounting of pay and the clearing process. If the commander fails to complete this process on time (in other words, on the scheduled ETS date), regardless of the service member's intent, the service member remains subject to the UCMJ.[69] In a footnote, however, the Army court hints that the service member's intent has some relevance.[70] How much weight should be given to the accused's intent is unclear.

Guest provides counsel with additional ammunition either to challenge or to sustain a discharge. Government counsel should look to the commander's intent surrounding the discharge certificate. Defense counsel should consider the accused's understanding of the document. These factors, which are outside of the "four corners" of the discharge certificate, may be relevant when analyzing the validity of a discharge.

Post-Arraignment Discharge

Smith v. Vanderbush[71] is another recent case concerning the termination of court-martial jurisdiction. Sergeant Vanderbush was administratively assigned to the Eighth United States Army (EUSA), Korea, but he was operationally assigned to (performed his duties with) the 2d Infantry Division (2ID).[72] As Sergeant Vanderbush's ETS date (15 June 1996) approached, he committed misconduct in two distinct episodes, both of which involved disrespect, disorderly conduct, assault, provoking speech, and disobedience of orders.[73] As a result, the 2ID commander convened a court-martial. The accused was arraigned on 30 May 1996 (fifteen days before his ETS date), and trial was set for 26 June 1996.[74] Meanwhile, unaware of the pending court-martial, EUSA continued processing Sergeant Vanderbush for discharge from the Army.[75] On 15 June 1996, Sergeant Vanderbush, in possession of a valid discharge certificate and paperwork which memorialized his final accounting of pay, flew home.[76] In an Article 39(a) session[77] on 24 June, the defense moved to dismiss the charges due to a lack of personal jurisdiction. The military judge denied the motion,[78] and the defense filed a writ of extraordinary relief with the Army

64. *Id.*

65. *Id.* at 780.

66. *Id.*

67. *See generally* United States v. Batchelder, 41 M.J. 337 (1994) (observing that early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when the commander does not intend the discharge to take effect until later).

68. For purposes of this discussion, "commander" means the commander with the authority to separate the accused.

69. *See* MCM, *supra* note 2, R.C.M. 202 discussion; UCMJ art 2(a)(1) (West 1995); Smith v. Vanderbush, 47 M.J. 56, 57 (1997).

70. *Guest*, 46 M.J. at 780 n.3 ("We find that, because it was never intended to operate as the official certificate—and both the Army and the appellant so understood—it could never take effect. The intent of the parties is germane to the effect which such a certificate may have.").

71. 47 M.J. 56 (1997). In last year's jurisdiction symposium article, Major Amy Frisk artfully addressed the service court's opinion in *Vanderbush*. *See* Frisk, *supra* note 44, at 6.

72. Vanderbush v. Smith, 45 M.J. 590, 592 (Army Ct. Crim. App. 1996).

73. *Vanderbush*, 47 M.J. at 61 (Sullivan, J., dissenting).

74. *Id.* at 57.

75. *Id.*

76. *Id.*

77. UCMJ art. 39(a) (West 1995). An Article 39(a) session is a court session without the presence of the members for purposes of arraignment, receiving pleas and forum, hearing and ruling on motions, and performing any other procedural functions. The persons typically present are the accused, defense counsel, trial counsel, the court reporter, and the military judge.

78. *Vanderbush*, 47 M.J. at 57. The military judge denied the motion, finding that once charges were preferred, court-martial jurisdiction attached and the accused could not be discharged until lawful authority (the convening authority) took authorized action on the charges.

Court of Criminal Appeals.[79] Hearing the writ, the Army court dismissed the charges for lack of personal jurisdiction, finding that Sergeant Vanderbush received a valid discharge from the Army.[80]

The CAAF reviewed *Vanderbush* and, contrary to the visceral opinions of many,[81] affirmed the lower court's decision.[82] Specifically, the CAAF held that, even though the government arraigned the accused and court-martial jurisdiction attached, a valid administrative discharge terminated jurisdiction.[83]

The government urged the CAAF to apply the concept of continuing jurisdiction.[84] Once arraignment occurred, the government argued, court-martial jurisdiction attached, and the "issuance of an administrative discharge would not divest a court-martial of jurisdiction to try a civilian former member of the armed forces."[85] In rejecting this argument, the CAAF reasoned that there was no statutory authority that extended the concept of continuing jurisdiction to the trial.[86] Continuing jurisdiction only permits appellate review and execution of a sentence "in the case of someone who already was tried and convicted while in a status subject to the UCMJ."[87]

The government also argued that once court-martial jurisdiction attached, only the convening authority could issue an administrative discharge.[88] The CAAF rejected this position as well. From the evidence presented by the government, the court could not find any regulatory restriction which prohibited the administrative commander from discharging a soldier at his ETS, despite the attachment of court-martial jurisdiction.[89] Absent any regulatory restrictions, the administrative discharge was valid. Sergeant Vanderbush received a valid discharge certificate and completed a final accounting of pay and a clearing process. Further, there was no administrative flagging to indicate that the commander of EUSA did not intend to discharge Sergeant Vanderbush at his ETS.[90]

It is unlikely that military practitioners will frequently encounter the *Vanderbush* predicament. Regardless, there are some legitimate practice points to take away from this case. First, counsel should closely track the ETS dates of accuseds, and government counsel should ensure that proper administrative action is taken to avoid an inadvertent ETS discharge. Second, similar to what the Army court recognized in *Guest*, counsel should consider the intent of the commander as a significant factor when advocating or challenging a discharge. Third, counsel should consider alternative theories of prosecution, such as fraudulent discharge. Interestingly, however, the CAAF gratuitously suggests that the Army provide "regulatory procedures to ensure that no official other than a convening authority (or other designated official) [is] empowered to issue an administrative discharge to an accused after arraignment."[91]

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79. *Id.* This case was heard by the Army Court of Criminal Appeals in response to the petitioner's petition for extraordinary relief in the nature of a writ of prohibition, asking the court to dismiss for lack of jurisdiction the charges that were referred to a special court-martial.

80. Vanderbush v. Smith, 45 M.J. 590, 598 (Army Ct. Crim. App. 1996).

81. *Vanderbush*, 47 M.J. at 61 (Sullivan, J., dissenting). In his dissent, Judge Sullivan clearly displays his frustration with the majority's judgment. He states:

> It appears Todd Vanderbush viewed the Army as a huge bureaucracy with a gavel in one hand (his court-martial) and a discharge stamp (his freedom) in the other hand. Vanderbush . . . merely became the master of his fate and decided to outprocess himself with the discharge stamp hand of the Army.

Id. In the author's own experience, many people are disturbed with the result in *Vanderbush.* When I explain the CAAF's holding to various audiences, there is often a murmur from the crowd. Students frequently express their dissatisfaction, usually not with the court's legal analysis, but with the outcome.

82. *Id.*

83. *Id.*

84. *Id.* at 59 (arguing that the concept of continuing jurisdiction allows the government to exercise court-martial jurisdiction over an accused even though the accused is a civilian former member of the armed forces). Historically, this concept only applied to execution of a sentence or completion of appellate review.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 60. The government's argument was based on its interpretation of provisions in *Army Regulation* (*AR*) *600-8-2*. The government did not cite to the provisions of *AR 635-200*, as it had in its arguments before the Army court. There is an apparent discrepancy between *AR 600-8-2* and *AR 635-200* over the proper timing of the general court-martial covening authority's approval to extend the accused beyond his ETS. *See* Frisk, *supra* note 44, at 9 n.43.

89. *Vanderbush*, 47 M.J. at 60.

90. *Id.* at 61.

91. *Id.* at 58.

All services should heed of the lessons learned in Vanderbush and review discharge regulations to avoid a similar problem.

Jurisdictional Issues at the Court-Martial

In addition to deciding exciting subject matter and personal jurisdiction issues, the military courts have answered jurisdictional questions which relate to properly convened and composed courts-martial. In *United States v. Turner*,[92] the CAAF held that an accused's request for trial by military judge alone can be inferred from the record.[93]

At trial, Chief Warrant Officer Turner's defense counsel made a written and oral request for trial by military judge alone.[94] The accused did not, on the record, *personally* request or object to trial by military judge, as required by Article 16.[95] On appeal, the defense challenged jurisdiction, arguing that the court-martial was not properly convened because the accused did not personally request to be tried by military judge alone.[96] The Navy-Marine Corps court agreed. Relying on the language of Article 16,[97] the service court held that "failure of the accused personally to make a forum choice was a fatal jurisdictional defect and reversed" the conviction.[98]

The CAAF overturned the Navy-Marine Corps court's decision and found substantial compliance with Article 16. The CAAF's finding, however, is based on the record of trial as a whole and is limited to the facts of the case.[99] The CAAF ~~clearly found a violation of Article 16, but th~~e court determined that, since there was substantial compliance, any error committed "did not materially prejudice the substantial rights of the accused."[100]

In *United States v. Sargent*,[101] another case pertaining to court-martial composition, the CAAF held that an unexplained absence of a detailed court member did not create a jurisdictional defect.[102] In *Sargent,* before a military judge alone, the accused was found guilty of committing larceny and wrongful appropriation. The accused, however, requested members for sentencing. When the court-martial convened for sentencing, one of the members was absent. Neither the trial counsel nor defense counsel raised the issue at trial. The members who were present were empanelled, heard the evidence, and sentenced the accused.[103]

On appeal, the defense argued defective jurisdiction. Relying on Rule for Courts-Martial 805,[104] the defense maintained that the unexplained absence of a detailed court-martial member constituted defective jurisdiction.[105] The CAAF disagreed. The court held that "the absence of four members detailed to a ten-member general court-martial did not constitute jurisdictional error."[106] So long as the number of members does not fall below the required quorum,[107] a court-martial can lawfully proceed. If members are missing and quorum is not broken, the appellate courts will test for prejudice.[108] Based on the facts in *Sargent,* there was no substantial prejudice to the accused.[109]

Military practitioners should not interpret *Turner* and *Sargent* as an invitation to ignore courts-martial procedures. In both cases, the CAAF resolutely declared that error occurred.

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92. 47 M.J. 348 (1997). For a learned discussion of the facts and other issues raised in *Turner*, refer to Major Gregory Coe's article in this issue discussing pretrial and trial procedures. *See* Major Gregory B. Coe, "*Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, Army Law., Apr. 1998, at 44.

93. *Turner*, 47 M.J. at 349.

94. *Id. See infra* note 100 and accompanying text.

95. UCMJ art. 16 (West 1995). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special court-martial. *Id.* In pertinent part, Article 16(1)(B) provides for trial by "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves." *Id*.

96. *Turner*, 47 M.J. at 348. *See* United States v. Turner, 45 M.J. 531 (N.M. Ct. Crim. App. 1996). Relying on the plain language of UCMJ Article 16, the service court determined that the accused must personally elect to be tried by military judge alone. Failure to personally make such a request is not a "meaningless ritual"; rather, "it is the only way for the military judge sitting alone to obtain jurisdiction." *Id.* at 534.

97. UCMJ art. 16. *See also supra* note 95 and accompanying text.

98. *Turner*, 47 M.J. at 349.

99. *Id.* at 350.

100. *Id*. On the record, Turner's defense counsel stated that Turner wanted to be tried by military judge alone. Turner's defense counsel also submitted a written request for trial by judge alone. Finally, when the military judge informed Turner of his forum rights, Turner indicated for the record that he understood his right to be tried by military judge alone. *Id*.

101. 47 M.J. 367 (1997).

102. *Id.* at 369.

103. *Id.*

Based on the circumstances particular to the cases, however, the errors were not jurisdictional or prejudicial. Military practitioners should heed these opinions and ensure that the jurisdictional requirements relevant to courts-martial composition are followed.

Conclusion

In reviewing this year's cases, it is evident that without jurisdiction the government is powerless to prosecute. The *Vanderbush* case makes this point abundantly clear. In addition to highlighting the importance of jurisdiction, the military courts resurrect issues that some may argue are settled. For example, in the area of subject matter jurisdiction, with *Curtis* and *Simoy*, the courts give credence to a service connection requirement for capital cases. This year's cases also plant the seeds for creative arguments about when a discharge is effective. Still unanswered, unfortunately, is the jurisdictional gap associated with post-fraudulent discharge offenses. This year's cases left military practitioners with armament and ammunition to employ when facing jurisdictional issues. Next year's cases will hopefully answer the unresolved issues.

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104. MCM, *supra* note 2, R.C.M. 805(b). R.C.M. 805(b) states:

> *Members*. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505 or 912(f); or as otherwise provided in R.C.M. 1102. No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present and, except as provided in R.C.M. 912(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least 3 members are present. Except as provided in R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

105. *Sargent*, 47 M.J. at 368.

106. *Id.*

107. The required quorum for a general court-martial is five, and the quorum for a special court-martial is three. UCMJ art. 16 (West 1995).

108. *See* UCMJ art. 59(a). Article 59(a) states: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

109. *Sargent*, 47 M.J. at 369.

Re-interpreting the Rules: Recent Developments in Speedy Trial and Pretrial Restraint

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Introduction

During the 1997 term, both the Court of Appeals for the Armed Forces (CAAF) and the service level courts issued significant decisions regarding the rules and laws that govern speedy trial and pretrial restraint.

Speedy Trial

With respect to speedy trial, the CAAF, joined by the Navy-Marine Corps Court of Criminal Appeals, continued to chip away the strict procedural requirements of the 120-day speedy trial rule promulgated by the President under Rule for Courts-Martial (R.C.M.) 707.[1]

Following closely on the heels of last year's groundbreaking decision in *United States v. Dies*,[2] the CAAF created another exception to R.C.M. 707's requirement that pretrial delays must be contemporaneously approved by competent authority. In *United States v. Thompson*,[3] the CAAF held that the special court-martial convening authority's (SPCMCA's) approval of two delays, after-the-fact, were not chargeable to the government because the delays were initiated by the *defense.* The CAAF was unwilling to grant the accused windfall speedy trial relief when the delay was granted at the behest of the defense. The Navy court reached a similar conclusion in *United States v. Anderson.*[4] The court concluded that a ninety-eight-day delay was properly excluded[5] when the special court-martial convening authority withdrew the charges in response to a *defense request* for delay pending discovery.

The Navy court also addressed two cases alleging government subterfuge to avoid the expiration of the 120-day speedy trial clock. In *United States v. Ruffin*,[6] the court held that preferral of charges one day after the accused was released from sixty days of restriction was not a subterfuge to avoid a speedy trial. In the later case of *United States v. Robinson,*[7] however, the same court concluded that the government's dismissal of charges on day 115 and re-preferral of essentially identical charges one week later *was* a subterfuge.

Pretrial Restraint

The CAAF issued two significant opinions regarding administrative credit for illegal pretrial punishment. In *United States v. Combs*,[8] the CAAF found that the government's refusal to permit the accused to wear his technical sergeant rank (E-6) pending the government's appeal of an adverse opinion from the Air Force Court of Criminal Appeals rose to the level of illegal pretrial punishment. The CAAF awarded the accused day-for-day credit for the twenty months he served as an E-1 pending the government appeal. In *United States v. McCarthy*,[9] the CAAF attempted to explain the applicable standard of review for appellate courts when reviewing allegations of illegal pretrial punishment. Unfortunately, the majority opinion does not provide as much clarity as desired.

The Army Court of Criminal Appeals issued an important opinion that explains the difference between sentence credit for illegal confinement and sentence credit for illegal pretrial

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1995) [hereinafter MCM].

2. 45 M.J. 376 (1996).

3. 46 M.J. 472 (1997).

4. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

5. *See* MCM, *supra* note 1, R.C.M. 707(d). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule [120-day clock] has run." *Id*.

6. 46 M.J. 657 (N.M. Ct. Crim. App. 1997).

7. 47 M.J. 506 (N.M. Ct. Crim. App. 1997).

8. 47 M.J. 332 (1997).

9. 47 M.J. 162 (1997).

punishment. In *Coyle v. Commander, 21st Theater Army Area Command*,[10] the Army court clarified the rule that credit for illegal pretrial *confinement* is to be awarded against the *approved* sentence. Credit for illegal pretrial *punishment*, on the other hand, is to be assessed against the *adjudged* sentence. Under certain conditions, such pretrial punishment may also be assessed against the *approved* sentence.

Speedy Trial and the Slippery Slope of R.C.M. 707

Rule for Courts-Martial 707 was amended in 1991 with the specific intent to "provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable."[11] The thrust of the rule change was to require counsel to secure approval of delays by competent authority at the time of the desired delay.[12] The paramount goal was to reform the previous practice of excluding "time periods covered by certain exceptions."[13]

In *United States v. Dies*,[14] the CAAF re-opened a door that had long been thought to be closed by the President's 1991 revision to R.C.M. 707.[15] The CAAF concluded that R.C.M. 707(c) was not an exclusive list of excludable time periods for the 120-day speedy trial rule.

Dies marked a return to the pre-1991 practice of categorically excluding certain time periods and a rejection of the President's rule requiring contemporaneous approval of delays. Although the equities in *Dies* support the conclusion,[16] the court's rationale opened the door to the possibility of other exceptions to what previously had been a clear procedural rule of military justice. It did not take long for the CAAF to find itself confronted with another case involving similar equitable circumstances favoring the government.

In *United States v. Thompson*,[17] the SPCMCA denied the defense request to delay the Article 32[18] investigation so that the accused could retain civilian counsel. Unbeknownst to the convening authority, the defense renewed its request before the Article 32 investigating officer, who granted the defense two delays during the course of the investigation. Prior to forwarding the charges to the general court-martial convening authority, the trial counsel informed the SPCMCA of the delays and advised him to approve the delays after-the-fact. The accused was ultimately arraigned on day 130.[19]

At trial, Thompson claimed that he was denied the right to a speedy trial under R.C.M. 707, because the Article 32 investigating officer was not authorized to exclude delays for speedy trial purposes, and that the convening authority could not exclude such time after the fact.[20] The military judge denied the motion, concluding that "the investigating officer was a

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10. 47 M.J. 626 (Army Ct. Crim. App. 1997).

11. MCM, *supra* note 1, R.C.M. 707 analysis, app. 21, at A21-40. In *United States v. Dies,* the CAAF recounted how, under the former R.C.M. 707, speedy trial motions often degenerated into "pathetic sideshows of claims and counter-claims, accusations and counter-accusations . . . as to who was responsible for this minute of delay . . . over the preceding months." United States v. Dies, 45 M.J. at 376 (1996).

12. *See* MCM, *supra* note 1, R.C.M. 707(e)(1). The convening authority approves delays after preferral; the military judge approves delays after referral.

13. *Id*. R.C.M. 707(c) analysis, app. 21, A21-41 (stating that "this section follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay").

14. 45 M.J. 376 (1996). In *Dies,* the government failed to secure an approved delay from the convening authority during the accused's 23-day AWOL. The defense argued that, under the strict provisions of R.C.M. 707, these 23 days were not excludable for purposes of calculating the 120-day limit for speedy trial. The CAAF disagreed, stating that the accused was "estopped" from asserting the right to a speedy trial and that R.C.M. 707(c) was not an exhaustive list of excludable delays. *See* Major Amy Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 14. In her article, Major Frisk posed this insightful question:

> The question for practitioners is whether, based on *Dies,* there are other periods of time that are also automatically excluded from government accountability. Although the court characterized its holding in *Dies* as "limited," it clearly opened the door to the creation of additional categories of "excludable delays" where the same equitable arguments apply on behalf of the government.

Id. at 17.

15. MCM, *supra* note 1, R.C.M. 707.

16. In *Dies*, the accused's own 23-day AWOL caused the delay on which the accused based his motion at trial that he was denied his right to a speedy trial. *Dies*, 45 M.J. 376.

17. 46 M.J. 472 (1997).

18. UCMJ art. 32 (West 1995).

19. *Thompson*, 46 M.J. at 473.

20. *Id.*

quasi-judicial officer with inherent power to grant such requests, and that, in any event, it would be unfair under these circumstances to hold the government accountable for delays that occurred solely at the request of the defense."[21]

On appeal, the Navy-Marine Corps Court of Criminal Appeals strictly construed R.C.M. 707(c)'s provisions regarding excludable delays. While recognizing that investigating officers are quasi-judicial officers, the Navy court found "no explicit or inherent authority in that officer to exclude delays from the speedy-trial clock."[22] The court also rejected the SPCMCA's after-the-fact approval of the delays, highlighting how "the entire thrust of R.C.M. 707(c) is that exclusion decisions are to be made before the delay occurs."[23]

In an opinion strikingly similar to *Dies*, the CAAF reversed the Navy court on both legal and equitable grounds. While acknowledging that "advance approval by the convening authority may be desirable," the court concluded that "the text of R.C.M. 707(c) does not require specifically that the delay be approved in advance in order for it to be excluded from the Government's accountability."[24] Any doubts regarding the court's view of the President's intent to require contemporaneous approval of delays were eliminated by its concluding remark: "the rule as it has existed since 1991 does not preclude after-the-fact approval of a delay by a convening authority that otherwise meets good cause and reasonableness-in-length standards."[25]

The CAAF's liberal interpretation of R.C.M. 707(c) was not the only justification offered for its conclusion in *Thompson*. Equitable considerations also played a major role. Based on the court's de novo review, the CAAF listed several factors which supported the trial judge's original decision to deny the speedy trial motion. Among those factors were: (1) both delays were requested by and for the direct benefit of the defense;[26] (2) no delays were the result of acts or omissions by the government; (3) this was not an after-the-fact delay—the SPCMCA's acts simply ratified an otherwise timely approved delay by the investigating officer; (4) since it was approved prior to referral, the delay and exclusion were approved while the SPCMCA still controlled the case; and (5) the facts were well documented and presented to the military judge for him to evaluate the good cause and reasonableness-in-length standards.[27] Chief Judge Cox authored a concurring opinion to emphasize his view that the two most important factors were that "the defense requested the delays and the convening authority ratified the investigating officer's decision to grant them."[28]

While two cases do not necessarily establish a trend, the results in *Dies* and *Thompson* come close. The results in these two cases—one a case relying primarily on the fact that the *defense initiated the delays*[29] and the other based upon *defense* related misconduct (AWOL)—demonstrate the CAAF's determined resistance to grant an accused a speedy trial windfall. In the wake of *Dies* and *Thompson*, the government stands a strong chance of overcoming the duty to obtain a contemporaneous delay from an appropriate authority in those cases where delays can be attributed to the conduct of the defense. Trial counsel should not, however, view *Dies* and *Thompson* as a green light to violate carelessly or willfully the provisions of R.C.M. 707 whenever the defense requests a delay. The CAAF issued a stern caution to the government that since such post hoc requests "likely will be viewed with considerable skepticism if it appears to be a rationalization for neglect or willful delay, the Government runs substantial risk by seeking approval from a convening authority only after a delay has occurred."[30]

Although the CAAF's equitable interest in preventing a significant windfall lends support to these two decisions, it does not justify them. The drafters of revised R.C.M. 707 recognized that the new rule might lead to an unfair advantage for the accused. To ensure that such a windfall to an accused was not excessive, the drafters included the intermediate remedy of dismissal without prejudice.[31] Consequently, to the extent that *Dies* and *Thompson* reflect a desire to avoid granting an excess benefit to an accused, the CAAF fails to account for

21. *Id.* at 474.

22. United States v. Thompson, 44 M.J. 598, 602 (N.M. Ct. Crim. App. 1996).

23. *Id.* (finding that "[b]ecause the investigating officer had no power to exclude delay and because the appointing authority's attempt to exclude delay retroactively was ineffective . . . the delay was not excluded from the speedy trial clock").

24. *Thompson*, 46 M.J. at 475.

25. *Id.* at 476. In light of the majority's rationale for reversing the Navy court, the CAAF did not address the certified issue of whether an Article 32 investigating officer has "the inherent power to exclude delay for speedy trial purposes under R.C.M. 707." *Id.*

26. *Id.* The court further noted: "[w]e see no reason to grant the defense a windfall from a claimed violation of R.C.M. 707 that the defense itself occasioned." *Id.*

27. *Id.*

28. *Id.* at 476.

29. *Id.* The fact that the defense requested the delay was also the first factor cited by the four judges in the lead opinion.

30. *Id.* at 475.

the intermediate remedy provided under the revised rule. Perhaps the CAAF's characterization of this intermediate remedy as "ephemeral"[32] reflects an unspoken critical attitude toward the existing speedy trial provisions of revised R.C.M. 707. After reading *Dies* and *Thompson*, one cannot help but get the impression that the CAAF sees little value in respecting the strict provisions of R.C.M. 707 when the remedy is perceived to be of so little, if any, benefit to the accused.

It did not take long for the CAAF's view of R.C.M. 707 to trickle down to the service courts. In *United States v. Anderson*,[33] the accused was charged with rape and indecent assault. At the Article 32 investigation, the defense renewed its previous request for a continuance in the proceedings until the government provided to the defense the results of a sex crime kit.[34] Shortly after receiving the request, the SPCMCA withdrew the charges "in the interests of justice, to honor [the defense] request for evidence . . . and to avoid any prejudice to the accused . . . ."[35] During the three months it took to process the sex crime kit, the defense twice demanded a speedy trial and raised the issue again with a speedy trial motion before the military judge. The military judge denied the motion,[36] concluding that the two demands for speedy trial did not negate the original defense request to delay the proceedings until provided with the results of the sex crime kit. Consequently, there was no violation of R.C.M. 707 because the defense was "accountable" for ninety-eight days of delay prompted by their initial request for a continuance.[37]

After a lengthy review of the facts, the Navy-Marine Corps Court of Criminal Appeals found that the SPCMCA's withdrawal of charges was excludable delay for R.C.M. 707 speedy trial purposes.[38] It was clear to the Navy court that the convening authority "approved—in fact ordered—a delay by withdrawing the charges to await possible exculpatory evidence *requested by the defense*."[39] Playing both ends against the middle, the Navy court emphasized that its holding was not based solely on the fact that the defense requested the delay.[40] The court also cited a prior Air Force case, *United States v. Nichols*,[41] which held that excludable delays under R.C.M. 707 are not limited to only those delays requested by parties to a trial. In *Nichols*, the Air Force court held that "there need not be a request for a delay from either the accused or the government before a delay is excludable under R.C.M. 707(c); the military judge or convening authority may approve a delay on his or her own initiative."[42]

The Navy court's reference to *Nichols* is important because it offers a fall-back position to the court's conclusion that the two subsequent defense demands for speedy trial did not negate the original defense request for delay to obtain the results of the sex crime kit. The fact that the convening authority withdrew the charges partly "in the interests of justice . . . and to avoid any prejudice to the accused,"[43] and not solely because the defense requested the delay, indicates that the convening authority had an independent justification for delaying the proceedings on his own initiative.[44] Although the withdrawal/delay in *Anderson* is more easily defensible as a contemporaneous delay approved

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31. R.C.M. 707(d) includes the provision that "dismissal will be with or without prejudice to the government's right to re-institute court martial proceedings against the accused for the same offense at a later date." MCM, *supra* note 1, R.C.M. 707(d).

32. *Thompson*, 46 M.J. at 476.

33. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

34. *Id.* at 542.

35. *Id.* at 543.

36. *Id.* at 545. The military judge made specific findings of fact that the accused was not denied his right to a speedy trial under R.C.M. 707 or the Sixth Amendment.

37. *Id.* The Navy court criticized the trial judge for "attributing" delay to one side or the other, noting that under the current rule the "military judge only need determine what is excludable delay—without attribution—because *even* Government delay can be excluded from the 120-day count." *Id.* at 545 n.4.

38. *Id.* at 546. The court declined to review whether the SPCMCA "meant 'dismissal' when he said 'withdrawal' . . . of charges." *Id.*

39. *Id.* at 546 (emphasis in original).

40. For if it did, the court would have had to respond more fully to the argument that the two subsequent defense demands for speedy trial negated its earlier request for delay.

41. 42 M.J. 715 (A.F. Ct. Crim. App. 1995).

42. *Id.* at 720-21.

43. *Anderson*, 46 M.J. at 543.

44. It is not difficult to imagine circumstances where both the government and defense were eager to proceed to trial, but the convening authority, based on a review of the facts, wanted to obtain additional evidence (such as a sex crime kit or DNA evidence) before proceeding to trial. Since commanders control the military justice system, the rules should permit them to make independent determinations regarding the need for delay absent specific requests from attorneys involved in the system.

by proper authority under R.C.M. 707, rather than a delay independently initiated by the convening authority, the Navy court's decision nevertheless reflects further willingness to liberally interpret R.C.M. 707 as necessary to avoid granting a windfall to the accused.

The emerging pattern established by *Dies*, *Thompson*, and *Anderson* reflects a fading interest in protecting the right of an accused to a speedy trial, at least with respect to the accused's right under the 120-day rule of R.C.M. 707. Judge Wynne expressed similar thoughts in his concurring opinion in *Anderson*. Judge Wynne concluded that the court had no duty to review the accused's alleged speedy trial error because the accused had not been denied a "substantial right."[45] Article 59 of the UCMJ states that the findings or sentence of a court-martial "may not be held incorrect . . . unless the error materially prejudices the substantial rights of the accused."[46] While Judge Wynne believed that dismissal of charges *with prejudice* to be a substantial right worthy of review, he believed that R.C.M. 707's lesser remedy of dismissal *without prejudice* was not.[47]

Both trial and defense counsel can take lessons from this series of cases. Defense counsel can no longer rely on the government's failure to comply with R.C.M. 707(d) to carry the day in a speedy trial motion. Trial counsel, perhaps tempted by these decisions to ignore their obligations under the rule, should do so with an understanding that they will be viewed with "great skepticism by the appellate courts."[48] On the positive side, government counsel facing motions alleging violations of R.C.M. 707's 120-day speedy trial rule can now refer the military judge to three cases that adopt a liberal interpretation of R.C.M. 707 in favor of the government.

Was That a Subterfuge?

In 1997, the Navy-Marine Corps Court of Criminal Appeals reviewed two cases of first impression involving allegations of government subterfuge. In *United States v. Ruffin*,[49] a closely divided Navy court concluded that the government did not have to wait a "significant period" of time to prefer charges after the accused was released from pretrial restriction in order to restart the R.C.M. 707 speedy trial clock. In *United States v. Robinson*,[50] however, the government's dismissal of charges on day 115, and re-preferral five days later, was closely scrutinized by the Navy court and was found to be a subterfuge.

In *Ruffin*, the accused was restricted for sixty-seven days prior to preferral of charges. The day after his restriction was lifted, the government preferred charges. Restriction was not reimposed. The accused was ultimately arraigned within 120 days of preferral, but not within 120 days of his original restriction. At trial, the accused alleged that his right to a speedy trial under R.C.M. 707 had been denied. He argued that the speedy trial clock should not have been reset when he was released from restriction, because he was not released for a "significant period"[51] before charges were preferred.

45. *Anderson*, 46 M.J. at 547 (Wynne, J., concurring).

46. UCMJ art. 59 (West 1995).

47. *Anderson*, 46 M.J. at 547. Judge Wynne's frustration over the futile remedial provisions of R.C.M. 707 is evident from his additional observation that:

> Dismissal without prejudice under R.C.M. 707 remedies the denial of a speedy trial by further delaying the trial, or prejudices the government's case when new proceedings are otherwise barred. When we attempt to retroactively dismiss charges or specifications without prejudice, we choose the oxymoron to which our phrases will be added. "Where the circumstances of delays [in trial] are not excusable . . . it is not remedy to compound the delay by starting all over."

Id. (citation omitted). Nevertheless, Judge Wynne encourages all trial judges and convening authorities to comply with the provisions of R.C.M. 707 just as they do with hundreds of other provisions in the *Manual for Courts-Martial*. *Id.* at 548.

48. United States v. Thompson, 46 M.J. 472, 475 (1997).

49. 47 M.J. 506 (N.M. Ct. Crim. App. 1997).

50. 46 M.J. 657 (N.M. Ct. Crim. App. 1997).

51. *See* MCM, *supra* note 1, R.C.M. 707(a). The rule provides, in pertinent part:

> (a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:
> (1) Preferral of charges; [or]
> (2) The imposition of restraint under R.C.M. 304(a)(2)-(4) [restraint , arrest, pretrial confinement] . . . .

See also id. R.C.M. 707(b)(3)(B). The rule specifies:

> (B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of:
> (i) the date of preferral of charges; [or]
> (ii) the date on which restraint under R.C.M. 304(a)(2)-(4) is reimposed . . . .

Both the trial judge and a split Navy court disagreed with Ruffin's argument. Relying heavily on the drafters' analysis of R.C.M. 707(b)(3)(B), the majority concluded that the requirement that an accused must be released from pretrial restraint for a "significant period" in order to restart the 120-day clock was only intended to apply to instances in which restraint is reimposed.[52] This conclusion is supported by the drafters' analysis of the related situation when charges are preferred while the accused is under restraint. Under these circumstances, if the accused is later released from restraint (and restraint is not reimposed), the speedy trial clock is reset to the day of preferral.[53] Final justification for the majority's interpretation is that it was consistent with achieving the dual policy goals of minimizing pretrial restraint and promoting speedy trial. In the instant case, the accused was restricted only for a short portion of the overall pretrial processing time. Moreover, permitting the government to prefer charges immediately after release from restraint avoids the undesirable result of further slowing the process by forcing the government to wait a "significant period" before preferring.[54]

In his dissenting opinion, Judge Lucas argued that the accused had jumped from the proverbial kettle of pretrial restriction to the fire of preferred charges.[55] Judge Lucas wrote in his opinion that both events were significant enough to trigger the speedy trial clock.[56] Since the accused was continuously under conditions that independently triggered the speedy-trial clock, Judge Lucas concluded that "there should be no interruption of the obligation of the government to continue to proceed to trial within [120 days]."[57]

Though Judge Lucas' reasoning did not carry the majority in *Ruffin,* his views did prevail in *United States v. Robinson.*[58] In *Robinson*, charges of indecent assault were dismissed on day 120.[59] Five days later, with no significant change to the legal status of the accused,[60] essentially identical charges were preferred. Despite a defense demand for speedy trial, the accused was not arraigned on the re-preferred charges until day 114. In response to Robinson's speedy trial motion, the government claimed that the convening authority's unfettered discretion to dismiss charges was not subject to judicial review.[61] The government relied on the plain language of R.C.M. 707(b)(3)(A)(i) to support its position that dismissal and re-preferral of charges starts a new 120-day clock.[62] The accused countered that the dismissal was a subterfuge solely to avoid the 120-day clock and that the dismissal was, therefore, subject to review by the court.[63]

Though ultimately in agreement with the government's assertion that a convening authority has unfettered discretion to dismiss charges, the Navy court held that "[u]nder the unique circumstances of this case,"[64] the speedy trial clock was not reset by dismissal on day 120. The court found that the

52. *Ruffin*, 46 M.J. at 659. "Subsection (3)(B) clarifies the intent of this portion of the rule. The harm to be avoided is continuous pretrial restraint." *Id*. *See* MCM, *supra* note 1, R.C.M. 707 analysis, app. 21, at 21-41. The court also relied on prior case law to support its holding, citing Chief Judge Everett's concurring opinion in *United States v. Gray*, 26 M.J. 16, 22 (C.M.A. 1988). In *Gray*, Chief Judge Everett noted that the "primary reason for the 'significant period' requirement in the rule is to preclude short, sham releases from restraint for 'a few hours or a day,' in order to stop the speedy-trial clock and obtain a zero restart of the clock on re-imposition of restraint." 26 M.J. at 22.

53. *Ruffin*, 46 M.J. at 660. Take the example where the accused is restricted on day 1, and charges are preferred on day 10; if restriction is lifted on day 20 for a "significant period," the 120-day speedy trial clock is reset to begin on day 10, when charges were preferred.

54. *Id.* at 662.

55. *Id.* at 665.

56. *Id. See* MCM, *supra* note 1, R.C.M. 707(a)(1) and (2).

57. *Ruffin*, 46 M.J. at 665. Judge Lucas feared that the majority's interpretation would permit commanders to release an accused from restraint on day 119 and prefer charges anew on day 120, thereby doubling the time they could take to get to trial.

58. 46 M.J. 506 (N.M. Ct. Crim. App. 1997).

59. *Id*. at 508. Both parties agreed that five of the 120 days were excludable under R.C.M. 707(c), thus making it day 115 for speedy trial purposes. The government claimed that the dismissal was due to "new" evidence that they were unable to discover at an earlier date. The majority disagreed with this justification for dismissal.

60. *Id.* at 510. Even after dismissal, the accused remained under suspended transfer orders, was on legal hold, was prohibited from working in his area of expertise, and was restricted in his ability to take leave.

61. *Id. See* MCM, *supra* note 1, R.C.M. 306 (c)(1), 401(c), 707(b)(3)(A).

62. *Robinson*, 46 M.J. at 508-09. *See* MCM, *supra* note 1, R.C.M. 707(b)(3)(A)(i).

63. *Robinson*, 46 M.J. at 509.

64. *Id.* at 511. The unique facts in this case were: (1) dismissal on the 115th chargeable day was for the sole purpose of avoiding the 120-day rule; (2) the government repreferred essentially identical charges five days later; (3) there was no practical interruption in the pending charges; and (4) there was no real change in the legal status of the accused during those five days. *Id*.

dismissal was a subterfuge done solely to avoid the 120-day speedy trial clock and was legally ineffective in resetting the speedy-trial clock. The court observed:

> Were we to conclude that the dismissal action on day 120 did reset the clock, R.C.M.707(a) would become meaningless and the protection of R.C.M. 707 would effectively be eliminated . . . . To carry the Government's position to its logical extreme, there would be no R.C.M. 707 violation even if a convening authority were to repeatedly dismiss preferred but unreferred charges on day 119 of the speedy-trial clock just to reset the clock.[65]

Like Judge Wynne in his concurring opinion in *Anderson*,[66] Judge Paulson dissented on the ground that there was no prejudice to the "substantial rights" of the accused, since the remedy ordered by the majority was dismissal *without prejudice* to the government.[67] Judge Paulson also objected to the majority's willingness to create a judicial remedy that the drafters of R.C.M. 707 did not intend. Though it may seem unfair that convening authorities have virtually unbridled discretion to dismiss charges, Judge Paulson noted that the drafters of R.C.M. 707 could have easily fixed the problem, had they intended to do so, by requiring the convening authority to explain the rationale for dismissal of charges. In the absence of such a rule, Judge Paulson would defer to the absolute authority of convening authorities to dismiss charges, even when done with the intent to re-prefer at a later date.[68]

The outcomes in both *Ruffin* and *Robinson*, like the prior trilogy of excludable delay speedy trial cases, were based largely on the degree to which the Navy court was willing to honor the President's rule-making authority. In *Ruffin*, the split Navy court deferred to the President and refused to extend the government's obligation to wait a "significant period" beyond the specific instances listed in R.C.M. 707. In *Robinson,* a slightly different Navy court[69] exhibited less deference to the President's rules regarding a convening authority's discretion to dismiss and to re-prefer charges.

Balancing Interests in Speedy Trial Issues

These divergent results provide an excellent example of the unique dilemma facing military appellate courts. They frequently must balance their duty to safeguard justice and the individual rights of the accused against their duty to honor general principles of separation of powers that demand deference to Congress' delegation of its rule-making authority to the President. With respect to speedy trial issues arising under R.C.M. 707, the balance lies clearly with the former duty, as our appellate courts repeatedly exhibit less respect for the Rules for Courts-Martial promulgated by the President.

Sentence Credit for Illegal Pretrial Punishment

Only in the *twilight zone* of post-trial processing, government appeals, and sentence rehearings could military appellate courts conclude that an accused suffered illegal *pretrial* punishment for conduct occurring months after the trial was completed. But that is exactly what happened in *United States v. Combs.*[70] In 1990, Tech Sergeant Combs was convicted and sentenced to fifty years confinement for assaulting his three-year-old daughter and murdering his eighteen-month-old son. In 1992, the Air Force Court of Military Review set aside the murder conviction and the sentence and ordered a rehearing, if practicable. Combs was released from confinement when the government appealed the Air Force court's decision. Upon release from confinement, the accused was assigned as a casual to Lowry Air Force Base and was later transferred to the Charleston Navy Brig in Charleston, South Carolina. The CAAF eventually denied the government's appeal in 1994. A year later, Combs pleaded guilty to the murder of his son in return for a twenty-year sentence limitation.

Though he never raised the issue while on casual status or during his subsequent guilty plea, Combs later alleged on appeal that he had been subjected to illegal *pretrial punishment*

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65. *Id.* at 510. Due to the fact-specific nature of this case, the majority was quick to emphasize what they were *not* holding.

> We make no general holding . . . that a convening authority must always give a reason for dismissal . . . that a convening authority does not have absolute discretion to dismiss charges, or that dismissal of preferred but unreferred charges can never result in a resetting of the speedy-trial clock when there is no apparent change in the legal status of an accused.

Id. at 510-11.

66. *See supra* note 47 and accompanying text.

67. *Robinson*, 46 M.J. at 511 (Paulson, J., dissenting).

68. *Id.* at 513. *See* United States v. Bolado, 34 M.J. 732, 738 (N.M.C.M.R. 1991), *aff'd* 36 M.J. 2 (C.M.A. 1992) (where the unavailability of Navy criminal investigators deployed to Operation Desert Storm prompted the convening authority to dismiss charges with the intent to reprefer once the witnesses were available).

69. Judge Paulson replaced Judge Wynne on the court.

70. 47 M.J. 330 (1997).

between trials because he was forbidden to wear his technical sergeant rank during the twenty months he served on active duty while awaiting the results of the government appeal and rehearing. The Air Force court held that the accused was improperly denied his original rank of technical sergeant. Based on the accused's failure to voice a prompt complaint, however, and his silence on the subject at his rehearing, the court was convinced that the denial of his rank was not due to a punitive intent on behalf of the government, but rather on a lack of clear guidance as to his legal status while "trapped in the twilight of the court-martial process." The Air Force court denied the appellant's request for credit.[71]

The CAAF reversed the Air Force court's decision and found that the accused's unrebutted affidavit unequivocally established the government's punitive intent.[72] The CAAF rejected the government's argument that Article 13's[73] prohibition against pretrial punishment did not apply to an accused who is not in pretrial confinement at the time of his alleged mistreatment.[74] The CAAF also refused to invoke waiver against the accused. Citing the unique procedural history of the case, characterized by the Air Force court as being "trapped in the twilight of the court-martial process,"[75] the CAAF concluded that Combs' "legal status between trials was so unique that neither the Government nor appellant were fully aware of his legal rights."[76] The court awarded the accused administrative credit for twenty months of confinement.

Characterizing the case as "sandbagging at its worst,"[77] Judge Gierke dissented on the basis that waiver should apply. He also observed that, even if the accused was entitled to relief, it was limited to credit for eight, as opposed to twenty, months. The accused was reduced to the grade of E-1 by operation of law when the convening authority approved the original sentence to confinement. Citing recent case law for the proposition that service court decisions are not self-executing, Judge Gierke concluded that the Air Force court's opinion setting aside the sentence did not take effect until the CAAF affirmed it twelve months later.[78] Consequently, requiring the accused to serve in the grade of E-1 pending the government appeal was not punishment, but a correct application of the law for the initial twelve months.[79]

One of the principal lessons learned from *Combs* is that counsel must be conscious of waiver principles. Only the unique facts of this case prevented the CAAF from applying this doctrine. Practitioners should also note that Article 13's prohibition against pretrial punishment is not limited to instances of pretrial confinement. It applies to anyone "held for trial." Finally, counsel should be wary that what might appear to be simply minor adverse treatment of a soldier pending trial may rise to the level of illegal pretrial punishment if done with a punitive intent.

A Methodology for Determining Punitive Intent

How are courts to determine whether alleged improper pretrial treatment of an accused is done with an intent to punish? In *United States v. McCarthy*,[80] the CAAF shed light on the subject by explaining the procedure appellate courts should follow when reviewing such allegations.

Prior to his trial for committing indecent acts with a child and disobeying protective orders, McCarthy was placed in maximum security pretrial confinement. The first three days of McCarthy's three-week stay in maximum security pretrial confinement included an intense suicide watch. At trial, the accused was awarded three-for-one credit for the three days of suicide watch, but received only day-for-day *Allen*[81] credit for the remaining three weeks of maximum security confinement.[82]

Prior to the CAAF's grant of review in this case, a conflict existed between the Air Force and Army courts regarding the

71. *Id.* at 333 (citing the unpublished opinion of the Air Force Court of Criminal Appeals).

72. *Id.*

73. UCMJ art. 13 (West 1995).

74. *Combs*, 47 M.J. at 333. The CAAF cited *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987), to support its conclusion that UCMJ Article 13 protects anyone "held for trial." *Id.*

75. *Id.* at 332 (quoting the unpublished opinion of the Air Force Court of Criminal Appeals).

76. *Id.* at 334.

77. *Id.* at 336 (Gierke, J., dissenting).

78. *Id*. *See* United States v. Miller, 47 M.J. 352 (1997); United States v. Kraffa, 11 M.J. 453, 455 (C.M.A. 1981); United States v. Tanner, 3 M.J. 924, 926 (A.C.M.R. 1977).

79. *Combs*, 47 M.J. 332, 337 (Gierke, J., dissenting).

80. 47 M.J. 162 (1997).

81. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984). In *Allen*, the accused was awarded day-for-day credit for each day of pretrial confinement served.

proper standard of review for allegations of illegal pretrial punishment.[83] McCarthy urged the CAAF to adopt a de novo standard based on the Air Force decision in *United States v. Washington*.[84] The government supported the Army court standard applied in *United States v. Phillips*.[85] The CAAF resolved the split by concluding that the proper approach is a little bit of both, since the ultimate issue of unlawful pretrial punishment "presents a 'mixed question of law and fact' qualifying for independent review."[86] Some aspects are to be reviewed for an abuse of discretion, while others are to be reviewed de novo. Exactly which aspects are to be reviewed under which standard remains unclear from the majority's opinion.

Unlawful pretrial punishment can take two forms: (1) imposition of restraint with *intent* to punish and (2) unduly rigorous and excessive circumstances which justify a presumption that the accused is being punished.[87] With respect to the former, the CAAF concluded that issues of purpose and *intent* are classic questions of fact and that such "basic, primary, or historical facts . . . will [be] reverse[d] only for a clear abuse of discretion."[88] But, in its detailed analysis of the facts, the majority appears to have conducted a de novo review of these basic, primary, historical facts.[89] In the most confusing portion of its opinion, the CAAF found "no clear abuse of the military judge's discretion,"[90] implying an abuse of discretion standard of review. In the very same paragraph, however, the CAAF expressly applied the de novo standard of review: "Applying de novo Article 13's first prohibition [intent to punish] . . . we hold that there was no violation."[91] These conflicting yet interwoven standards of review add little clarity to what is admittedly a complex aspect of appellate practice.[92] The CAAF was a bit more precise with its conclusion that the second prohibition under Article 13 (unduly rigorous or excessive conditions) is reviewed for an abuse of discretion: "We hold that the judge did not abuse his discretion in finding that the classification was supported by reasonable and legitimate governmental interests."[93]

Judge Effron's dissenting opinion provides the clearest and most logical two-step appellate review of alleged intentional pretrial punishment. According to Judge Effron, the historical facts on which the military judge relies for his decision should be reviewed for an abuse of discretion. Under the second step of review, the trial judge's ultimate conclusion "as to whether such facts demonstrate an intent or purpose to punish" would be reviewed de novo, as are other questions of law.[94]

Give Credit Where Credit is Due

A question counsel frequently ask is whether sentence credit is applied against the *approved* sentence or the *adjudged* sentence.[95] The Army Court of Criminal Appeals addressed this issue pursuant to an extraordinary writ in *Coyle v. Commander*, *21st Theater Army Area Command*.[96] Coyle was

82. *McCarthy*, 47 M.J. at 165. The military judge's conclusion that the accused was not subjected to illegal pretrial punishment under Article 13 of the UCMJ was supported by detailed findings of fact based on the testimony of those who subjected the accused to pretrial confinement. *Id*.

83. *Id.* at 164.

84. 42 M.J. 547 (A.F. Ct. Crim. App. 1995).

85. 38 M.J. 641 (A.C.M.R. 1993), *aff'd*, 42 M.J. 346 (1995).

86. *McCarthy*, 47 M.J. at 165.

87. *Id.*

88. *Id.*

89. *Id.* at 167. The CAAF stated that it was "not prepared to hold, *as a matter of law* that the brig officials in this case violated the provisions of the *Manual*," and that they agreed with the military judge's finding "that the imposition of maximum custody . . . was 'supported by reasonable and legitimate governmental interest.'" *Id*. (emphasis added).

90. *Id.*

91. *Id.*

92. *Id.* at 168 (Effron, J., concurring). In his concurring opinion, Judge Effron best sums up the majority's opinion with the statement that "although the majority asserts it is applying an 'abuse of discretion' standard, the majority's detailed analysis of the historical events reflects a de novo review." *Id*.

93. *Id.* at 167.

94. *Id.* at 168 (Effron, J., dissenting).

95. In the former, the accused will always receive a tangible benefit; the same is not true in the latter. For example, assume that the accused in a case is awarded 30 days credit, the adjudged sentence includes twelve months confinement, and the convening authority approves ten months confinement. If the 30 days is awarded against the approved sentence, the accused would only have nine months left to serve. But if the 30 days credit is awarded against the 12 month sentence adjudged at trial, the accused would not benefit from the same 30 day reduction against the approved sentence.

convicted of larceny, assault, and provoking speech and was sentenced to a bad-conduct discharge, total forfeitures, reduction to E-1, and twenty-two months confinement. Pursuant to a pretrial agreement, the convening authority approved only twelve months confinement. At trial, the military judge awarded the accused twenty-two days of *Allen*[97] credit and one day of R.C.M. 305(k) credit for an untimely magistrate review.[98] The military judge also ruled that the hourly sign-in requirement and order to submit to urinalysis testing based on mere suspicion rose to the level of unlawful pretrial punishment. Three times during the course of the trial, the military judge informed the accused that he would consider the unlawful pretrial punishment in adjudging an appropriate sentence.[99] After announcing a sentence that included twenty-two months confinement, the military judge explained that he would have otherwise adjudged twenty-four months confinement had there been no unlawful pretrial punishment.[100]

Although the Army court ultimately refused to consider the appellant's extraordinary writ demanding that credit for illegal pretrial punishment be awarded against the approved sentence,[101] the court used this case as a vehicle to restate the procedures for awarding credit for illegal pretrial confinement and pretrial punishment. In instances where the accused is placed in illegal pretrial *confinement*, credit must be awarded against the *approved* sentence. However, when an accused is subjected to illegal pretrial *punishment*, different procedures apply. At a minimum, the nature and extent of illegal pretrial punishment *must* be considered by the sentencing authority in adjudging an appropriate sentence. Depending on the circumstances, credit for illegal pretrial punishment *may* be assessed against the approved sentence.[102]

Conclusion

The most common concern of counsel who face issues of illegal pretrial restraint involves the amount of credit to which an accused is entitled for illegal pretrial *confinement.* These recent cases are important because they demonstrate how other aspects of pretrial treatment of an accused may warrant relief for an accused. Illegal pretrial *punishment* in violation of Article 13 of the UCMJ provides fertile ground for zealous advocacy. Both trial and defense counsel must be wary of circumstances that may rise to the level of illegal pretrial punishment. From the government's perspective, counsel should attempt to prevent pretrial punishment from occurring. From the defense perspective, counsel must initially raise the issue at trial and then zealously argue for the credit to which their clients are entitled.

96. 47 M.J. 626 (Army Ct. Crim. App. 1997).

97. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

98. *See* MCM, *supra* note 1, R.C.M. 305(i), (k). Rule for Courts-Martial 305(i) requires that pretrial confinement be reviewed for probable cause by a neutral and detached officer within seven days. If the required review does not comply with the provisions of R.C.M. 305(i), the accused must be awarded day-for-day credit for each day of non-compliance pursuant to R.C.M. 305(k).

99. *Coyle*, 47 M.J. at 628.

100. *Id*.

101. *Id.* at 629. Jurisdiction was denied because the accused failed to satisfy the two-part burden of proof: (1) circumstances are so unusual that ordinary appeal provides inadequate relief and (2) the accused is clearly and indisputably entitled to the relief sought. *Id*.

102. *Id.* at 630. *See* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). A related issue, which was not addressed by the Army court, was whether credit for unlawful pretrial *confinement* is to be credited against the approved sentence or the adjudged sentence. *See* MCM, *supra* note 1, R.C.M 305(k) (stating that "the remedy for non-compliance . . . of this rule shall be an administrative credit against the sentence adjudged"). The more common practice is for credit for such illegal pretrial confinement to be awarded against the sentence ultimately *approved* by the convening authority.

New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice (1997)

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Ignorance of the law excuses no man from practicing it.[1]
—Addison Mizner

Introduction

A thorough understanding of the substantive criminal law[2] is the foundation of both effective trial advocacy and, more broadly, the practice of military criminal law. The law of crimes and defenses exerts an obvious influence on charging decisions, proof analysis, and instructions. It also defines the baseline for an adequate providence inquiry and is central to the analysis of a variety of issues, such as multiplicity, preemption, and legal sufficiency of the evidence in appellate review. Unfortunately, too many judge advocates neglect the systematic study of substantive criminal law, preferring instead a learn-as-you-go approach that results in an incomplete and outdated knowledge of crimes and defenses. This "substantive criminal law attention deficit disorder" leaves Army lawyers ill-equipped to anticipate or to recognize defenses, to respond to motions, and skillfully to use the law in argument. Until a drug is developed to manage this condition, practitioners will have to read case law, articles like this, and even the *Manual for Courts-Martial* (*MCM*).

One of the leading causes of neglect in this area is a belief that substantive criminal law is a relatively stable mass of law requiring little effort on the part of the practitioner to stay current. After all, substantive criminal law is derived primarily from statute,[3] and statutory amendments to the punitive articles have been relatively few in number.[4] Practitioners might seem justified in expecting little change in substantive criminal law since they completed their rigorous studies in the Judge Advocate Officer Basic Course. This expectation is reinforced by several general principles woven into the fabric of American criminal jurisprudence. The principle of fair notice[5] holds that citizens are entitled to know in advance what conduct is criminal. Courts are not in the business of creating new offenses in the process of appellate review and, in theory, should not be the primary source of change in the criminal law.[6] Fair notice is provided by statutes and regulations, which are prospective in application. One corollary of the fair notice principle is that courts should strictly construe criminal statutes in favor of the accused.[7] Together, these principles exert a conservative influence on the development of substantive criminal law under the Uniform Code of Military Justice (UCMJ).

Yet, despite the expectation of stability, a large percentage of military justice cases reported each year are devoted to "new developments" in substantive criminal law.[8] Working against

1. *Quoted in* Michael Shook & Jeffrey Meyer, Legal Briefs 156 (1995).

2. Substantive criminal law includes the law of crimes and defenses. A recognized authority gives a somewhat more formal definition: "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability." 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 1.2, at 8 (1986).

3. Of course, only a few defenses are expressly defined in the Uniform Code of Military Justice (UCMJ) (for example, lack of mental responsibility under Article 50a, mistake of fact as to the victim's age under Article 120(d), and the non-exculpatory statute of limitations defense under Article 43). Other defenses are derived from the elements of the statutory offenses or developed by judicial decision from common law sources. The *MCM* contains a relatively complete list of special defenses available in courts-martial. *See* Manual for Courts-Martial, United States, R.C.M. 916 (1996) [hereinafter MCM].

4. In the past 20 years, there have been only three amendments to the UCMJ that directly affect the punitive articles: Article 112a was created by the Military Justice Act of 1983; Article 120(a) was amended in 1993 to make the offense of rape gender neutral and to remove the spousal exemption; and Article 120(d) was added in 1996 to create a mistake of fact defense as to the age of the victim for carnal knowledge.

5. The principle of fair notice is rooted in the constitutional standard of due process.

6. *See* United States v. Joseph, 37 M.J. 392, 401 (C.M.A. 1993) ("Most judges—including those on this court—profess to reject lawmaking as an appropriate aspect of their judicial role. The propriety of such judicial restraint surely is no more clear, in terms of both sound government and constitutional principles, than in the context of substantive criminal law.").

7. *See infra* notes 176-177 and accompanying text. *See also* Crandon v. United States, 494 U.S. 152, 160 (1990) (stating, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text"); United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982) ("[E]specially in light of the canon of strict construction of penal statutes, Article 118(3) cannot be taken to mean that for all purposes wanton disregard of life has been equated to intent to kill.").

the conservative posture of the law is the pressure of time and the boundless ingenuity of prosecutors, defense counsel, and appellate counsel in asserting and defending novel theories and applications of old statutes. The net result is a steady stream of incremental changes, extensions, and clarifications in the law of crimes and defenses.

This article reviews recent significant decisions in the law of crimes and defenses by the Court of Appeals for the Armed Forces (CAAF). Not every decision analyzed here contains "new law." Some merely raise new issues or create uncertainties that will require more definitive resolution in subsequent cases. A number of cases this year explore arcane corners of substantive criminal law, such as the transferred intent doctrine, the crime of pandering, and the viability of the "exculpatory no" defense to a charge of false official statement. Several major decisions introduce important clarifications in the law of aggravated assault, larceny of pay and allowances, and misuse of government credit cards. Finally, this article addresses developments in the exciting law of pleadings, multiplicity, and lesser-included offenses. Consider this reading therapy and a first step toward recovery.

Conventional Offenses: Attempted Murder and Transferred Intent

The venerable common law doctrine of transferred intent[9] has long been recognized in military case law[10] and is expressly adopted by the 1984 *Manual for Courts-Martial*.[11] Transferred intent is a legal fiction used by courts to prevent an accused from escaping the full measure of criminal responsibility for the homicide of an unintended victim.[12] Thus, if the accused shot at a certain person with the intent to kill, but missed his intended victim and killed a bystander, the doctrine of transferred intent may hold the accused liable for the murder of the bystander.[13] Even if the accused were only negligent toward the unintended victim as a matter of fact, he may be held liable for intentional or premeditated murder as a matter of law.[14]

In the case of *United States v. Willis*,[15] the CAAF suggests that the doctrine of transferred intent may also be applied to hold the perpetrator of an attempted murder liable for the attempted murder of bystanders who are endangered but not harmed in the attempt. This novel application of the transferred intent doctrine to cases of attempted murder is legally and conceptually problematic. Although *Willis* is a guilty plea case, the CAAF missed the opportunity to state an important limitation on the transferred intent doctrine.[16]

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8. *See* Major William T. Barto, *Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice*, ARMY LAW., Apr. 1997, at 50 (observing that from 1991-1995 over 30% of reported decisions of military appellate courts included issues of substantive criminal law).

9. *See* 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200-01 (Cooley ed., 3d ed. 1884) ("Thus if one shoots at A. and misses him, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other."), *cited in* Ford v. State, 625 A.2d 984, 998 (1993).

10. *See*, *e.g.*, United States v. Gravitt, 17 C.M.R. 249 (C.M.A. 1954); United States v. Black, 11 C.M.R. 57 (C.M.A. 1953).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 43c(2)(b) (1984). The current version of the *MCM* expressly applies and discusses transferred intent in relation to premeditated murder under UCMJ, art. 118(1). The explanation includes this definition:

> *Transferred premeditation.* When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

MCM, *supra* note 3, pt. IV, ¶ 43c(2)(b). The *MCM* reference to transferred intent in the case of unpremeditated murder is less explicit, stating elliptically, "The intent need not be directed toward the person killed . . . ." *Id.* ¶ 43c(3)(a).

12. *See generally* LAFAVE & SCOTT, *supra* note 2, § 12, at 399-402 (referring to the doctrine of transferred intent as "pure fiction").

13. Professors LaFave and Scott observe that the modern approach to transferred intent, exemplified by the *Model Penal Code*, avoids the use of a fiction by viewing the issue as one of simple causation.

> Actually it is probably more correct to say that the crime merely requires an intent to kill another, so that there is no problem as to mental state, and no need to resort to the fiction of "transferred intent." Rather, the question is whether the fact that a different person was killed somehow makes it unfair to impose criminal liability on A, a problem which is more appropriately dealt with as a matter of causation.

Id. 310-11.

14. *See* United States v. Black, 11 C.M.R 57 (C.M.A. 1953) (holding that the accused had been properly convicted of intentional murder of his friend who was fatally wounded by a bullet which passed through the intended victim of a premeditated murder).

15. 46 M.J. 258 (1997).

The accused in *Willis* premeditated the murder of his estranged wife and his aunt, who were scheduled to testify against him at an Article 32 investigation.[17] On the day of the hearing, he went to the base legal office, found his wife, and shot her to death. After killing his wife, he sought his aunt in a nearby office. When he tried to enter the office, his uncle blocked the door, and the accused was only able to force the door open approximately six inches. The accused reached around the partially open door and fired three shots in the small area behind the door where he knew his aunt and uncle were located. No one in the office was injured.[18]

The accused pleaded guilty to the attempted murder of both his aunt and uncle.[19] During the providence inquiry, however, the accused was ambivalent regarding his intent to kill his uncle, stating,"[I]f my 9mm had not jammed, I probably would have shot [my uncle] as well. I didn't have the intent, but I did endanger him at that time."[20] Although he acknowledged his guilt to each element of the offense, the accused did not further clarify his intent toward his uncle. Nonetheless, the military judge accepted his plea to the attempted murder of his uncle by relying on the doctrine of transferred intent.[21]

The Air Force Court of Criminal Appeals affirmed the conviction, reasoning that the accused's intent to kill his uncle could be inferred from the nature and scope of the attack against his aunt.[22] The court erroneously labeled this factual inference as an application of the transferred intent doctrine.[23] As noted above, transferred intent is not based on a factual inference, but a legal fiction.

The CAAF compounded the conceptual confusion of the service court when it held that the appellant's plea of guilty to the attempted murder of his uncle was provident "under either a transferred intent or concurrent intent theory."[24] The court defined concurrent intent by quoting from a recent opinion of the Maryland Supreme Court: "[I]ntent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity."[25] Despite the impressive title, practitioners will recognize the "concurrent intent theory" as simply a specific application of the familiar permissive inference that a person "intends the natural and probable consequences of his acts."[26]

Both the CAAF and the service court fall into error by confusing the operation of a permissive factual inference with the purely legal doctrine of transferred intent. Thus, at one point in the CAAF's majority opinion, the court states a conclusion as to the accused's actual intent: "Appellant's admitted actions are sufficient to establish that he had the concurrent intent to kill both his aunt and his uncle."[27] The court then offers an alternative rationale that employs the transferred intent doctrine: "Thus, we conclude that appellant's shooting into the occupied room together with the necessary intent to kill [his aunt] was

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16. While it is generally recognized that opinions affirming guilty plea convictions have less precedential value than those opinions based on a legal sufficiency review of a full record, the CAAF occasionally uses a guilty plea review to announce important legal conclusions. *See*, *e.g.*, United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (recognizing the defense of voluntary abandonment under UCMJ art. 80). Judge Cox refused to join the majority opinion in *Byrd*, expressing "reservations about making substantive law on a guilty plea record." *Id.* at 293.

17. United States v. Willis, 43 M.J. 889, 891 (A.F. Ct. Crim. App. 1996).

18. *Id.*

19. *Id.* The accused also pleaded guilty to attempted murder of Captain Hatch, whom the accused shot at before shooting at his aunt behind the blocked door. The accused was also convicted, contrary to his pleas, of the premeditated murder of his wife, desertion, escape from confinement, wrongful appropriation, and other various offenses and was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. *Id.*

20. *Willis*, 46 M.J. at 260.

21. *Willis*, 43 M.J. at 895.

22. *See id.* at 896.

> [W]e find compelling Chief Judge Everett's conclusion in [*United States v. Roa*, 12 M.J. 210 (C.M.A. 1982)] . . . that, as a factual matter, tossing a grenade into a crowded room, knowing the complete lethality of an operable grenade, was sufficient to infer an intent to kill, *notwithstanding that nobody was, in fact, killed.* In this case, appellant pulled the trigger three times at nearly point-blank range. The pistol was unaimed, in the sense that he could not see to distinguish which of the two people he knew to be there would be struck. He moved the pistol between each attempted shot, with the evident idea of covering the small area occupied by the Plybons.

Id.

23. *Id.*

24. *Willis*, 46 M.J. at 261.

25. *Id.* at 261, *quoting* Ford v. State, 625 A.2d 984 (1993).

26. MCM, *supra* note 3, pt. IV, ¶ 43c(3)(a).

sufficient for the military judge to accept his guilty plea to the attempted murder of [his uncle]."[28] In this alternative approach, only the actual intent to kill the aunt is considered a "necessary" predicate for the assertion of liability for the attempted murder of the uncle.

If *Willis* had been a contested case, the court might have reasonably inferred that the accused actually intended to kill both his aunt and his uncle when he fired multiple rounds in a random pattern into the small area behind the door. In reviewing a guilty plea, however, the court is not free to disregard the accused's statements during the providence hearing by substituting its own inferences.[29] The correct inquiry in this appeal is whether the apparent inconsistency between Willis' plea and his disavowal of the specific intent to kill his uncle constitutes a "substantial basis" for questioning the guilty plea.[30] The court circumvents that issue by invoking a permissive inference and the transferred intent theory.

Judge Sullivan recognized the mistake of employing a factual inference to circumvent the problem of an arguably defective providence inquiry. Writing separately, he voted to affirm the conviction on the firmer ground that the accused's apparent denial of the requisite intent to kill his uncle was simply ambiguous and insufficient to undermine confidence in the guilty plea.[31]

Unlike the theory of concurrent intent, transferred intent is not a rule of inference; rather, it is a legal policy designed to prevent an accused from escaping responsibility for harm actually inflicted on an unintended victim.[32] As the Supreme Court of Maryland explained, "[t]he purpose of transferred intent is to link the mental state directed towards an intended victim . . . with the actual harm caused to another person. In effect, transferred intent makes a whole crime out of two component halves."[33] When *A* shoots at *B* with the intent to kill *B*, but the bullet misses *B* and kills *C*, the doctrine of transferred intent holds *A* fully liable for the unintended harm to *C* as a simple matter of policy. The doctrine of transferred intent is not used to infer that *A* actually intended to kill *C*; rather, it "transfers" the intent to kill to the actual victim of harm. That is not a factual inference but an assertion of legal responsibility contrary to the facts. In *Willis*, if the accused actually intended to kill both victims, there is no need to rely on the fiction of transferred intent. On the other hand, if he actually intended to kill only his aunt, the fundamental rationale behind the transferred intent doctrine—to make "a whole crime out of two component halves"—does not require its application either. The accused completed the whole crime of attempted murder of his aunt. He may be held fully liable for that offense. He may also be held fully liable for the assault on his uncle. For that assault, he may be liable for an aggravated assault or an attempted murder, depending on his actual mental state.

In *Willis*, the CAAF does not simply "transfer" the intent from an intended victim to an unintended victim; rather, it multiplies the accused's liability for *unharmed* bystanders in the proximity of the attack. There is no precedent in military law for this application of the doctrine of transferred intent. The Maryland Supreme Court opinion from which the CAAF borrows the concurrent intent theory expressly rejects the use of transferred intent to hold an accused liable for attempted murder of unharmed bystanders.[34] This limitation on the application of the doctrine is also implicit in the *MCM*'s explanation of the rule, which requires an actual killing of an unintended victim as a predicate for the application of the rule.[35] This is a sensible limitation; otherwise, an accused would be subject to liability for the attempted murder of everyone in the proximity of a bullet's path, whether or not it finds its intended target. The court's approach in *Willis* also raises a more fundamental due process concern: using the doctrine of transferred intent to multiply liability for attempted murder gives the government a free ride by relieving it of its constitutional burden of proving the accused's guilt on every element of the offense beyond a reasonable doubt.[36]

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27. *Willis*, 46 M.J. at 261.

28. *Id*. at 262.

29. *See* UCMJ art. 45 (West 1995); MCM, *supra* note 3, R.C.M. 910.

30. *See* United States v. Prater, 32 M.J. 433 (C.M.A. 1991) (reviewing the development of the "substantial basis" test). *See generally* FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 19-24.00 (1991) (discussing standards of review of military judge's decision to accept a guilty plea following an incomplete or defective providence inquiry).

31. *Willis*, 46 M.J. at 262 (Sullivan, J., concurring).

32. *See* LAFAVE & SCOTT, *supra* note 2, § 3.5, at 311.

33. Ford v. State, 625 A.2d 984, 997 (1993).

34. *See id*. at 999-1000 (holding that the doctrine of transferred intent is inapplicable to attempted murder).

35. *See supra* note 11.

Willis holds several lessons for the practitioner. On the most basic level, it serves as a reminder of trial counsel's duty to pay attention during providence inquiry and to ask the military judge to clarify any statements by the accused that are inconsistent with guilt on each element of the charged offense. The case also introduces the concept of "concurrent intent" into the military justice lexicon. This is a useful theory of culpability in cases where the nature of the attack indicates an intent to commit multiple homicides. Finally, the case demonstrates one of the conceptual pitfalls lurking in the use of the transferred intent doctrine. Where an attempted murder of a single victim is carried out in a manner that endangers bystanders, the perpetrator may be liable for multiple assaults on those bystanders. If someone other than the intended victim is actually killed, the doctrine of transferred intent applies, but, unless the accused intended to kill more than one victim, there is only one attempted murder.

Conventional Offenses: Assault

Article 128 sets forth the law of assaults under the UCMJ. Assault is one of the basic building block offenses, serving as a component or predicate offense for many other offenses under the UCMJ.[37] Doctrinal developments in the law of assaults, therefore, have broad significance in the substantive criminal law. Despite the fundamental significance of assault, military courts continue to define and refine the law of assaults under Article 128 more than forty-five years since the enactment of the UCMJ. This section reviews several of the more significant and interesting cases of assault recently decided.[38]

HIV-Infected Semen as a "Means or Force Likely"

There are several well-settled ways to charge HIV-related misconduct. The two most common approaches are to charge a violation of Article 90 for willful disobedience of the "safe-sex" order[39] or to charge a violation of Article 128(b) for aggravated assault with a means likely to inflict death or grievous bodily harm.[40] The military justice system was one of the first American jurisdictions to explore the application of aggravated assault statutes to HIV-related misconduct.[41] The court continued to explore the ramifications of that application in three significant cases in 1996 and 1997.

The HIV-assault cases created some confusion regarding the proper standard for determining whether a particular means of assault was a "means likely to inflict death or grievous bodily harm" under Article 128(b). The confusion was manifested by a split in the Navy-Marine Corps Court of Criminal Appeals in *United States v. Outhier*.[42] Private First Class Outhier went AWOL from his duty station at Camp Pendleton, California and appeared incognito at the U.S. Naval Academy as a Navy SEAL recruiter under the pseudonym "Jonathan Valjean."[43] One officer candidate, named Avila, took advantage of "Jon's" visit to obtain advanced water survival training. Jon subjected the enthusiastic trainee to a potentially dangerous exercise in which Avila was bound hand and foot and cast into the deep end of the pool. Although Avila was not injured in any way, PFC Outhier subsequently pleaded guilty to assault with a means likely to inflict death or grievous bodily harm.[44] The Navy-Marine Corps court affirmed his conviction. Citing the leading HIV cases, the majority defined "likely" in the statutory phrase "other force or means likely to inflict death or grievous bodily harm"[45] as "more than merely a fanciful, speculative, or remote

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36. The government would be relieved of its burden to prove the mens rea element of each attempted homicide once it proves that element with regard to the intended victim. While the proper application of the transferred intent doctrine also is subject to this "two for the price of one" criticism, the government in those cases must still prove that a killing occurred and that the accused caused that killing by a specific act or omission.

37. *See*, *e.g.*, UCMJ arts. 90 (assaulting a superior commissioned officer); 122 (robbery); 134 (indecent assault) (West 1995).

38. This article does not discuss the significant case of *United States v. Davis*, 45 M.J. 681 (N.M. Ct. Crim. App. 1997), which holds that an unloaded or non-functioning firearm is a "dangerous weapon" under UCMJ art. 128(b). That decision conflicts with the holding of the Army Court of Criminal Appeals in *United States v. Turner*, 42 M.J. 689 (Army Ct. Crim. App. 1995). *Davis* is currently pending decision by the CAAF, which is likely to announce its decision before or shortly after this article is published.

39. *See*, *e.g.*, United States v. Pritchard, 45 M.J. 126 (1996).

40. *See infra* notes 54-59 and accompanying text. Although attempted murder (art. 80) and assault with intentional infliction of grievous bodily harm (art. 128(b)) are also theoretically possible charges, military appeals courts have not been presented with such a case. *See generally* Elizabeth Beard McLaughlin, *A "Society Apart?" The Military's Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, at 3 (discussing various charging options in HIV cases).

41. *See* Richard Lacayo, *Assault with a Deadly Virus*, TIME, July 20, 1987, at 63 ("[M]ilitary prosecutors are now among the first lawmen in the country to see the AIDS virus as a weapon and its willful transmission as a crime."). *See*, *e.g.*, United States v. Stewart, 29 M.J. 92 (C.M.A. 1989); United States v. Morris, 30 M.J. 1221 (A.C.M.R. 1990).

42. 45 M.J. 326 (1996).

43. *Id.* at 327.

44. *Id.*

possibility."[46] Judge DiCiccio, dissenting in part, agreed that the majority accurately defined the standard applied in HIV assault cases.[47] He argued, however, that the Court of Military Appeals had adopted that standard in view of the unique public threat posed by the spread of the HIV virus and that the standard should not be extended to cases outside of that context.[48]

On appeal, the CAAF emphatically rejected the Navy-Marine Corps court's conclusion that it had established a different standard for aggravated assault in the HIV cases and held that only one standard applies to assault with a "means likely," regardless of the particular means used in a given case.[49] The court held that a "means likely to inflict death or grievous bodily harm" includes any means that has "the natural and probable" tendency to inflict such harm.[50] Applying that standard to the facts of the case, the court held that the plea was improvident in view of the extensive safety precautions that Outhier had employed in the water survival training exercise.[51]

In the HIV cases, the court was required to determine whether an assault with HIV-infected semen could be a "means likely" to inflict death or grievous bodily harm.[52] The court analyzed this question by distinguishing between several links in the causal chain.[53] The first link is the invasion of the victim's body by the HIV virus; the second link is the development of AIDS from the HIV infection. The court held that the likelihood of invasion by the virus need only be "more than merely a fanciful, speculative, or remote possibility."[54] If that standard is met, the issue becomes whether HIV infection is a means likely to cause the debilitating and ultimately fatal condition known as AIDS. Since the natural and probable consequence of HIV infection is the development of AIDS, it may be said that HIV infection is a means likely to inflict death or grievous bodily harm. In other words, the "natural and probable consequences" standard is applied to the second link in the causal chain.

In *United States v. Joseph*,[55] the court drew an analogy to an assault by firearm to illustrate this analysis. If the means used in an assault is a high velocity projectile, the issue is whether the projectile is likely to cause death or great bodily harm *if* it hits the victim.[56] The bullet need not actually hit the victim to constitute an assault by a means likely.[57] There must, however, be some possibility that the bullet could hit the victim. That possibility must be more than "fanciful, speculative, or remote." The government must introduce expert testimony to prove the requisite probabilities at each stage of the causal analysis.

Informed Consent of the Victim Is No Defense

In *United States v. Bygrave*,[58] the court confronted two previously unresolved challenges to the prosecution of HIV-posi-

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45. UCMJ art. 128(b) (West 1995).

> (b) Any person subject to this chapter who—
> (1) commits an assault with a dangerous weapon *or other means or force likely to produce death or grievous bodily harm*; or
> (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.

Id. (emphasis added).

46. United States v. Outhier, 42 M.J. 626, 632 (N.M. Ct. Crim. App. 1995).

47. *Id.* at 635 (agreeing that HIV assaults are treated as a "special category").

48. *Id*.

49. *Outhier*, 45 M.J. at 328.

50. *Id.* at 329.

51. *Id.* at 330. Judge Sullivan, joined by Judge Crawford, dissented as to the result only. *Id.* at 332-33.

52. *See* United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (accused did not ejaculate); United States v. Joseph, 37 M.J. 392 (C.M.A. 1993) (accused wore a condom); United States v. Johnson, 30 M.J. 53 (C.M.A. 1990) (attempted anal intercourse).

53. *See Joseph*, 37 M.J. 392, 396 (C.M.A. 1993).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 46 M.J. 491 (1997).

tive soldiers who engage in sexual intercourse. In *Bygrave*, the accused was convicted of assault with a means likely to cause death or grievous bodily harm on two victims.[59] The case is unique because one of the victims consented to unprotected sexual intercourse after the accused informed her of his HIV-positive condition.[60] On appeal, the accused challenged his conviction as to the consenting victim on both statutory and constitutional grounds. The appellant argued that consent negates the element of assault that requires proof of "unlawful force or violence" against the victim.[61] The court held that, for public policy reasons, informed consent is not a valid defense to assaults that are likely to result in death or grievous bodily harm.[62] The court reserved judgment about the viability of an informed consent defense in cases where the accused also wears a condom or the putative victim is already HIV-positive. In either of those cases, the risk of transmission or marginal health risk may be so small that the public interest in protecting the victim might be insufficient to preclude the consent defense.[63]

The appellant in *Bygrave* also argued that his conviction violated his asserted constitutional "right to engage in sexual intercourse."[64] The court was unable to find any "generalized constitutional right to sexual intimacy between consenting adults" in existing precedent.[65] Private acts of consensual heterosexual intercourse between unmarried adults are not proscribed by the UCMJ, and case law offers no conclusive answer as to whether such acts are protected by the "right to privacy" as defined by the Supreme Court.[66] The court declined the invitation to determine whether such a right exists. Instead, it held that, even if there is a fundamental right at stake, it is outweighed by the government's compelling interest in protecting the life and safety of members of the armed forces.[67] The accused's consenting partner in *Bygrave* was also a sailor. The court found that the Navy has a compelling interest in maintaining her readiness for duty, avoiding the costs of medical care associated with HIV, and preventing the further spread of the disease to other members of the military community.[68] The court expressly reserved judgment on whether the government's interests would be sufficiently compelling if the victim was a civilian or married to the accused at the time of the offense.[69]

Mere Use of a Condom Is No Defense

In *United States v. Klauck*,[70] the court reaffirmed its holding in *United States v. Joseph*[71] that use of a condom by a male accused does not preclude conviction for assault by HIV-infected semen. In *Klauck*, the victim was not informed of the accused's HIV-positive condition, but the accused did use a condom.[72] At trial, the government offered expert testimony concerning the unreliability of condoms due to faulty produc-

59. *Id.* at 492. The accused was sentenced to a bad conduct discharge, confinement for four years, total forfeitures, and reduction to the grade of E-1.

60. *Id.* The consenting victim subsequently married the accused after testing positive for HIV.

61. *Id.* at 493.

62. *Id.* The court elaborated on this conclusion in a footnote.

> In this respect, aggravated assault is like numerous other crimes under the Uniform Code of Military Justice in which the consent of the immediate "victim" is irrelevant because of the broad military and societal interests in deterring the criminalized conduct. *See*, *e.g.*, Arts. 114 (dueling), 120 (carnal knowledge), and 134 (bigamy).

Id. at 493.

63. *Id.* at 493-94, nn.5, 6.

64. *Id.* at 494.

65. *Id.* at 495.

66. Courts have hinted at the possible marital exception for consensual sodomy in many decisions. *See*, *e.g.*, United States v. Scoby, 5 M.J. 160 (C.M.A. 1983). The CAAF recently implied the possibility, holding that an accused was not denied any constitutional right of privacy when his abused spouse sought to terminate an assault by engaging him in an act of consensual sodomy. *See* United States v. Thompson, 47 M.J. 378 (1997).

67. *Bygrave*, 46 M.J. at 496.

68. *Id.*

69. *Id.*

70. 47 M.J. 24 (1997).

71. 37 M.J. 392 (C.M.A. 1993).

72. *Klauck*, 47 M.J. at 25.

tion, permeability, and improper use.[73] The CAAF held that the evidence was legally sufficient to sustain a conviction.[74]

Klauck is significant because it goes beyond *Joseph* in two ways. First, the condom in this case apparently was worn properly and remained intact throughout the intercourse, whereas in *Joseph*, there was evidence that the condom had broken during intercourse.[75] Additionally, in *Klauck*, the sexual intercourse was interrupted before the accused ejaculated. This case combines the lack of ejaculation with the use of a condom and still meets the legal sufficiency standard, because the government expert also testified that HIV may be transmitted through pre-ejaculatory fluids.[76]

Bygrave and *Klauck* consolidate the law of HIV-related assaults and highlight possible limitations on future applications. Practitioners must carefully observe what the court did and did not hold. First, the CAAF has never held that sexual contact with an HIV-infected person is a means likely to inflict death or grievous bodily harm *as a matter of law*.[77] The government bears the burden of presenting expert testimony concerning the risk of exposure to HIV under the circumstances of the case and the likelihood of HIV to cause AIDS. Meeting this burden in a given case may require proof of the conveyance of the virus in pre-ejaculatory seminal fluid or other bodily fluids; the risk of transmission through oral, anal, or genital contact; or the risk of transmission by a female carrier.[78] Second, the court has not yet decided certain issues of statutory and constitutional significance. The court has not been presented with a case that combines the informed consent of the victim and the use of a condom. Such a case raises the possibility of both a consent defense and a constitutional challenge on the basis of due process under the fair notice principle.[79] It is also unclear whether sex between two HIV positive partners would constitute a means likely to cause death or grievous bodily harm, though it still would probably violate a safe sex order. Finally, the court has not decided whether the constitutional "right of privacy" precludes prosecution in a case involving a civilian victim or a victim who is married to the accused at the time of the alleged assault.

Assault by Offer: Words Alone?

Under most circumstances, words alone are insufficient to constitute an assault under Article 128. The *MCM* states: "The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence."[80] In *United States v. Milton*,[81] the CAAF explored the limits of that rule and held that verbal threats accompanied by the display of a concealed firearm may constitute an assault under Article 128, even though the weapon is not pointed at the victim or brandished in any manner.[82]

The accused in *Milton* sought out a soldier whom he suspected of having a sexual interest in his wife.[83] Unaware of Milton's identity, the victim began to describe his adulterous intentions in lusty detail. At some point in the monologue, Milton lifted his shirt, revealing a pistol in his waistband, and said: "I want you to stay away from my wife or me and you are going to have serious problems and when I say serious problems I mean we're going to have serious problems."[84] Although Milton did not brandish the pistol or even express an intent to use the weapon at that time, the victim feared imminent violence and fled. Milton was apprehended at his quarters a short time later, and the pistol was found with a loaded clip and a round in

73. *Id.*

74. *Id.* at 26.

75. *Joseph*, 37 M.J. at 397.

76. *Klauck*, 47 M.J. at 25.

77. *See* United States v. Bygrave, 46 M.J. 491, 493 (1997) ("Although we have previously held that, in certain circumstances, a court may find that protected sex is an act likely to result in grievous bodily harm or death . . . we have never held that protected sex with an HIV-positive partner must be so found as a matter of law.").

78. There are no reported military cases of prosecution of a female accused for assault by exposing a sex partner to HIV.

79. In *Bygrave*, the court cautioned the government in *Bygrave* that "the prosecution of an HIV-positive service member for having safe sex after providing appropriate notice of his status to his or her partner might conceivably raise constitutional due process concerns." *Bygrave*, 46 M.J. at 495. The fair notice concern is based on the content of the safe-sex order, which implicitly authorizes sexual intercourse if the subject wears a condom and informs his partner that he has HIV. It would be anomalous if the government were to authorize sex under these conditions and then prosecute the subject for complying with the conditions.

80. MCM, *supra* note 3, pt. IV, ¶ 54c(1)(c)(ii).

81. 46 M.J. 317 (1997).

82. *Id.* at 318.

83. *Id.*

84. *Id.*

the chamber. The accused pleaded guilty to simple assault by offer.[85]

Although *Milton* is a guilty plea case, it offers a useful illustration of the problems that can arise in this corner of the law of assaults. The focus of the court in cases of assault by offer is the victim's reasonable apprehension of immediate harm.[86] The court concludes that, under the totality of the circumstances in this case, Milton's victim had reasonable grounds to fear imminent harm.[87] In order to reverse a conviction based on a guilty plea, the court must find a "substantial basis" in law and fact for questioning the plea.[88] Given the limited factual record in a guilty plea, the appellate court accepts the accused's admissions regarding the existence of certain crucial elements, such as the victim's reasonable apprehension.

The conclusion in *Milton* is nonetheless troubling. The accused did not express an intent to use immediate violence. His threat was explicitly conditional. Moreover, the accused did not brandish or remove the pistol from his belt at any time. At what point was there a "demonstration of violence," as required by Article 128? The court stresses the fact that Milton intended to frighten the victim and that he apparently succeeded.[89] However, while the victim's perception of imminent harm is the proper focus of an offer-type assault, both the *MCM* and the court insist on an independent showing of some overt physical act beyond mere words. Judge Sullivan, in a concurring opinion, was unwilling to find a sufficient demonstration in the mere disclosure of the concealed firearm.[90] He voted to affirm on the totality of the facts, which included a brief foot pursuit by the accused.[91]

The CAAF has construed the term "offer" in Article 128 to require some physical demonstration of violence.[92] In *Milton*, the court asserted that "words alone, or threats of violence to occur at some future date, are insufficient" to constitute an offer-type assault.[93] Thus, if Milton had simply informed the victim that he had a pistol and did not display the weapon, the court could not find a demonstration of violence, even if the victim fled in fear. Similarly, if Milton had approached the victim in the dark or from behind and uttered his intent to shoot the victim, there would be no assault under Article 128, according to the court's "mere words" limitation.[94]

While the presence of the weapon certainly shows the potential for violence, the law requires a demonstration or an "offer" to use violence immediately.[95] Under the court's approach in *Milton*, any threatening words by an individual with a holstered firearm or access to a nearby deadly weapon could be sufficient to constitute an assault, if the putative victim is aware of the availability of a weapon. Under the court's approach in *Milton*, the requirement for a physical offer becomes nearly illusory.

Even if Milton's threat is viewed as undesirable, that does not ineluctably lead to the conclusion that the threat violated Article 128. Circumstances similar to *Milton* often include sufficient demonstrations of violence to justify an assault charge. But when a physical offer is missing, practitioners should consider alternative ways to address the type of misconduct found

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85. *Id.* The accused was sentenced to a bad conduct discharge, confinement and forfeitures for four months, and reduction to the grade of E-1.

86. MCM, *supra* note 3, pt. IV, ¶ 54c(1)(b)(ii). "An offer type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm." *Id.*

87. *Milton*, 46 M.J. at 319.

88. *See* United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

89. *Milton*, 46 M.J. at 319. The flight of the victim in this case calls to mind the biblical proverb: "The wicked flee when no one pursues, but the righteous are bold as a lion." *Proverbs* 28:1.

90. *Milton*, 46 M.J. at 318 (Sullivan, J., concurring).

91. *Id.*

92. *See id.*

93. *Id.* at 319.

94. *See* LaFave & Scott, *supra* note 2, § 7.16, at 317.

95. The *MCM* illustrates this requirement by comparing the following hypotheticals:

> Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe.

MCM, supra note 3, pt. IV, ¶ 54c(1)(c)(iii).

in *Milton*. First, there are several options for charging verbal threats under the UCMJ. Article 117 proscribes "provoking speeches or gestures" that are likely to incite immediate retaliation.[96] Article 134 proscribes the communication of "certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently *or in the future*."[97] Additionally, Milton may have violated Article 134 or Article 92 by carrying the concealed weapon.[98] There are many ways to address this kind of misconduct without stretching the definition of criminal assault to the point of distortion.

Regardless of the strain placed on the doctrine of assault by offer, *Milton* sends this message: soldiers who take it upon themselves to utter conditional threats backed by displays of the capability to inflict harm may run afoul of Article 128. "Saber rattling," even in the name of chivalry, may be an assault if the victim reasonably apprehends immediate bodily harm.

Assault Consummated By X-Ray?

Assault consummated by a battery is one of three types of simple assault under Article 128(a).[99] Unlike an attempt or offer, battery requires proof that the accused "did bodily harm" to the victim.[100] The *MCM* defines bodily harm very broadly, to include "any offensive touching, however slight."[101] The touching need not be direct to support a battery. Military courts have held, for example, that deliberate or negligent exposure of a victim to smoke[102] or CS gas[103] can constitute a battery.

In *United States v. Madigar*,[104] the Coast Guard Court of Criminal Appeals explores the outer limits of indirect battery by holding that unauthorized X-rays may constitute a sufficient touching to satisfy Article 128. The accused, an X-ray technician, subjected female patients to unnecessary and unauthorized X-rays, apparently to gratify his sexual desires.[105] Victims were told to remove certain articles of clothing and to assume certain compromising positions as part of the unauthorized X-rays.[106] The accused pleaded guilty to battery and various other charges.[107] At trial, the judge took notice, with the express consent of the accused, that "in passing through the body, the X-ray radiation can damage parts of cells of the body, so that if a great many such exposures are suffered by the body, eventually disease or deterioration of the body can result."[108] There was no evidence in the case that individual victims were exposed more than one time or that any measurable physical injury was inflicted. The court was unable to find a single precedent involving a criminal prosecution for exposure to X-ray radiation, but it found numerous tort cases from the early days of X-ray technology when burns were not uncommon.[109]

The issue in this appeal was specifically limited to whether the touching by X-rays was substantial enough to satisfy Article 128. The court was not asked to resolve whether the consent of the victims was a valid defense to the crime charged. Even if a single, brief exposure to X-ray radiation is found to be a "harmful or offensive touching" for purposes of Article 128, the question remains whether the fraudulently obtained consent of the victims is valid consent.

Consent goes to the issue of lawfulness. A battery is unlawful when it is done "without legal justification or excuse and without the lawful consent of the person affected."[110] Consent, therefore, is a defense to an assault which does not entail the risk of serious bodily harm or breach of public peace.[111] Since

96. *See* United States v. Thompson, 46 C.M.R. 88 (C.M.A. 1972) (construing Article 117 to require "fighting words" within the meaning of existing Supreme Court precedents).

97. MCM, *supra* note 3, pt. IV, ¶ 110b(1) (communicating a threat).

98. *Id.* ¶ 112 (carrying a concealed weapon).

99. *See id.* ¶ 54c(1), (2) (discussing two distinct theories of simple assault and assault consummated by battery).

100. *Id.* ¶ 54c(2)(a).

101. *Id.* ¶ 54c(1)(a).

102. *See* United States v. Banks, 39 M.J. 571 (N.M.C.M.R. 1993).

103. *See* United States v. Schroder, 47 C.M.R. 430 (A.C.M.R. 1973).

104. 46 M.J. 802 (C.G. Ct. Crim. App. 1997).

105. *Id.* at 802.

106. *Id.* at 804.

107. *Id.* at 802. The accused was sentenced to a dishonorable discharge, confinement for seven years, total forfeitures, and reduction to the grade of E-1.

108. *Id.* at 803.

109. *Id.* at 803-04.

it is unlikely that a single exposure to X-rays could be deemed serious injury, consent may be a defense.

Madigar is very similar to *United States v. Brantner*,[112] in which a recruiter committed various indecent assaults on recruits under the pretense of performing necessary pre-induction examinations. The Navy-Marine Corps court held that, because the recruiter was not authorized to perform such examinations, the touching was not "lawful," and that his fraudulently induced consent could not transform them into lawful acts.[113]

Practitioners should recognize that *Madigar* was a guilty plea, in which the judge took judicial notice of the harmful nature of X-ray radiation. In a contested case, the government would bear the burden of proving the harmful or offensive nature of the touching. The issue of consent would also be front and center in a contested case.

As in *Milton*, the real lesson in this case may be a reminder to carefully consider charging alternatives. The UCMJ is flexible enough to permit charging this sort of misconduct without testing the limits of the assault statute. The essence of Madigar's crimes is two-fold: he abused the victims, and he abused his position. The physical abuse of the victims can be fully reflected in charges of indecent assault,[114] indecent acts,[115] maltreatment,[116] or battery[117] stemming from any physical contact that occurred as the accused posed victims for the X-rays. The abuse of his position and violation of trust of putative medical patients could be fully reflected in charges alleging derelictions of duty[118] or violations of the general article (Article 134).[119] In the wake of *Madigar*, some zealous prosecutors will likely speculate about other assaults consummated by exposure to various bands on the electromagnetic spectrum. Bright lights or lasers that inflict retinal burns may be a fertile field for the bored and under-worked prosecutor with a background in science—or science fiction.

Conventional Offenses: Larceny of Pay and Allowances

In the popular board game "Monopoly," if the bank makes an accounting error in a player's favor, he is free to retain the windfall and to use it for his personal benefit without incurring any civil or criminal liability. Soldiers who apply that lesson to real-life finance errors resulting in direct deposits of unauthorized pay or allowances may need a real-life "get-out-of-jail-free" card when the error is discovered. In *United States v. Helms*,[120] the CAAF unanimously ruled that a service member who receives unauthorized pay or allowances as a result of a government error may be convicted of larceny if he discovers the error, fails to inform the government, and forms the intent to steal the unauthorized payments.

The scenario in *Helms* is now a familiar one to military courts: Airman First Class Helms received basic allowance for quarters (BAQ) and overseas housing allowance (OHA) for eleven months after moving into government quarters in Germany.[121] As a result, he was overpaid more than $11,000. There was no evidence that Helms did anything to initiate the unauthorized allowances, to ensure their continued payment, or to frustrate government attempts to recoup the money.[122] The government offered evidence that the accused was present when his spouse had a casual conversation about the BAQ/OHA payments with a finance NCO at some point during the eleven-month period.[123] The NCO advised Helms to visit his

110. MCM, *supra* note 3, ¶ 54c(1)(a).

111. *See id.* pt. IV, ¶ 54c(1)(a) (requiring proof that the assault was done without the "lawful consent" of the victim). An important limitation on the lawfulness of consent is discussed in *United States v. Bygrave*, 46 M.J. 491 (1997). *See supra* notes 58-69 and accompanying text.

112. 28 M.J. 941 (N.M.C.M.R. 1989).

113. *Id.* at 943. *See generally* Rollin M. Perkins & Ronald N. Boyce, Criminal Law 1079-83 (3d ed. 1982) (discussing the defense of consent in cases of battery and indecent assault).

114. UCMJ art. 134 (West 1995).

115. *Id*.

116. *Id*. art. 93.

117. *Id*. art. 128.

118. *Id*. art. 92(3).

119. Such conduct might be charged as a general disorder or neglect under clauses one and two of UCMJ art. 134.

120. 47 M.J. 1 (1997).

121. *Id.* at 2.

122. There was no evidence that the accused attempted to defraud the government by any affirmative act. Despite some language to the contrary in the unreported service court opinion, the CAAF makes it clear that the accused's culpable act was one of "inaction" only. *Id.* at 3.

finance office to ascertain whether he was entitled to the payments. Helms did not follow that advice or inform the government of the overpayments at any time.[124]

Helms was convicted of larceny of the full amount of the overpayments.[125] The conviction was affirmed by the Air Force Court of Criminal Appeals in an unpublished opinion. The CAAF found the evidence legally sufficient to support a larceny conviction and announced a new, simplified rule for cases involving larceny of pay or allowances. "We now hold that once a service member realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the service member has committed larceny."[126] This definitive holding appears to resolve any lingering doubts about the legal basis of prosecuting service members under Article 121 when they try to keep money received as a result of a government error. The precise doctrinal basis for this ruling, however, remains problematic and portends further confusion for unwary courts and counsel.

In *United States v. Antonelli*,[127] the CAAF held that a wrongful withholding arises when the accused does some affirmative act to frustrate government attempts to account for mistaken payments.[128] In reaching that conclusion, a majority of the court reaffirmed its view that Article 121 merged and codified the three common law offenses of larceny, obtaining by false pretenses, and embezzlement.[129] While Article 121 simplified the pleading of these various forms of theft, it did not enlarge the scope of liability under any of the component common law offenses.[130] Thus, in order to be liable under Article 121, one must be guilty of one of the common law offenses that are combined in that statute.

In a concurring opinion that foreshadowed *Helms*, Judge Crawford expressed skepticism toward the majority's view that criminal liability under Article 121 must be strictly limited to the common law definitions of larceny and embezzlement.[131] Writing for the unanimous court in *Helms*, Judge Crawford nonetheless relies on two alternative common law theories to support liability in the case. According to the court, Helms is guilty of either a wrongful taking based on the common law doctrine of "mistaken delivery"[132] or a wrongful withholding based on the "fictional notion of continuing trespass."[133]

At common law, the recipient of mistakenly delivered goods was guilty of larceny if he had both actual knowledge of the mistake and the intent to steal the goods *at the time they were delivered*.[134] Thus, the crucial issue of fact under the mistaken delivery doctrine is the accused's intent at the time of delivery. If, at the time of the delivery, the accused is unaware of the mistake or intends to return the property, there is no larceny at common law, even if the recipient later decides to keep the property permanently.[135] Applying this doctrine to the facts in *Helms*, it would be critical to determine when the intent to steal arose during the eleven-month period of monthly or bimonthly overpayments.[136] Under the mistaken delivery doctrine, the accused is only liable for the larceny of erroneous payments that are received after he discovers the error and decides to steal the

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 1. The accused was sentenced to a bad conduct discharge, confinement for 10 months, reduction to the grade of E-1, and a reprimand. *Id.*

126. *Id.* at 3.

127. 35 M.J. 122 (C.M.A. 1992), *aff'd following remand*, 43 M.J. 183 (1995).

128. *Antonelli*, 43 M.J. at 185. The accused in *Antonelli* submitted BAQ certification forms in which he falsely stated that he had been providing support to his dependents as a basis for receipt of BAQ. *Id.* at 184.

129. *Antonelli*, 35 M.J. at 124-27 (reviewing precedents).

130. *Id.* at 125.

> The consolidation of these crimes, however, did not enlarge the scope of the statutory crime of "larceny" to include more than its components previously encompassed . . . . [T]hat which did not constitute common law larceny, embezzlement, or false pretenses, prior to the adoption of Article 121(a), was not thereafter punishable as a violation thereof.

Id. (quoting United States v. Buck, 12 C.M.R. 97, 99 (C.M.A. 1953)).

131. *Id*. at 131 (Crawford, J., concurring). Judge Crawford expressed dissatisfaction with this rigid adherence to common law technicalities and suggested that the language of Article 121, a "*newly crafted* statute," might offer a more direct route to finding liability in cases of overpayments of allowances. *Id*. (emphasis in original).

132. United States v. Helms, 47 M.J. 1, 3 (1997).

133. *Id.*

134. LaFave & Scott, *supra* note 2, § 8.2(g), at 342-43.

135. *Id.*

payments. For example, if the evidence showed that Airman Helms received unauthorized OHA/BAQ payments for eleven months, but only discovered the error and decided to steal the payments during the seventh month of that period, he could only be guilty of larceny for the remaining four months of the period. He will be civilly indebted to the government for the whole period, but his criminal liability attaches no earlier than his actual knowledge and specific intent to steal. The court does not acknowledge this important limitation on the application of the mistaken delivery theory. If the evidence does not show when the intent to steal arose, however, the prosecution may still establish a larceny of the cumulative amount of the overpayments by relying on a theory of wrongful withholding.

In *Helms*, the court holds that when a service member receives mistaken overpayments but forms the intent to steal at a later date he may be guilty of larceny by wrongful withholding, even if there is no evidence of a specific duty to inform the government of the error.[137] This is the most significant aspect of the court's holding. The current edition of the *Military Judges Benchbook*[138] identifies this as an unsettled point of law and states, "[t]he mere failure to inform authorities of an overpayment of an allowance does not of itself constitute a wrongful withholding of that property."[139] According to the *MCM*, in order to establish a wrongful withholding, the government must prove that the accused failed "to return, [to] account for, or [to] deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property."[140]

In *Antonelli*, the court held that the government retains ownership of erroneous payments to service members.[141] In *Helms*, the court takes the final doctrinal step and holds that a service member's failure to inform the government of the error after he has discovered it constitutes wrongful withholding.[142] In effect, the court imputes a duty to inform the government of mistakes in pay. The accused's failure to perform that duty is the actus reus of this type of larceny. Unlike the mistaken delivery doctrine, this theory of larceny avoids the necessity of showing the intent to steal at the time the funds are transferred to the accused. Since the duty to inform presumably continues as long as the accused possesses the funds, the accused may be liable for money received before the intent to steal arises.

Unfortunately, the court relies on the common law doctrine of "continuing trespass" to support the wrongful withholding theory of larceny in *Helms*. At common law, the doctrine of continuing trespass was used to establish liability where the thief forms the intent to steal sometime after an original *unlawful* taking of the property is completed.[143] Since there could be no larceny unless the taking and the intent to steal concurred in time, the thief might escape criminal liability on technical grounds if he could show that the intent to steal arose after the taking occurred. The fiction of continuing trespass solves the problem of concurrence in such cases by declaring that the trespass continues as long as the property remains in the thief's possession. The continuing trespass doctrine, however, applies only if there is a trespass in the original taking of the property.[144] That is not the case in circumstances where the government freely transfers funds into the service member's account.

The attempt to justify this new theory of wrongful withholding on the basis of the common law only creates doctrinal confusion. The court could have avoided these doctrinal complications by embracing Judge Crawford's suggestion in *Antonelli* that Article 121 was enacted to address the needs of a modern military establishment and should not be limited by a common law straightjacket.[145] Wrongful withholding is a descendant of the offense of embezzlement, which was originally a statutory offense created to fill gaps left in the common law of larceny. Determination of the precise scope of a modern embezzlement statute must be based on the canons of statutory interpretation, not common law doctrines.[146] The common law

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136. None of the existing model instructions in the *Military Judge's Benchbook* are adequate to explain the wrongful taking under the theory of mistaken delivery. The gravamen of such an instruction would be the concurrence in time of the receipt of the payments and the knowledge of the mistake and intent to steal. *See* U.S. Dep't of the Army, Pam. 27-9, Legal Services: Military Judge's Benchbook (30 Sept. 1996) [hereinafter Benchbook].

137. This holding is implicit in the facts of the case as recited in the court's opinion. The court is unable to cite any evidence in the record that suggests the precise point during the 11-month period of payments when an intent to steal arose or any evidence that the accused had a legal duty to inform authorities of the mistaken overpayments. Implicitly, these facts are not necessary to the court's holding that Helms is guilty of wrongfully withholding the entire amount of the mistaken payments.

138. Benchbook, *supra* note 136.

139. *Id.* at 448.

140. MCM, *supra* note 3, pt. IV, ¶ 46c(1)(b).

141. United States v. Antonelli, 43 M.J. 183, 184 (1995).

142. United States v. Helms, 47 M.J. 1, 3 (1997).

143. *See* LaFave & Scott, *supra* note 2, § 8.5(f), at 365-67 (discussing the common law doctrine of continuing trespass).

144. *See id.* at 366-67.

145. *See supra* note 131 and accompanying text.

did not contemplate the peculiar circumstances of overpayments by the government to personnel in its military service, who are bound by oath and duty to a position of trust. The federal courts have held that a larceny occurs when a civilian retains possession of unauthorized tax refunds or other moneys drawn on the U.S. Treasury when the recipient knows of the mistake.[147] Article 121 could likewise be held to reach such misconduct as a simple matter of statutory interpretation.

Cases such as *Helms* present significant advocacy challenges to both government and defense counsel. First, the government has the difficult burden of proving actual knowledge and specific intent. The actual knowledge and specific intent elements of the offense make an honest mistake of fact an applicable defense.[148] This further complicates the government's task. Evidence that a soldier attempted to correct pay errors may be proof of actual knowledge, but it is also strong evidence that there was no intent to steal. Likewise, spending the money is equivocal evidence. It may be circumstantial evidence of an intent to steal, or it may simply be evidence that the accused honestly thought it was his. Second, the military judge will have to instruct members in accordance with these new theories of prosecution under Article 121. As indicated above, the *Military Judges Benchbook* does not currently offer instructions that reflect the doctrinal breakthrough in *Helms*. Finally, because of the difficulties of proof and the frequency of finance errors, prosecutors should be cautious in pursuing criminal charges in such cases. Involuntary recoupment of the debt and administrative actions may be a more appropriate way of protecting the government's interests in many cases.

Military Offenses

Misuse of Government Credit Cards

The primary purpose of the government credit card program is to increase the efficiency of military finance operations by eliminating the need for paying advanced travel expenses and issuing travelers checks.[149] The program also provides service members with a convenient way to pay for expenses related to official travel. The success of the program depends in part on the proper use of the credit cards entrusted to individual service members. When cardholders use government credit cards to pay for unofficial expenses, commanders look increasingly to the military justice system for disciplinary options. Two decisions this year illustrate the two leading approaches to charging misuse of government credit cards.[150]

In *United States v. Long*,[151] the accused used his government American Express card to withdraw cash for personal use on seven occasions. He pleaded guilty to willful dereliction of duty for failing to use his government card "only for expenses related to official government travel."[152] In his appeal to the Army Court of Criminal Appeals, the accused argued that the charge of violating Article 92(3) failed to state an offense because it alleged acts which went beyond the scope of his duties instead of alleging a failure to perform certain duties. The accused argued that a dereliction of duty can only arise from the nonperformance or faulty performance of a duty.[153] The court disposed of this challenge by noting that the specification alleged a particular duty to use the government credit card for expenses related to official travel only and clearly alleged the nonperformance of that duty.[154] The court found this case to be no different than prior cases of dereliction involving a failure to follow fund accountability procedures.[155]

146. *See* LaFave & Scott, *supra* note 2, § 8.6(e)(3) at 378 (observing that the common law does not provide a clear answer to whether a wrongful withholding of mistakenly delivered goods can constitute an embezzlement and noting that the determination of that question depends on the precise wording and intent of modern statutes).

147. *See* United States v. McRee, 7 F.3d 976 (11th Cir. 1993) (en banc) (holding that the alleged failure of the recipient to do anything to induce the issuance of an erroneous IRS refund check did not prevent the check from remaining government property or prevent the accused's conviction for conversion of government property under 18 U.S.C. § 641); *accord* United States v. Irvin, 67 F.3d 670 (8th Cir. 1995).

148. *See* MCM, *supra* note 3, R.C.M. 916(j) ("If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.")

149. *See* 9 U.S. Dep't of Defense, Reg. 7000.14R, DoD Financial Management Regulation, app. A, para. A (Dec. 1996) [hereinafter DOD Reg. 7000.14R].

150. Larceny generally is unavailable as a charge for misuse under current government credit card programs that set up a private contract between the card issuer and the individual soldier. The use of the credit card incurs a debt, which may not be the object of a larceny. *See* United States v. Mervine, 26 M.J. 482 (C.M.A. 1988); *but see* United States v. Schaper, 42 M.J. 737 (A.F. Ct. Crim. App. 1995) (holding that prior contractual agreement with credit card issuer authorizing cash withdrawals for limited official purposes did not preclude larceny conviction of cash used for personal expenses under circumstances of the case); United States v. Christy, 18 M.J. 688 (N.M.C.M.R. 1984) (larceny conviction upheld where personal expenses charged to a government credit card were billed directly to the U.S. government).

151. 46 M.J. 783 (Army Ct. Crim. App. 1997).

152. *Id.* at 784.

153. *Id.*

154. *Id.* at 785.

155. *Id.*

The opinion affirms this approach to charging the misuse of government credit cards but does not explore any other aspects of this application of the law.

Long is the first reported case to uphold a conviction for dereliction in the use of a government credit card. Prosecutors should recognize the potential difficulties in proving a case of dereliction in these circumstances. In order to prove a case of dereliction, the government must prove that a duty exists, that the accused had actual knowledge of the duty, and that the accused violated the duty.[156] The existence of the duty may be established by regulations that create the government credit card program.[157] The more difficult element to prove will often be the actual knowledge of the duty. In *Long*, the accused pleaded guilty and therefore admitted knowledge of the duty. In a contested case, the trial counsel will normally have to look to the local procedures for issuing the credit card to establish notice. Such procedures should include written notice of restrictions on the card's use and should require that the accused acknowledge these restrictions by signing a standard form.[158]

In *United States v. Hughey*,[159] the CAAF reviewed a conviction for violation of a lawful general regulation arising out of the unauthorized use of a government credit card. In *Hughey*, a local general regulation, issued by an Air Force major general, specified restrictions on the use of the government credit card and imposed time limits on repayment of charges that were more strict than limits imposed by American Express.[160] The accused violated the regulation by incurring over $11,000 in charges for personal expenses during a three-month period and failing to repay the charges within the specified time limit.[161] The CAAF rejected the accused's challenges to the lawfulness of the regulation and affirmed the conviction.

The accused in *Hughey* argued that the regulation in issue was not a lawful regulation because it interfered with a private voluntary agreement between the accused and the credit card company and was not sufficiently related to any military duty. The court agreed with the findings of the trial judge that the regulation was a valid means of implementing a military program that served the "public military purpose" of "facilitating government business and deployment activities."[162] Moreover, because the regulation was issued by a proper authority, it was presumed to be lawful.[163] The accused failed to overcome that presumption. In assessing the lawfulness of the regulation, the court refused to consider the existence of alternative funding methods that might have a lesser impact on the personal finances of service members. The court found that "military officials have broad authority to structure, test, and restructure finance and accounting activities in an effort to obtain improved efficiencies and economies in the conduct of military affairs."[164]

The accused also argued that the regulation was unlawful because its only purpose was to increase the maximum punishment for failure to pay just debts, an offense already defined in the UCMJ.[165] The court noted that the regulation imposed much narrower restrictions than those available under the Article 134 offense and was applicable to only a specific type of debt arising out of a military credit card program. In finding the regulation to be lawful, the court cautioned that deficiencies in the program that affect the individual's ability to comply or that deny him notice of the program rules may provide a defense to prosecution for violating a regulation designed to reinforce the credit card program.[166] The court's concern with notice of program restrictions is not based in Article 92(1), which does not require proof of actual knowledge of a lawful general regulation. Instead, the court appears to be raising a due process notice issue in circumstances that "sucker punch" soldiers by issuing them credit cards without adequately briefing them on the proper use of the cards.[167]

Practitioners can take a giant stride toward simplifying the prosecution of cases of credit card abuse by helping command-

156. *See* MCM, *supra* note 3, pt. IV, ¶ 16c(3)(b).

157. *See*, *e.g.*, U.S. Dep't of Army Letter 37-97-1, subject: Government Travel Charge Card Program (14 Aug. 1997) [hereinafter DA Letter 37-97-1].

158. *See id.* (containing a sample format for a "Statement of Understanding" to be signed by the cardholder). Trial counsel should review the local procedures to ensure compliance with this policy and adequacy of the notice of card restrictions given to cardholders.

159. 46 M.J. 152 (1997).

160. *Id.* at 153.

161. *Id.*

162. *Id.* at 155.

163. *Id.* at 154.

164. *Id.*

165. *Id.* at 154. *See generally* MCM, *supra* note 3, pt. IV, ¶ 14c(2)(a)(iii) ("Disobedience of an order . . . which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.").

166. *Hughey*, 46 M.J. at 155.

ers to implement regulations that meet the criteria of Article 92(1). This is a superior method of charging misuse of government credit cards, because of its simplicity of proof and greater maximum punishment. Currently, there is no explicitly punitive Department of the Army or Department of Defense regulation for this purpose.[168]

Pandering

The *MCM* prohibits two forms of pandering: (1) pandering by compelling, inducing, enticing, or procuring an act of prostitution; and (2) pandering by arranging or receiving consideration for sexual intercourse or sodomy.[169] In *United States v. Miller*,[170] the accused was convicted of the former type of pandering by wrongfully enticing women to engage in sexual acts in exchange for cigarettes and other tempting inducements.[171] None of the ladies accepted the accused's offers, but they did inform his military superiors of his propositions. The accused had greater success with the appellate courts following his court-martial convictions for pandering. He convinced the Air Force Court of Criminal Appeals that pandering, as defined in the *MCM*, requires a transaction with at least three parties.[172] The service court dismissed the pandering conviction and affirmed a conviction for solicitation to commit prostitution under art 134.[173]

The CAAF also found the appellant's arguments irresistible and held that the offense of pandering requires the participation of at least three parties.[174] First, the court noted that if pandering requires only two parties, it is essentially no different from solicitation of another to commit prostitution, which carries a maximum punishment of a dishonorable discharge and confinement for five years. Solicitation to prostitute oneself, on the other hand, provides for a maximum punishment of a dishonorable discharge and only one year of confinement.[175] The court reasoned that it is unlikely that the president would have intended such disparity in punishments for such closely related misconduct. Second, the court relied on the canon that "criminal laws are strictly construed in favor of the defendant."[176] Also called the "rule of lenity," this canon of construction compels a court to resolve ambiguities in criminal statutes in favor of the accused.[177] Since the court found the text of the pandering offense to be ambiguous, it ruled in favor of the accused and held that pandering requires at least three parties.[178]

This ruling clarifies proper charging options in cases of prostitution. In cases involving only the accused and one other person, the correct charge is prostitution or solicitation for prostitution. Pandering only arises when the accused arranges for or receives valuable consideration for arranging an act of sexual intercourse or sodomy between two other people. While it only takes two to tango, it takes at least three to pander under the UCMJ.

Defenses: "Exculpatory-No" Doctrine

The "exculpatory-no" doctrine holds that a person who gives a "mere denial" of criminal misconduct to law enforcement officials cannot be prosecuted under Article 107 if that denial turns out to be false.[179] The doctrine originated in the federal courts as a special defense to the false statement statute in the federal criminal code at 18 U.S.C. § 1001.[180] In fashioning a

167. *See id.*

168. *See* DOD REG. 7000.14R, *supra* note 149, app. A; DA Letter 37-97-1, *supra* note 157. At least one Army installation has implemented a local general regulation on the *Hughey* model since that case was decided. *See* U.S. ARMY AIR DEFENSE CENTER AND FT. BLISS, REG. 27-4, PROHIBITED AND REGULATED CONDUCT, Interim Change No. IO3 (19 Aug. 1997).

169. *See* MCM, *supra* note 3, pt. IV, ¶ 97b.

170. 47 M.J. 352 (1997).

171. *Id.* at 356.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id. See supra* note 7.

178. *Miller*, 47 M.J. at 357.

179. United States v. Solis, 46 M.J. 31, 32 (1997).

180. *Id.*

military version of the exculpatory-no defense, the CAAF has drawn upon federal precedents. Although the CAAF has assumed the existence of the exculpatory-no defense in a long line of cases,[181] it has never found it applicable to a single case it has decided.[182] In *United States v. Solis*,[183] however, the CAAF joined a growing majority of federal circuit courts which have concluded that the doctrine rested on faulty grounds. In the lead opinion, Judge Effron announced that the military's tentative courtship with the exculpatory-no defense is absolutely over—maybe.

Judge Effron's plurality opinion in *Solis* concluded that the exculpatory-no doctrine has no basis in the text or legislative history of Article 107 and is "not compelled by any self-incrimination concerns."[184] This ruling anticipated the recent decision of the United States Supreme Court in *Brogan v. United States*,[185] which formally declared the death of the exculpatory-no defense under 18 U.S.C. § 1001. The Supreme Court held that the exculpatory-no defense had no legitimate statutory or constitutional basis.[186] *Brogan* ends the debate over any asserted constitutional basis for the defense.

In *Solis*, Judge Effron found no support for the defense in the text or legislative history of Article 107. "There simply is no indication that Congress intended that persons accused or suspected of offenses should have a license to lie to military investigative organizations, while witnesses who give false statements about the same events should be punished."[187]

Even though the court found no basis for the defense in Article 107, Article 31, or the Fifth Amendment, it still could not clearly and finally declare an end to the inquiry. Judge Effron entertains the possibility that the *MCM* may impose an independent limit on the use of Article 107 against an "accused or suspect if they did not have an independent duty or obligation to speak."[188] Judge Effron states that this "guidance" is not based on the statutory elements of the offense, and proof of an "independent duty or obligation" to speak is not required for a conviction under Article 107.[189] The meaning and effect of the *MCM* provision is, therefore, an open question. According to Judge Effron, it could be viewed as nothing more than the President's attempt to summarize the court's dicta in decisions that predate the 1984 *MCM*. Alternatively, the plurality suggests that this provision could constitute a presidential regulation on government charging discretion under Article 107 or may confer a procedural right on the accused which courts are bound to enforce.[190]

Chief Judge Cox, writing separately, agrees that the doctrine "does not provide a defense to a prosecution for making a false official statement under Article 107."[191] He further agrees with Judge Effron that the exculpatory-no doctrine may have an independent regulatory basis in the *MCM*. Judges Gierke and Sullivan concur in the result in separate opinions and maintain that the case can be decided on the basis of existing precedents without reaching the broader statutory and constitutional questions addressed in the lead opinion.[192] Judge Gierke is unwilling to rule out a statutory basis for the defense and expresses doubt that "Congress intended to criminalize a suspect's exclamation, 'I didn't do anything wrong!' as he or she is being apprehended."[193]

The CAAF returned to the exculpatory-no doctrine later in the 1997 term in *United States v. Black*.[194] In *Black*, the appellant was convicted for making a false official statement by falsely denying memory of certain events. He relied on the

181. *See*, *e.g.*, United States v. Dorsey, 38 M.J. 244 (C.M.A. 1993); United States v. Frazier, 34 M.J. 135 (C.M.A. 1992); United States v. Prater, 32 M.J. 433 (C.M.A. 1991).

182. This observation is made by Judge Effron in *United States v. Solis*. *See* 46 M.J. 31, 34 (1997).

183. *Id.*

184. *Id.*

185. 118 S. Ct. 805 (1998). The U.S. Supreme Court decided *Brogan* after the CAAF decided *Solis.* In *Brogan*, the Court ruled that there is not an "exculpatory-no" defense under federal law. *See id.*

186. *Id.*

187. *Solis*, 46 M.J. at 33.

188. *Id.* at 35.

189. *Id.*

190. *Id.* at 35-36.

191. *Id.* at 36 (Cox, C.J., concurring).

192. *Id.*

193. *Id.* (Gierke, J., concurring in the result).

194. 47 M.J. 146 (1997).

exculpatory-no defense on appeal. The lead opinion by Judge Effron cites *Solis* for the proposition that the exculpatory-no doctrine is not a defense under Article 107.[195] In dissent, Judge Sullivan takes issue with that interpretation of the holding in *Solis*, asserting that Chief Judge Cox's concurring opinion in *Solis* "possibly raises some doubt in my view about extinction of the exculpatory-no doctrine or its *Manual* equivalent."[196] Chief Judge Cox closes the door on Judge Sullivan's objection and retorts that Judge Sullivan "does not accurately characterize my opinion there."[197] Judge Gierke expressly adheres to his separate opinion in *Solis*.[198]

So, is the exculpatory-no defense dead or not? A clear majority of the CAAF has held that the defense has no statutory or constitutional basis. The court has not, however, completely ruled out an exculpatory-no defense based on Part IV, paragraph 31c(6) of the *MCM*.[199] This dicta leaves the exculpatory-no defense on artificial life support for the time being. The CAAF should, and probably will, pull the plug eventually for several reasons.

First, the discussion of punitive articles in Part IV of the *MCM* is expressly denominated as "explanation" of the statute, and the provision at issue here plainly states: "A statement made by an accused or suspect during an interrogation is not an official statement *within the meaning of the article* . . . ."[200] The court has often noted that it is not bound by the statutory interpretations offered by the President in the *MCM*.[201] Second, the drafter's analysis to paragraph 31c(6) cites pre-1984 case law as its source.[202] The cases cited have been overruled by the CAAF since the latest version of the *MCM* was promulgated.[203] It would be anomalous indeed if the court were to find "procedural rights" in a provision based on its own earlier invalid opinions. Finally, the court suggests that the President may have intended that this provision limit prosecutorial discretion in charging.[204] This is at odds with the overtly interpretive purpose of the provision, as already observed. Furthermore, that kind of prosecutorial guidance is found in the Rules for Courts-Martial, which are based on Article 36.[205] In Part I, paragraph 4, the *MCM* itself warns against finding rights in the discussion of the punitive articles.[206] The court's concern with overcharging may be valid, but the President has already addressed that concern elsewhere in the *MCM*.[207] The time has come to let go of the exculpatory-no defense.

Multiplicity and Lesser Included Offenses

The basic law of multiplicity and lesser included offenses seems to have reached a stage of tentative stability, if not relative clarity. Three judges on the CAAF now appear committed to a generally consistent elements-based approach to resolving issues of multiplicity and lesser included offenses.[208] This is good news for practitioners, who can rely on a generally consistent methodology for resolution of multiplicity issues at trial. In 1997, the court continued its unsuccessful quest for the "Grail of Multiplicity," turning its attention to the issue of waiver and several special applications of the law of multiplicity.

195. *Id.* at 147.

196. *Id.* at 151.

197. *Id.*

198. *Id.*

199. *See* United States v. Solis, 46 M.J. 31, 35-36 (1997).

200. MCM, *supra* note 3, pt. IV, ¶ 31c(6)(a) (emphasis added).

201. *See*, *e.g.*, United States v. Gonzalez, 42 M.J. 469, 474 (1995) (stating that "it is beyond cavil that *Manual* explanations of codal offenses are not binding on this court").

202. *See* MCM, *supra* note 3, at A23-8.

203. *See* United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Sanchez, 39 M.J. 518 (A.C.M.R. 1993).

204. *Solis*, 46 M.J. at 35.

205. *See* UCMJ art. 36 (West 1995) (authorizing the President to promulgate rules of evidence and procedure for courts-martial).

206. *See* MCM, *supra* note 3, pt. I, ¶ 4, discussion (stating that "[t]he supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity").

207. *See id*. R.C.M. 307(c)(4) discussion, R.C.M. 906(b)(12), R.C.M. 907(b)(3)(B).

208. *See* Barto, *supra* note 8, at 66-68 (discussing United States v. Oatney, 45 M.J. 185 (1996)).

In *United States v. Lloyd*,[209] the Air Force Court of Criminal Appeals held that multiplicity issues never rise to the level of plain error, and, therefore, it embraced a bright line rule that multiplicity claims are always waived unless raised at trial.[210] On further review, the CAAF unanimously rejected the Air Force court's "new bright line rule" and held that, in the absence of an express waiver on the record, the plain error standard of review would be applied to multiplicity claims raised for the first time on appeal.[211] The court, however, imposed a further limitation on appellate review of multiplicity claims raised for the first time on appeal following an unconditional guilty plea.[212]

The CAAF held "that appellate review of multiplicity claims is effectively waived by unconditional guilty pleas, except where the record shows that the challenged offenses are '*facially duplicative*.'"[213] Charges are "facially duplicative" when it is apparent from looking at the specifications that they allege the "exact same conduct"[214] or are "factually the same."[215] This standard is based on the premise that "a guilty plea generally precludes the post-trial litigation of factual questions" because of the limited factual record available to the appellate court.[216] Facially duplicative specifications are a special exception to this rule because "a fact hearing is usually not required to establish a double jeopardy claim when the challenged specifications literally repeat each other as a matter of fact."[217]

In *Lloyd*, the accused pleaded guilty to one specification alleging cunnilingus on divers occasions between 1 August 1988 and 1 December 1991, and another specification alleging a single act of fellatio with the same victim that occurred sometime during the last six months of the same period of time. The appellant claimed that these specifications were multiplicious. The court held that these multiplicity claims could not be considered on appeal because the challenged charges were not facially duplicative. Additionally, the appellant claimed that two other specifications alleging indecent acts were multiplicious with a specification alleging rape of the same victim during the same time period at the same locations. Again, it was not clear from the specifications themselves that the indecent acts were part of a course of action leading to intercourse on every occasion.[218]

The court applied the new "facially duplicative" standard in *United States v. Harwood*.[219] Lieutenant Harwood pleaded guilty to fraternization with a certain airman under her supervision by engaging in "hugging, kissing, and sexual intercourse" with him, in violation of Air Force custom.[220] She also pleaded guilty to a violation of Article 133 for "wrongfully and dishonorably" having a close personal relationship with the same airman during the same time period (about one month) by engaging in hugging, kissing, and sexual intercourse. At trial, defense counsel asserted that the charges were multiplicious for sentencing but did not object to multiple convictions. Comparing the specifications, the court found them to be facially duplicative and proceeded to a plain error review of the multiplicity issue.[221]

In resolving the multiplicity claim in *Harwood*, the CAAF established a categorical exception to the multiplicity rule announced in *United States v. Teters*.[222] Instead of performing a comparison of the elements, the court relied on the general rule that, when the underlying conduct is the same, a charge under clauses one or two of Article 134 is a lesser included offense of a charge under Article 133.[223] Thus, the court con-

209. 46 M.J. 19 (1997).

210. *Id.* at 20.

211. *Id.*

212. *Id.*

213. *Id.* at 23 (emphasis added).

214. *See id.*

215. *See id.*

216. *Id.* at 23.

217. United States v. Harwood, 46 M.J. 26, 28 (1997).

218. *Lloyd*, 46 M.J. at 24.

219. 46 M.J. 26.

220. *Id.* at 27.

221. *Id.*

222. 37 M.J. 370 (C.M.A. 1993). *See* Major William T. Barto, *Alexander the Great, the Gordion Knot, and the Problem of Multiplicity in the Military Justice System*, 152 Mil. L. Rev. 1 (1996) (containing a concise description of significant developments in the law of multiplicity under *Teters*).

cluded that "an obvious violation of the Double Jeopardy Clause has occurred."[224]

Chief Judge Cox concurred in *Harwood*, expressing an alternative rationale for the same conclusion.[225] He reminded the court that the elements test of *Teters* is only a rule of statutory construction to be employed when legislative intent is not clear. The Chief Judge pointed to the statutory language of Article 134, which begins with the phrase "Though not specifically mentioned in this chapter . . . ." According to Chief Judge Cox, this language shows the clear intent of Congress to preclude conviction under Article 134 for the same conduct under an enumerated article.[226]

In dissent, Judge Crawford rejected the majority's conclusions on both waiver of the issue and resolution of the multiplicity claim.[227] The "facially duplicative" standard applies only to cases of passive waiver.[228] According to Judge Crawford, there was evidence of an express waiver in the record in this case. As to the multiplicity issue, Judge Crawford relied on *United States v. Oatney*[229] and insisted on a comparison of the elements, as required by *Teters*.[230] She further pointed out that the greater and lesser included offense relationship between Articles 133 and 134 relied on by the majority was based on case law which was decided before *Teters*. Judge Crawford concluded that each offense requires proof of a unique element, and, therefore, they are separate offenses for all purposes.[231]

In *United States v. Britton*,[232] the CAAF was again presented with a multiplicity claim raised for the first time on appeal. Unlike the other two cases decided in 1997, however, this was not a guilty plea case. The appellant claimed that his conviction for assault with intent to rape was multiplicious with his conviction for rape arising out of the same course of conduct.[233] Four judges concluded that Congress did not intend to allow an accused to be convicted or punished for both an assault with intent to rape and rape arising out of the same course of conduct.[234] The majority examined legislative history and found that Congress specifically considered a proposed article proscribing felonious assaults, but declined to enact it on the grounds that felonious assaults were nothing more than attempts to commit the contemplated felony.[235] From this premise, the majority inferred that Congress could not have intended to allow convictions for rape and an assault with intent to rape, which it had declined to prohibit in a separate statutory provision. The court also drew upon the general rule set forth in *United States v. Foster*[236] that "with regard to assaultive and sexual crimes . . . Congress could not have intended multiple convictions and multiple punishment for the selfsame act."[237]

In an effort to buttress this tenuous inference of legislative intent, the court also offers a cursory comparison of the elements as a backstop rationale. The court began with the truism that a person who commits rape necessarily commits an assault. It further states that, under *Foster*, Article 134 offenses may be lesser included offenses of the enumerated articles, notwithstanding the unique requirement to prove the prejudicial or service-discrediting nature of the conduct under Article 134.[238] The court then hastily concludes that assault with intent to commit rape is a lesser included offense of rape "because the assault

223. *Harwood*, 46 M.J. at 28.

224. *Id.* at 28-29.

225. *Id.* at 29.

226. *Id.*

227. *Id.* at 29-30.

228. *Id.*

229. 45 M.J. 125 (1996) (holding that communicating a threat and obstruction of justice based on the same threat were not multiplicious under an elements test).

230. United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993) (adopting the *Blockburger* test for multiplicity).

231. *Harwood*, 46 M.J. at 30.

232. 47 M.J. 195 (1997).

233. *Id.* at 197-98.

234. *Id.* at 196.

235. *Id. See* United States v. Gomez, 46 M.J. 241 (1997). *See also infra* notes 265-278 and accompanying text.

236. 40 M.J. 140, 146 (C.M.A. 1994).

237. *Britton*, 47 M.J. at 197.

is the force required by the second element of rape."[239] The court ignores the fact that each offense requires proof of a unique element which the other offense does not: rape requires proof of vaginal penetration, and assault with intent to rape requires proof of a specific intent to rape. Thus, a correct application of the elements test produces a conclusion that contradicts the conclusion reached by the court.

While the alternative rationales offered are less than compelling, the court undoubtedly reached the correct conclusion. *Britton* is a sound decision in search of a defensible rationale. The court's conclusion on the multiplicity issue could be justified by starting with the undisputed premise that Congress did not intend to permit multiple convictions or punishments for both an attempt and the completed offense arising out of the same act.[240] On that basis, the court could have simply held that when an assault with intent to rape amounts to an attempted rape, the accused may not be convicted of both the assault and the completed rape. An assault with intent to rape comes closer to completion of the offense than the law of attempts requires; therefore, an assault with intent to rape is an alternative way to charge attempted rape. Allowing multiple convictions for rape and the predicate assault with intent to rape would, therefore, clearly contravene the legislative intent expressed in Article 80. This reasoning would not require the court to speculate about possible congressional intent on the basis of ambiguous legislative history. The intent of Congress is stated in Article 80 itself. Under this approach, the elements comparison is simply unnecessary.[241]

A second area of difficulty for the majority in *Britton* is its resolution of the waiver issue and application of the "facially duplicative" test. *Lloyd* held that plain error review was unavailable to an appellant who pleaded guilty and raised multiplicity claims for the first time on appeal, unless the charges in issue are facially duplicative.[242] *Lloyd* makes it quite clear that the facially duplicative standard was a special prerequisite to plain error analysis only in cases of unconditional guilty pleas. Where there is a full record, as in *Britton*, the court may proceed directly to a plain error analysis. Here, the court seems to confuse the threshold finding of facial duplicity with the discretionary judicial conclusion of plain error. Judge Gierke asserts: "Applying the "facially duplicative" test, we conclude that the assault specification in this case facially duplicates the rape specification because it merely describes the force used to commit rape. Accordingly, we hold that appellant's conviction of both offenses was plain error."[243] The "facially duplicative" standard of *Lloyd* and the plain error standard of Article 59 are very different standards and apply to different stages of the analysis.[244]

Even if the facially duplicative test was applicable in *Britton*, the majority applies it in a way that renders it meaningless. The only reason the majority knows that the assault alleged is the same one leading up to the rape is by reference to the record of trial. Otherwise, it would not be possible to determine from the face of the charge sheet that these were part of the same act or transaction. Such "peeking" at the record is contrary to the very definition of the facially duplicative standard. Judge Crawford, in dissent, concluded that the specifications in this case clearly show that they are not facially duplicative.[245] Judge Crawford also correctly asserts that the appropriate inquiry under the plain error doctrine is whether the accused was prejudiced by the separate convictions.[246] She concludes that he was not, and she would affirm his convictions.

Finally, *Britton* is significant because the court's newest member writes a concurring opinion,[247] offering his proposed

238. *Id.*

239. *Id.*

240. "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, *even though failing*, to effect commission, is an attempt to commit that offense." UCMJ art. 80(a) (West 1995) (emphasis added). Thus, attempted rape is a lesser-included offense to rape. *See* MCM, *supra* 3, pt. IV, ¶ 45d(1)(d).

241. In fact, if we were required to rely on the elements comparison to discern the intent of Congress, we would be bound to conclude that attempted rape and rape were separate offenses for multiplicity purposes, since each requires proof of a unique element. Article 80 is an example of a clear expression of legislative intent that precludes the application of the *Teters* test.

242. *See supra* notes 213-219 and accompanying text.

243. *Britton*, 47 M.J. at 199.

244. The plain error doctrine is set forth most clearly in *United States v. Olano*, 507 U.S. 725 (1993). Two distinct conclusions are necessary before a court can grant relief on the basis of plain error. First, there must be a "clear and obvious error" that affects "substantial rights." *Id.* at 734. Second, such error must be prejudicial to the accused; in other words, it must have affected the outcome of the case. *Id.* Finally, the plain error rule is permissive. If the court finds that there is plain error, it has the authority to grant relief but is not required to do so in every case. According to the Supreme Court, this discretion should normally be exercised only in cases where it is necessary to prevent a "miscarriage of justice." *Id.* at 736. *See* United States v. Thomas, 46 M.J. 311 (1997) (citing *Olano* as authoritative for the military justice system).

245. *Britton*, 47 M.J. at 205.

246. *Id.*

solution for reducing the glut of multiplicity litigation in military appellate courts. After an able review of the law of multiplicity, Judge Effron proposes that appellate courts introduce a "conditional dismissal" option in multiplicity cases, which would permit courts to dismiss lesser offenses in cases of "colorably multiplicious" offenses. According to Judge Effron, this would allay the government's concerns on appeal to preserve lesser convictions in the event that the more serious convictions are reversed.[248] Neither the majority nor the dissent commented on this proposal.

Practitioners should take care in interpreting the court's latest rulings in this complex area of the law. In particular, *Britton* should not be permitted to distort the current understanding of the elements test or the facially duplicative standard of *Lloyd*. Also, in applying the holding in *Harwood*, trial counsel should heed the court's advice in *United States v. Foster* to charge Article 134 offenses in the alternative, even if they are technically lesser included offenses of Article 133 or some other enumerated article. This practice answers notice concerns and ensures that the full range of lesser included offenses will be considered on the record at trial.

Pleadings

Amendment and Variance

The rules which govern changes to charges and specifications are set forth in Rule for Courts-Martial (R.C.M.) 603.[249] These rules pertain to changes made by, or at the request of, the government prior to the announcement of findings. Such changes are referred to as "amendments." The operation of the rules depend on whether the proposed change is characterized as a major or minor change, as defined in R.C.M. 603(a).[250] A "variance" occurs when a panel or military judge enters findings of "guilty by exceptions and substitutions," as permitted by R.C.M. 918.[251] The rule governing exceptions and substitutions in findings does not use the categories of major or minor changes. Rather, the rule simply states that "[e]xceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it."[252] Although related by a common concern, the rules of amendment and variance are derived from different procedural rules and operate at different phases of the trial. *United States v. Moreno*[253] is an important case for practitioners who seek to understand how these rules operate in practice.

Technical Sergeant Moreno was charged with conspiracy to sell drugs that he had stolen from the hospital pharmacy where he worked.[254] On the day before trial, trial counsel moved to amend the conspiracy specification by changing the alleged overt act from removing the drugs from the pharmacy to shipping the drugs to a co-conspirator.[255] Defense counsel opposed the amendment on the grounds that it was a "major change." The military judge denied the defense objection and permitted the change. The defense did not request a continuance to prepare to defend against the amended specification.[256]

247. *Id.* at 199-205.

248. *Id.* at 202-03.

249. *See* MCM, *supra* note 3, R.C.M. 603.

250. *Id.*

251. *Id.*

252. *Id.* R.C.M. 918.

253. 46 M.J. 216 (1997).

254. *Id.* at 217.

255. *Id.*

On appeal, the accused maintained that the amendment was a major change; the government characterized the change as a permissible "variance" under existing precedent.[257] The CAAF, however, chose to avoid the categorical formality of the rules by identifying the underlying concern of both R.C.M. 603 and R.C.M. 918—the question of notice and the accused's ability to prepare a defense.[258] The court noted that the overt act is not the essence of the conspiracy offense, but merely serves to show that the conspiracy is alive and in motion.[259] The court held that "[w]hen the basic facts remain unchanged, other overt acts may be substituted or amended" without prejudicing the accused's ability to prepare for trial.[260] Although it may be implied, the majority did not expressly rule that the change in this case was a minor change. Rather, it held that, regardless of the proper characterization of the change, the accused was not unfairly surprised at trial.[261] If the accused was surprised by the change, he could have requested a continuance. Concurring in the result, Judge Sullivan reasoned that the change was a major change under R.C.M. 603, but the error did not prejudice the accused.[262]

Moreno offers several important lessons for the practitioner. First, defense counsel should request a continuance in order to preserve some hope for showing prejudice on appeal. This may place the accused between a rock and a hard place in some cases. In *Moreno*, the court recognized that the accused probably would not have asked for a continuance because of the very real risk of seeing additional charges.[263] Second, the government has a strong precedent to argue that changes to the overt act are never major changes based on this case. Finally, counsel who are arguing a motion regarding amendment or variance must cast their arguments in terms of the accused's ability to prepare an adequate defense. If the formal categories favor counsel's position, he should argue them, but he should always cast the argument in terms of this underlying interest.

Preemption

If an offense is enumerated in Articles 80 through 133, it may not be charged under Article 134. This doctrine of preemption is derived from the statutory text of Article 134 itself, which begins with the phrase "Though not specifically mentioned in this chapter, all disorders and neglects . . . ."[264] In *United States v. Gomez*,[265] the CAAF held that a charge under Article 80 does not preempt charges for assault with intent to commit various felonies under Article 134. This holding resolves a question raised by Chief Judge Cox in the 1995 case *United States v. Weymouth*.[266]

In *Gomez*, the accused was charged with attempted rape.[267] At his contested trial, the military judge sua sponte instructed the members that assault with intent to rape under Article 134 was a lesser included offense.[268] The defense did not object to the instruction. The members found the accused not guilty of attempted rape but guilty of the Article 134 assault with intent to rape. The accused challenged his conviction on grounds of preemption, relying on indications in the legislative history that Congress expressly rejected a proposal for a felonious assault article in the UCMJ on the grounds that such assaults could be charged under either Article 80 or Article 128.[269]

Despite the relatively strong arguments from legislative history, the CAAF unanimously held that felonious assaults are not preempted by Article 80. This conclusion is based on the plain

256. *Id.*

257. *Id.* at 218.

258. *Id.*

259. *Id.*

260. *Id.* at 219.

261. *Id.*

262. *Id.*

263. *Id.*

264. UCMJ art. 134 (West 1995).

265. 46 M.J. 241 (1997).

266. 43 M.J. 329 (1995) (holding, in part, that an accused cannot be convicted of both an attempted murder and an assault with intent to murder arising from the same criminal act or transaction).

267. *Gomez*, 46 M.J. at 242.

268. *Id.* at 246.

269. *Id.* 243-44.

language of Article 134,[270] the President's consistent adherence to the viability of the offense since the promulgation of the 1951 *MCM*, and the doctrine of stare decisis.[271] The crime of assault with intent to commit a felony was among the six offenses originally specified by the President under Article 134 in the 1951 *MCM*.[272] Whatever the merits of the legislative history arguments, it is obvious that the President did not believe that Article 80 preempted this offense. Additionally, the CAAF has recognized the validity of this offense since 1953.[273] The court asserts that, by failing to repudiate these formal interpretations of the law, Congress has implicitly approved of them. The court leaves open the question of whether assault with intent is a lesser included offense of attempted rape, but it does not disturb its holding in *Weymouth* that one may not be convicted of both offenses.[274]

Gomez holds definitively that Article 134 assault with intent to commit a felony is a viable offense.[275] The difficult question for practitioners is when to charge this offense. It is difficult to construct a hypothetical scenario involving an assault with intent to rape that does not amount to an attempted rape. While the court in *Gomez* multiplies hypotheticals of attempts that are not assaults, it is unable to offer any examples of a felonious assault that is not an attempt when the contemplated felony is a crime against the person of the victim.[276] Such a hypothetical belongs in the same category as perpetual motion machines—it does not exist. Thus, in every case where counsel could charge a felonious assault under Article 134, he could also charge an attempt. There is no case in which Article 134 offers a greater maximum punishment.[277] This leaves two potential reasons for charging Article 134 instead of, or in addition to, Article 80. One reason is to ensure that the government has the full range of lesser included offenses available should the attempt charge fail.[278] The second reason is less technical. Counsel should consider whether, in a given case, the title and model specification for assault provides a better and more graphically complete description of the offense. The charge of attempt focuses on the intent of the accused. The assault charge explicitly uses the word "intent" but also adds the more graphic description of an assault. Therefore, when counsel wish to emphasize the assaultive nature of the attack and its evil purpose, they may find that Article 134 offers a more direct way of expressing that emphasis to a panel of laymen.

Conclusion

From the practitioner's standpoint, clarity in the substantive law is desirable, regardless of which side of the "v" one practices on. On the other hand, counsel must be aware of those areas of the law which the courts have identified as open or unresolved questions. These doctrinal interstices become opportunities for advocacy. The crop of decisions reviewed in this article is a mixed bag of clarity and confusion. The CAAF appears committed to a fairly broad and flexible use of Article 128 with several critical caveats for overzealous prosecutors. In the area of larceny, the court at first blush appears to have cut the Gordian knot of *Antonelli*, but may have spawned new legal complications for practitioners. The development of the law can sometimes be a painful process. If practitioners strive to use the law to achieve just results, their discretion will cover a multitude of legal errors in appellate opinions.

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270. *Id.* The plain language argument depends on the view that article 80 does not reach certain assaults with intent to commit a felony. If there are cases in which an article 134 felonious assault could be charged, but article 80 could not, that would be an offense "not specifically mentioned in this chapter," as stated in the text of article 134. *See* UCMJ arts. 80, 134 (West 1995).

271. *Gomez*, 46 M.J. at 246.

272. *Id.*

273. *Id.*

274. *Id.* at 247.

275. *Id*. at 242.

276. *See id.* at 245.

277. *See* MCM, *supra* note 3, pt. IV, ¶ 64e.

278. *See* United States v. Weymouth, 43 M.J. 329 (1995) (suggesting that certain aggravated assaults may not be lesser included offenses of attempted murder, but may be lesser included offenses of assault with intent to kill).

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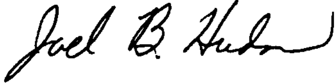

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"Something Old, Something New, Something Borrowed, Something Blue":[1] Recent Developments in Pretrial and Trial Procedure

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In 1996, the membership of the Court of Appeals for the Armed Forces (CAAF) changed with the addition of another associate judge.[2] The new membership raised many questions, mainly, would the court's disposition on key issues change? Would the court establish a new direction for military justice?

The major pretrial and trial procedure cases from 1996 provided just a glimpse of the trail the court is blazing for military justice. In 1997, however, the courts were more productive. The CAAF and intermediate service courts resolved many issues that affect the way practitioners execute their missions. In addition, contrary to the 1996 cases, the 1997 pretrial and trial procedure cases are of truly "landmark" proportion.[3] The new CAAF and the intermediate service courts mixed "something old, something new, something borrowed, and something blue" to provide a clear statement of the law in pretrial and trial procedure.

This article reviews recent developments in the law relating to Article 32 investigations, pleas and pretrial agreements, court-martial personnel, and voir dire and challenges. Not every recent case is discussed; only those that establish a significant trend or change in the law are considered. Practical ramifications for the practitioner[4] are identified and discussed.

Something Old

Article 32 Investigations: Still at the Forging Stage

The most significant development in the area of Article 32 investigations in 1996 involved the Air Force Court of Criminal Appeals successfully focusing the CAAF's 1995 evisceration of the 100-mile situs rule.[5] One might conclude that there is not much that is more controversial than the 100-mile situs test in this area of the law. One case shows that the law of Article 32 investigations is still in the forging stage.

Murder, Lesbian Duress, and McKinney: Retreat from Fatal Vision

In *MacDonald v. Hodson*,[6] the famous court-martial case involving Captain MacDonald's murder of his wife and children, and inspiration for the book *Fatal Vision*,[7] the Court of Military Appeals considered whether an Article 32 investiga-

1. "Something old, something new, something borrowed, something blue." This is a traditional wedding rhyme that was first quoted in an 1883 English newspaper and was attributed to "some Lancashire friends." In order to start a marriage successfully, a bride had to mix something old, something new, something borrowed, and something blue, and have a sixpence for her shoe. "Something old" protected a baby. There is no cited history to explain "something new." A bride who wore "something borrowed" (something that a happy bride had already worn) was lucky. A bride who wore blue expressed faithfulness. The "lucky sixpence" produced prosperity or warded off evil from disappointed suitors. *See* A Dictionary of Superstition 42-43 (Iona Opie et al. eds, 1989).

2. Associate Judge Andrew W. Effron joined to court to fill a vacancy left open when Judge Wiss passed away in October 1995. Judge Effron brings to the CAAF a background rich in military legal experience. After graduating from the 80th Officer Basic Course, The Judge Advocate General's School, United States Army, he was a trial and defense counsel at Fort McClellan, Alabama. He then served with the Office of the Department of Defense General Counsel while in uniform and then as a civilian attorney-advisor. As counsel, general counsel, and then minority counsel to the Senate Armed Services Committee from 1987-1996, he was involved in the most significant legislative changes affecting the military justice system. His wealth of experience and knowledge of the intent behind the 1984 *Manual for Courts-Martial* and law and regulations of all of the services will have a pivotal impact on the deliberations and opinions of the CAAF.

3. Even the intermediate service court cases possess landmark qualities, considering that they analyze an issue that was not completely resolved by the CAAF but remains critical to the continued vitality of the military justice system. In the significant cases from 1996, for the most part, the courts interpreted a recent case that espoused a new statement of the law. As such, there was no particularly new statement of black letter law, but an interpretation that established a mild twist in the application of that black letter law. *See generally* Major Gregory B. Coe, *Restating Some Old Rules and Limiting Some Landmarks: Recent Developments in Pre-Trial and Trial Procedure*, Army Law., Apr. 1997, at 25.

4. The term "practitioner" includes all judge advocates in the military justice system. The 1997 cases contain lessons for staff judge advocates, appellate military judges, military judges, defense counsel, and trial counsel.

5. *See* United States v. Burfitt, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). *See also* Manual for Courts-Martial, United States, R.C.M. 405(g)(1)(a) (1995) [hereinafter MCM].

6. 42 C.M.R. 184 (C.M.A. 1970).

tion could be closed to the public. In response to the investigating officer's (IO) order closing the Article 32 investigation, Captain MacDonald filed a petition for extraordinary relief. The Court of Military Appeals denied the writ, holding that under applicable regulation the investigating officer was within his authority in closing the investigation.[8] More importantly, the court held that the Article 32 investigation was not a trial within the meaning of the Sixth Amendment to the Constitution, and there was no requirement that the proceedings be public.[9]

The "*Fatal Vision*" closure rule stood for twenty-seven years[10] until the Air Force court signaled its death knell in *San Antonio Express-News v. Morrow*.[11] In *San Antonio Express-News*, the court tackled whether it should grant an extraordinary writ of mandamus and order an Article 32 IO to reverse a closure decision which barred the press and public from an Article 32 investigation. The accused was charged with the murder of an eleven-year-old girl who had been missing for six years. The circumstances surrounding the case piqued the interest of the local press.[12] When the Article 32 was finally held in May 1996, the government requested that the investigation be closed to the press and public.

The IO granted the government request for the following reasons: "a need to protect against the dissemination of information that might not be admissible in court; to prevent against the contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the complete candor of witnesses called to testify at the hearing."[13] San Antonio Express-News, the local newspaper, appealed to the Air Force Court of Criminal Appeals.[14]

Presented with a case of first impression[15] involving the interpretation of Rule for Courts-Martial (R.C.M.) 405(h)(3),[16] the court determined that all it was required to do to resolve the

7. Joe McGinniss, Fatal Vision (1983).

8. The provision in question was from *Army Regulation 345-60*. Paragraph 2 provided: "This regulation also provides guidelines for the release of information to the public which might prejudice the rights of an accused." *MacDonald*, 42 C.M.R. at 184. Paragraph 4 prohibited the release of information "before evidence thereon has been presented in open court." *Id*. The investigating officer originally granted Captain MacDonald's request for an open hearing. The investigating officer reversed his decision, despite Captain MacDonald's oral and written waiver of the protections of the regulations. The Judge Advocate General of the Army then denied Captain MacDonald's request for relief, but approved a recommendation that Captain MacDonald's mother be permitted to attend the hearing. *Id*. at 184-85.

9. *Id.* at 185. The court specifically noted:

> The article 32 investigation partakes of a preliminary judicial hearing and of the proceedings of a grand jury . . . . However, the investigating officer hast no authority to appoint counsel, but must refer a request for such appointment to the appointing authority who then acts upon it . . . . However, finality does not attach to the investigating officer's recommendations; it is advisory only . . . in certain limited circumstances, such testimony may be admissible as previously reported testimony . . . strict rules of evidence applicable at trial are not followed. Rather testimony and other evidence of all descriptions normally will come to the attention of the investigating officer, some germane to the charges before him; and others of no material significance whatever; some will implicate the accused, and some will fail to do so, while tending to implicate others not then under charges. In making his report, it is the officer's responsibility to cull from his final product all extraneous matters and present only such evidence as in his opinion will be admissible at trial. Regulation 345-60 curtails the release of such information to the public in order to reduce the possibility of prejudice to the accused subject, and others not charged.

Id.

10. Prior to 1984, the *Manual for Courts-Martial* (*MCM*) did not contain guidance on the factors to use in deciding whether an Article 32 investigation should be closed. In 1984, the *MCM* was reissued. It contained a specific reference to public access at Article 32 investigations. Rule for Courts-Martial (R.C.M.) 405(h)(3) provides: "Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." MCM, *supra* note 5, R.C.M. 405(h)(3). It is interesting to note that the analysis to the provision states that the basis for the rule is *MacDonald*. *See id*. R.C.M. 405(h)(3) analysis, app. 21 at A21-25. Citing R.C.M. 806 for circumstances which might support closure, the analysis to R.C.M. 405(h)(3) concludes by indicating that the new rule in no way expresses a preference for closed or open hearings. *See id*.

11. 44 M.J. 706 (A.F. Ct. Crim. App. 1996), *petition for extraordinary relief filed*, 45 M.J. 88 (1997).

12. *Id.* at 707. During the six-year period, the victim's disappearance was highly publicized, presumably in an attempt to locate her remains or finally to determine her whereabouts.

13. *Id.* at 708. The Article 32 IO was very careful, and she received excellent advice from her legal adviser (or she was a judge advocate). Although the investigation was closed to spectators, the IO specifically emphasized to both government and defense counsel that closure did not preclude either from disclosing what occurred during the hearing. Moreover, the closure action neither foreclosed the accused from taking advantage of his right to verbatim transcripts nor encumbered his right to a copy of the detailed report of investigation. In her affidavit to the Air Force Court of Criminal Appeals, the IO provided the well-conceived reasons that supported her action, and she stated that she permitted government and defense counsel to present argument on the issue, reviewed the law, and deliberated for two hours before making her decision. The case underscores the very important role that a legal adviser plays in the Article 32 investigation, or, if the Article 32 IO was a judge advocate, the advantages of having an attorney as the investigating officer.

14. *Id.* at 707. The Air Force court issued an order staying the investigation pending the outcome of its resolution of the writ.

15. *MacDonald* was decided in 1970; therefore, it predates the 1984 *MCM*, which first contained the rule on closure of Article 32 investigations. While the new closure rule was based on *MacDonald*, the court did not have occasion to interpret the rule regarding closure until *San Antonio Express-News*.

issue was look at the plain meaning of the rule and drafters' comments. The court reasoned that R.C.M. 405(h)(3) favors open hearings. Even though no cases raised the closure issue since R.C.M. 405 was enacted, the Air Force court also concluded that the *"Fatal Vision"* rule was probably inconsistent with the 1995 *Manual for Courts-Martial* (*MCM*) and the CAAF's current view of pretrial procedures in a 1990s military justice system.[17]

While the Air Force court was able to discern correctly that R.C.M. 405(h)(3) tipped the scale in favor of open hearings, it was not able to define how a commander or IO should apply the rule to make a closure decision.[18] Rule for Courts-Martial 405(h)(3) leaves the decision to the discretion of the directing commander or IO, but it is unclear on what factors to consider, the appropriate weight to accord to those factors, the evidentiary requirements, the standards of review, and assignment of evidentiary burden.[19] The court declined to look at Supreme Court cases in the area, but held that the IO did not abuse her discretion in closing the hearing.[20] The IO's decision was not a reflexive response to the government's request. Because the application of R.C.M. 405(h)(3) was subject to differing interpretation and is a developing area of the law, issuance of mandamus was inappropriate.

Final resolution of the closure issue was complicated by the Army Court of Criminal Appeals decision in *United States v. Anderson*.[21] In *Anderson*, the accused was pleaded guilty to attempted larceny, larceny, and forgery.[22] During a portion of the accused's providence inquiry and her testimony on sentencing, the military judge closed the proceedings.[23] The accused testified regarding her motivation for committing some of the contested offenses, including the fact that she was the victim of a lesbian rape. According to the accused, the rapist informed the accused that unless she committed larcenies and forgeries, the rapist would reveal information to the public about the incident. Prior to any of the information becoming part of the record, the military judge and counsel discussed the matter in an R.C.M. 802 conference.[24] The military judge closed the proceeding to save the accused embarrassment, but failed to provide the specific justification on the record to support closure.[25]

The military judge's action gave the court occasion to discuss the rules regarding closure of *court-martial proceedings*. Referring to the memorandum opinion of *United States v. Hood*,[26] the Army court held that "absent national security or other adequate justification clearly set forth on the record, trials in the United States military justice system are to be open to the public."[27] Since an "open trial forum is to ensure that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent,"[28] the court applied the "stringent" four-step closure test of *Press Enterprises v. Superior Court of California*.[29] The four-step test authorizes closure of criminal trials if: the party seeking closure advances an over-

16. MCM, *supra* note 5, R.C.M. 405(h)(3). The rule provides, with regard to spectators, that "[a]ccess by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." *Id.*

17. *San Antonio Express-News*, 44 M.J. at 710. The Air Force court opined:

> In denying Captain MacDonald's petition, the [c]ourt said an Article 32 investigation was not a trial in the Sixth Amendment sense, so there was no requirement that it be public. We believe this dicta may not represent the view of the [CAAF] today, considering the changes to the *MCM* and customary procedures for conducting Article 32 investigations.

Id.

18. *Id.*

19. The court noted that the drafters referred directing commanders and IO's to R.C.M. 806(b), discussion, for a list of factors to consider in a closure decision. *Id.* Rule for Courts-Martial 806 implements the rules regarding public trials. Subsection (b) concerns control of spectators and the circumstances when spectator access to courts-martial may be limited or foreclosed completely to maintain the dignity and decorum of the proceedings. *See* MCM, *supra* note 5, R.C.M. 806(b). In the discussion, the drafters acknowledge the public's right to, and interest in, a public trial. *See id.* R.C.M. 806(b) discussion. A number of reasons support partial or total closure: prevention of overcrowding or noise might justify limited access; disruptive or distracting appearance or conduct might support exclusion of individuals; a desire to protect witnesses from harm or intimidation justifies exclusion; access may be reduced when there are no other means to relieve inability to testify due to embarrassment; and certain evidentiary hearings might require partial or total closure to prevent panel members from becoming a ware of excluded evidence. *Id.*

20. *San Antonio Express-News*, 44 M.J. at 710. The Air Force court could have gone further and constitutionally analyzed the closure issue as the CAAF did in *ABC, Inc. v. Powell*, 47 M.J. 363 (1997). A constitutional and legislative analysis, in addition to a plain meaning examination, would have provided greater foundation for the decision.

21. 46 M.J. 728 (Army Ct. Crim. App. 1997).

22. The accused was also found guilty of larceny, forgery, and falsely obtaining services. *Id.*

23. *Id.* at 729.

24. Rule for Courts-Martial 802 authorizes the military judge to hold a conference with the parties to consider matters that will promote a fair and expeditious trial. *See* MCM, *supra* note 5, R.C.M. 802. A military judge can conduct an 802 conference before or during trial. *Id.*

25. *Anderson*, 46 M.J. at 729.

riding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the court-martial considers reasonable alternatives to closure; and the court-martial makes adequate findings that support closure to aid in review.[30]

San Antonio Express-News and *Anderson* presented the CAAF with two potentially different views on analyzing a closure issue. *San Antonio Express-News* represented the plain meaning analysis of the *MCM* provision regarding closure of Article 32 investigations. *Anderson* represented a direct interpretation of R.C.M. 806 and federal and military jurisprudence as it applies to the trial stages of a court-martial. Complicating the matter further, R.C.M. 405(h)(3) referred to R.C.M. 806 for factors to consider in closing the Article 32 investigation. One could argue by analogy that the rules, though applicable to different stages of the military justice process, say the same thing.

Analyzing the cases that support these decisions, the CAAF fashioned a closure rule for Article 32 investigations which retreats entirely from the "*Fatal Vision*" rule. In *ABC, Inc v. Powell*,[31] Sergeant Major of the Army (SMA) McKinney was charged with four specifications of maltreatment of subordinates, two specifications of assault, and twelve specifications of violations of Article 134 of the Uniform Code of Military Justice (UCMJ).[32] The special court-martial convening authority (SPCMCA) directed an Article 32 investigation and ordered the IO "to foreclose access by spectators to all of the proceedings of this investigation in accordance with R.C.M. 405(h)(3)."[33] Sergeant Major McKinney requested reconsideration of the decision.[34]

In response, the SPCMCA provided four reasons supporting closure,[35] but appeared to focus on the need to "protect the alleged victims who would be testifying as witnesses against SMA McKinney, specifically to shield the alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history."[36] The CAAF held that a military accused has a qualified right to a public Article 32 investigation.[37] In addition, the CAAF held that when the accused is entitled to a public hearing, the public and press have the same right and have standing to complain if access is abridged or denied.[38]

Similar to the Air Force court's analysis in *San Antonio Express-News*, the CAAF looked to the plain meaning of

26. No. 9401841 (Army Ct. Crim. App. Feb. 20, 1996), *petition for grant of rev. denied*, 45 M.J. 15 (1996). *Hood* is an interesting case in its own right. The accused was charged with failure to obey a lawful regulation, larceny, wrongful appropriation, and sale of military property arising out of his duties as a squad leader in an ammunition section of his unit's support platoon. At trial, the accused requested that the court-martial be closed to the public. The military judge closed the court-martial to the public, focusing only on the issue of whether the accused understood and knowingly waived his right to a public trial. The court applied the four-step rule of *Press Enterprises v. Superior Court of California*, 464 U.S. 501 (1984) and found that the military judge had abused his discretion. *Id.* He "acquiesced in the request without offering an explanation for his decision . . . and failed to narrowly tailor the closure or to consider other alternatives." *Id.*

27. *Anderson*, 46 M.J. at 729. *See* United States v. Travers, 25 M.J. 61 (C.M.A. 1987).

28. *Anderson*, 46 M.J. at 729.

29. 464 U.S. 501 (1984).

30. The application of *Press Enterprises* was not a novel idea. The courts applied the rule to "in-court" proceedings as early as 1977 with the United States Court of Military Appeals decision in *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). *See* United States v. Travers, 25 M.J. 61 (C.M.A. 1987); United States v. Hershey, 20 M.J. 433 (C.M.A. 1985). The 1984 *MCM* recognized the press' and the public's right to a public trial. *See* MCM, *supra* note 5, R.C.M. 806(a) discussion (providing that "except as otherwise provided in this rule, courts-martial shall be open to the public"). In addition, the discussion to the rule provides that public access "reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process." *Id.*

31. 47 M.J. 363 (1997). This case is actually two cases that were consolidated for judicial economy.

32. UCMJ art. 134 (West 1995). *See* Petition for Extraordinary Relief in the Nature of A Writ of Mandamus, USCA Doc. No. 97-8024/AR (C.A.A.F. June 19, 1997). The government preferred the charges on 7 May 1997.

33. Memorandum, Commander, Fort Myer Military Community, to COL Robert L. Jarvis, subject: Appointment of Article 32(b) Investigating Officer (undated).

34. Letter from Charles W. Gittins, to Commander, Fort Myer Military Community, subject: Article 32 Investigation (May 13, 1997) [hereinafter Gittins Letter]. Citing *San Antonio Express-News* and, indirectly, the rules regarding the trial stages of a court-martial, the request for reconsideration noted that denial of press and public access to pretrial investigations must be used sparingly. *See id.* Sergeant Major McKinney argued that there was no adequate reason to support closure under applicable case law—there was no national security issue at stake, the alleged victims were not young children who might be harmed by giving testimony at a tender age, and there was no need to protect the alleged victims from embarrassment because their stories were already detailed in the press. *Id.*

35. Letter, Commander, Fort Myer Military Community, to Charles W. Gittins, subject: Article 32 Investigation (May 16, 1997) [hereinafter Commander's Letter]. Similar to *San Antonio Express-News*, the other reasons for total closure were: to maintain the integrity of the military justice system; to ensure due process to SMA McKinney; and to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the potential pool of panel members.

36. *ABC, Inc.*, 47 M.J. at 364. *See also* Commander's Letter, *supra* note 35.

37. *ABC, Inc.*, 47 M.J. at 365.

R.C.M. 405(h)(3) and determined that in ordinary circumstances the rules favor an open investigation.[39] Taking the analysis one step further, however, the CAAF indicated that an accused's qualified right to a public Article 32 investigation is as significant as the Sixth Amendment right to a public trial.[40] This holding is a complete retreat from the *Fatal Vision* rule announced in *MacDonald*.

The standard to apply in deciding whether to close an Article 32 investigation is whether there is a "cause shown that outweighs the value of openness."[41] The CAAF further stated that the determination must be made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim . . . ."[42] Citing *San Antonio Express-News* and *United States v. Hershey*,[43] the CAAF determined that closure must "be tailored to achieve the stated purpose and should also be 'reasoned,' not 'reflexive.'"[44] Finally, only "articulated and compelling" factors justify closure. The court held that the SPCMCA's reasons, although conceived in good faith, did not justify a total or partial closure in *McKinney* because those reasons were unsubstantiated.[45]

A sub-issue of first impression that deserves brief comment from the *McKinney* prosecution[46] and *San Antonio Express-News* involves the appellate courts' power to review and to grant extraordinary relief from determinations that occur at the Article 32 stage. In both cases, petitioners/accuseds requested extraordinary relief from the appellate courts to force a commander or an IO to reverse a decision made at the pretrial stage of court-martial. In an attempt to foreclose defense relief, the government's principal argument was that, because the issue concerned a pretrial stage of court-martial, the appellate court lacked authority under the UCMJ to review the matter under the All-Writs Act.[47]

The Air Force court's leap in *San Antonio Express-News* toward extending its supervisory authority to include Article 32 investigations is logical and artful. The court began with the conclusion that the Court of Military Appeals liberally defined the limits of the All-Writs Act to include matters that may *potentially* reach the appellate court.[48] Two major premises support the holding. First, an Article 32 investigation is an integral part of a court-martial; a general court-martial cannot occur unless an Article 32 is conducted or the accused waives that proceeding.[49] Second, an Article 32 investigation is a judicial proceeding, and the IO is a quasi-judicial officer. The Air Force court brought the syllogism to its logical end: an issue involving a judicial proceeding that is an integral part of the court-martial may potentially reach an appellate court, which has the responsibility for supervising "each tier of the military justice process to ensure that justice is done."[50]

38. *Id.*

39. *Id*. at 365. The CAAF quoted the language of the rule, but also emphasized that the discussion of the rule provides that "[o]rdinarily the proceedings of a pretrial investigation should be open to spectators." *Id.*, *quoting* MCM, *supra* note 5, R.C.M. 405(h)(3) discussion.

40. *ABC*, *Inc.*, 47 M.J. at 365 (citing Press Enter. v. Superior Court of California, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555 (1980)). The military case that implemented these rules for the formal stages of courts-martial is *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). *See* United States v. Grunden, 2 M.J. 116 (C.M.A. 1977); MacDonald v. Hodson, 42 C.M.R. 184 (C.M.A. 1970); United States v. Brown, 22 C.M.R. 41 (C.M.A. 1956).

41. *ABC*, *Inc.*, 47 M.J. at 365.

42. *Id.*

43. 20 M.J. 433 (C.M.A. 1985).

44. *ABC*, *Inc.*, 47 M.J. at 365.

45. *Id.*

46. As will be discussed, the Army Court of Criminal Appeals entertained a court-martial personnel issue in *McKinney*. That case is discussed in another section of this article. *See* McKinney v. Jarvis, 46 M.J. 870 (1997).

47. 28 U.S.C.A. § 1651 (West 1997).

48. *See* Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979). Regarding the supervisory authority of the Courts of Military Review, the Court of Military Appeals stated:

> An appellate tribunal of that sort . . . has judicial authority over the actions of trial judges in cases that may *potentially* reach the appellate court . . . . Without stopping to define the limits of such independent proceedings, we have no doubt that, as the highest tribunal in each service, a Court of Military Review can confine an inferior court [within its system] to a lawful exercise of its prescribed jurisdiction.

Id. at 220 (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)).

49. *See* UCMJ art. 32(a) (West 1995).

Practitioner Tips

The Article 32 closure cases present many lessons for practitioners. First, while not specifically making the Article 32 investigation a trial proceeding under the Sixth Amendment, the CAAF did reason by analogy that an accused has a qualified right to a public Article 32 investigation similar to the right to a public trial. Trial and defense counsel who seek to close the proceedings must have clearly articulated, well-founded, and empirical reasons for doing so. The CAAF will review Article 32 closures under a constitutional-based analysis with the view that the right to an open investigation is akin to the public trial rights under the Sixth Amendment.[51] Because R.C.M. 405(h)(3) and R.C.M. 806 appear to tip the scale in favor of an open hearing, any closure must be specifically tailored to protect an interest that outweighs the value of an open hearing. Partial closure should always be the first option to protect an interest that outweighs openness.

Second, the CAAF implicitly reminded practitioners of the importance of the Article 32 advisor to the IO. *San Antonio Express-News* appears to be the picture-perfect case to illustrate the value of the adviser to an Article 32 investigation. When confronted with the closure issue, the IO heard arguments, *reviewed the law*, and *deliberated for two hours before ruling*.[52] She then announced the specific basis of her ruling and told both counsel and the accused that closure would not abridge the accused's right to a verbatim transcript investigation, or result in a gag rule.[53] The judicious manner in which the IO handled this complicated turn of events communicates that a savvy Article 32 advisor knew what to do and how to do it and understood that the issue would receive appellate review. An Article 32 advisor who counsels based on the "long view" of the case will ensure that a hearing is completed to accomplish the statutory and jurisprudential ends contemplated by Article 32 and R.C.M. 405.

Anderson, while an important link in the modern development and culmination of the closure issue in *McKinney*, is pivotal for military judges. In *Anderson*, the military judge closed the proceedings upon the request of the accused. The public's right of access to courts-martial was relegated to a position of secondary importance. The military judge, however, failed to include a justification or explanation for closure on the record. Military judges have a difficult mission in a closure situation: they must balance the accused's waiver of the R.C.M. 405(h)(3) and 806 rights to a public hearing and trial against the public's First Amendment right to open proceedings and the government's reasons supporting closure. An accused's request to limit dissemination of embarrassing sexually-related information might sway a military judge toward closure. The trick for military judges is not to forget that the competing interest must always be weighed. As the Army court cautioned in *Anderson*, military judges should not be "lulled into error by parties who join in a closure request."[54]

Something New

Pleas and Pretrial Agreements: A Continuing Analysis and Constriction of a New Rule

No rules at the CAAF have received greater attention over the last two years than those regarding terms that practitioners can propose, negotiate, accept, and approve as part of a pretrial agreement. The court addressed the lawfulness of pretrial agreement terms in the 1995 case of *United States v. Weasler*.[55] For the first time in the CAAF's forty-seven-year history, it held that an accused could lawfully waive an unlawful command influence issue in a pretrial agreement. The only conditions imposed on this waiver provision were that the defense initiate the term and that it only concern accusatory stage[56] unlawful command influence.

Perhaps the most important part of *Weasler* was the CAAF's promise, in response to Judge Sullivan's and the late Judge Wiss' concurrences, to conduct special review of all future

50. San Antonio Express-News v. Morrow, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996).

51. The primary reason why the CAAF invalidated the closure in *McKinney* was because, although the justifications were well-stated, they were lacking in foundation. There was no evidence to support the conclusion that the witnesses would be embarrassed after testifying, because their stories had already been detailed in the press. *See* Gittins Letter, *supra* note 34. The civilian defense counsel's letter requesting reconsideration is particularly revealing on this point. In addition, the most impressive part of the *McKinney* opinion is the CAAF's review of cases in which civilian sister courts, both state and federal, delineate those situations where a trial or a pretrial proceeding should be closed. Practitioners involved in any closure situation would do well to review this part of the *McKinney* case to get a clear picture of the reasons that might justify partial or total closure.

52. *San Antonio Express-News*, 44 M.J. at 707.

53. *Id.* at 708.

54. United States v. Anderson, 46 M.J. 728, 732 (Army Ct. Crim. App. 1997) (quoting United States v. Hood, No. 9401841 (Army Ct. Crim. App. Feb. 20, 1996)).

55. 43 M.J. 15 (1995). *See* Major Gregory B. Coe, *supra* note 3; Major John I. Winn, *Recent Developments in Military Pretrial and Trial Procedure*, Army Law., Mar. 1996, at 40; Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, Army Law., Aug. 1996, at 3 n.70.

56. The accusatory stage is before referral of charges to a court-martial. An improper action during this stage can be withdrawn and properly reinitiated. The adjudication stage is after referral, and correction of an error at this stage is almost impossible without reversing the findings or granting sentence relief.

cases that involve pretrial agreement terms based on unlawful command influence.[57] Since *Weasler*, neither the intermediate service courts nor the CAAF have had the opportunity to review a case involving an unlawful command influence term in a pretrial agreement. The emphasis for post-*Weasler* cases has been directed toward informing practitioners to view *Weasler* with a modest eye—that is, terms in a pretrial agreement must not violate R.C.M. 705 and public policy.[58] In 1997, the courts had the opportunity to apply *Weasler* in an unlawful command influence context and further define the limits of bargainable terms.

Social Misfits, Unlawful Command Influence, and Pretrial Agreements: United States v. Bartley

In *United States v. Bartley*,[59] the accused entered guilty pleas to absence without leave, wrongful use of cocaine and marijuana, and wrongful appropriation of an automobile.[60] Though he had a pretrial agreement, the accused subsequently alleged that there was a sub rosa agreement to waive an unlawful command influence issue concerning the convening authority's negative predisposition and inelastic attitude toward drug offenses and offenders.

Prior to the accused's case, a poster around the command detailed certain "myths" about drug use and its impact on the mission.[61] The substantive basis of the accused's request for relief was that his defense counsel, based on a sub rosa agreement with the government, failed to make the unlawful command influence motion regarding the poster.[62] The defense counsel intentionally failed to raise the issue, probably because he believed it was not "winnable"[63] and he could get more mileage out of the unlawful command influence during negotiations with the government. Neither the government nor the defense reduced any potential agreements regarding the issue to writing. Indeed, the convening authority and staff judge advocate disavowed any knowledge of the agreement, and the "staffer" followed suit.[64]

The Air Force Court of Criminal Appeals held that the poster did not constitute unlawful command influence, and that it simply raised some issues regarding drug use and its potential impact on military operations without suggesting a punishment.[65] The convening authority and staff judge advocate were unaware of the unlawful command influence issue, and the pretrial agreement neither referenced nor required a specific waiver of the unlawful command influence issue to obtain a sentence limitation.[66] On these bases, the Air Force court

57. *See Weasler*, 43 M.J. at 19. The CAAF stated that "[it] will be ever vigilant to ensure that unlawful command influence does not play a part in our military justice system." *Id.*

58. An unfortunate by-product of *Weasler* is the idea that R.C.M. 705 now permits the government and the defense to negotiate, to agree to, and to approve any and all terms imaginable (as long as the accused understands his rights, the defense proposes the term, and special attention is paid to unlawful command influence situations). This is not what the CAAF intended in *Weasler.*

59. 47 M.J. 182 (1997). This article will discuss the unlawful command influence issues raised with regard to their impact on pretrial agreements only.

60. The accused was sentenced to a bad-conduct discharge, confinement and partial forfeitures for 12 months, and reduction to the lowest enlisted grade. The pretrial agreement did not affect the convening authority's action. It provided that confinement in excess of 36 months would be disapproved. *Id.* at 183.

61. *Id*. at 184, 186. The poster, entitled "Who's Kidding Whom?," listed the myths of drug use and explained why people who subscribe to those myths do not understand why they are incompatible with Air Force concepts of discipline and justice. The CAAF noted three of those myths: Off-Duty Activities Should Not Affect EPR [Enlisted Performance Report] Evaluations"; "Drug Abusers Still Can Be Considered Well Above Average Military Members" ; and "Drug Abusers Can Be Trustworthy, Dependable Airmen." *Id.* The poster was displayed, among other places, in the waiting room of the convening authority's office and the SJA's office.

62. The information regarding the motion is confusing at best. The affidavits created at the request of the Air Force Court of Criminal Appeals when the case was in the first stage of the appellate process indicated that the individual defense counsel (IDC) had already drafted a motion based on unlawful command influence. According to this affidavit, the IDC decided not to proceed with the motion because the convening authority who authored the poster "ceased" to be the general court-martial convening authority (GCMCA). *The court does note that the same convening authority continued in command.* What is clear from this affidavit is that the IDC and the area defense counsel (who represented accused at the Article 32 investigation) discussed the unlawful command influence motion with an individual responsible for staffing military actions to the GCMCA. An interesting fact in the case, which tips the scale toward concluding that at least the defense discussed the issue with the civilian "staffer," is that the defense had drafted a written motion to raise the issue at court-martial. *See id*. at 185.

63. *Id.*

64. The staffer, a civilian attorney, indicated that he had a responsibility to process pretrial agreements. He stated that he processed the pretrial agreement in this case consistent with prior practice. However, the staffer specifically denied that he discussed unlawful command influence with any member of the defense team. *Id.* at 185.

65. *Id.* The court cited language that indicated that the poster actually suggested rehabilitative alternatives to remedy drug abuse in the Air Force, although it pointed out that the military does not provide a "perpetual rehabilitation service for *social misfits*." *Id.* The court noted that the poster indicated that the Air Force "should try to return to duty members who show real promise for further service," but it also indicated that the Air Force does not have the resources to "restore every member." *Id.*

66. *Id*. at 185-86.

affirmed the accused's conviction and validated the pretrial agreement.

True to its promise in *Weasler*, the CAAF took another view and reached a different result. Highlighting that it "has been diligent in guarding against unlawful command influence,"[67] the CAAF focused its decision on how the prohibition against sub rosa agreements affect unlawful command influence issues. Rule for Courts-Martial 705(d)(2) implements the prohibition.[68] The CAAF, however, was particularly interested in giving practitioners and intermediate appellate courts a lesson on why courts must ensure that pretrial agreements involving unlawful command influence are always consistent with the UCMJ and case law.

Citing *United States v. Jones*,[69] *United States v. Green*,[70] and *United States v. King*,[71] the CAAF stressed the constitutional and statutory significance of pretrial agreements that reflect the accused's voluntary and knowing acceptance of terms.[72] The court said that the pretrial agreements in *Weasler* and, the most recent case to directly interpret its meaning, *United States v. Rivera*[73] were in writing and discussed during the providence inquiry.

The CAAF required reversal in *Bartley* for two reasons. First, there was no indication from filed documents that the accused was aware of the specific reason that the defense counsel waived the motion.[74] Second, and more important, even if the accused was aware of the issue, the matter was never raised at the trial.[75] The *court-martial* did not have a fair opportunity to determine whether the unlawful command influence issue illegally forced the accused to plead guilty. This is an extremely important point for practitioners and the intermediate appellate courts.

When the accused raises a "lack of understanding" or a sub rosa agreement argument regarding unlawful command influence and pretrial agreements, the CAAF would rather be careful than "deductive." While the Air Force court determined that the poster was neutral[76] regarding the proper disposition of military drug offender cases, the CAAF reasoned that, neutral or not, the poster "negate[d] many defense arguments in favor of rehabilitating drug users like the appellant."[77] While the Air Force court determined that the defense counsel's failure to mention unlawful command influence at any stage of the court-martial was a key issue,[78] the CAAF focused on the appellate courts' inability to review the matter for lack of a complete record.[79]

The CAAF's opinion was unanimous and appropriately focused on the narrow issue of unlawful command influence in the context of pretrial agreements. *Bartley* might be the case that assuages those with apocalyptically negative interpretations of *Weasler's* capacity to produce "blackmail type options" and encourage rather than decrease incidences of unlawful command influence.[80]

Drugs, More Drugs, and Restitution: Weasler Odds and Ends

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67. *Id.* at 186.

68. *See* MCM, *supra* note 5, R.C.M. 705(d)(2).

69. 23 M.J. 305 (C.M.A. 1987).

70. 1 M.J. 453 (C.M.A. 1976).

71. 3 M.J. 458 (C.M.A. 1977).

72. *See Bartley*, 47 M.J. at 186. *See also King*, 3 M.J. at 458; MCM, *supra* note 5, R.C.M. 910(f)(4).

73. 46 M.J. 52 (1997).

74. *Bartley*, 47 M.J. at 186.

75. *Id. Weasler* teaches that, with regard to pretrial agreements, accusatory stage unlawful command influence is waivable if specifically included in the pretrial agreement. Unlawful command influence, as a general matter, is never waived. The fact that the accused pleaded guilty, therefore, did not waive the unlawful command influence issue.

76. *Id*. at 186. The Air Force Court of Criminal Appeals determined that the poster was, as a general matter, neutral on how the Air Force and the military ought to deal with drug abusers.

77. *Id.*

78. *Id.* It is easy to overlook the CAAF's language regarding the impact of *Weasler* on the court-martial stages of *Bartley.* The CAAF was not about to criticize counsel for failing to raise the issue based on *Weasler* because, at the time of the case, *Weasler* had not been issued. What the court did say, however, was that counsel should have placed the issue on the record, considering the prior case law on unlawful command influence and the *MCM* provisions dealing with that issue. *Id. See* United States v. Jones, 23 M.J. 305 (C.M.A. 1987); United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

79. *Bartley*, 47 M.J. at 187.

The "odds and ends" cases involving the contours of *Weasler* and R.C.M. 705(c)(2) continue to present the courts with novel issues. The trends continue from the last two years. First, as in previous years, the courts are carefully reviewing the terms of pretrial agreements to ensure compliance with case law and regulation. Second, the courts are focusing on waiver as a primary means to deny the accused appellate relief. Third, continuing a trend from 1995, the court will not permit an accused to claim the benefit of a pretrial agreement term and then to obtain relief based upon an argument that the term is inconsistent with the spirit and intent of R.C.M. 705(c)(2).[81]

In *United States v. Rivera*,[82] the CAAF reviewed a pretrial agreement that contained a defense proposed term that required the accused to "waive all pretrial motions" and "to testify at any trial related to [his] case without a grant of immunity."[83] The benefit of the bargain for the accused, who was charged with multiple drug offenses, was a very favorable fourteen-month limitation on potential confinement. Rivera "beat the deal" and received only twelve months confinement.

Dissatisfied with the outcome of his court-martial, Rivera questioned the terms of his agreement, arguing that they were void as against public policy and Air Force regulation.[84] Further, the accused argued that the convening authority was required to issue him a grant of immunity so that he could comply with the "testify" provision in the pretrial agreement without the threat of further prosecution. The Air Force Court of Criminal Appeals rejected the accused's public policy, regulatory, and immunity arguments. Nothing in the pretrial agreement indicated that there were viable motions that could be made.[85] Moreover, the court held that the language of R.C.M. 705(c)(2)(B) did not require a convening authority to issue a grant of immunity to an accused in support of an agreement to "testify without a grant of immunity."[86]

The CAAF opinion in *Rivera* is illuminating because it draws strength from the recent trend to look first at how the Supreme Court and federal circuits analyze and dispose of similar issues. Additionally, the opinion is indicative of a continuing trend in the area of pretrial agreements to make relief contingent upon the absence of waiver.[87]

The CAAF reviewed the recent changes to R.C.M. 705(c) and concluded that R.C.M. 705(d)(1), which now permits either the defense or the government the right to propose terms to a pretrial agreement, was the culmination of a plethora of changes that liberalized pretrial agreement practice.[88] The CAAF then recognized the impact of Article 36,[89] which mandates that the President, when it is practicable, implement procedures to make the practice of criminal law in courts-martial identical with that of the United States district courts.[90]

The court then relied on a 1995 Supreme Court case, *United States v. Mezzanato*,[91] to quash the issue raised by divergent interpretations regarding the negative effect of *Weasler* on the military justice system.[92] In *Mezzanato*, the government obtained the accused's consent, as a precondition to pretrial negotiations, to use the accused's statements during those negotiations to impeach contradictory statements made at trial.[93] The most important part of *Mezzanato* is the Supreme Court's language regarding the effect of such a practice on the federal

80. *See* United States v. Weasler, 43 M.J. 15 (1995) (Sullivan, J., concurring). Concurring in the result, Judge Sullivan wrote that the case would produce "blackmail-type" options for those who might engage in unlawful command influence in courts-martial. *Id.* at 21. The late Judge Wiss wrote, "I believe that this Court will witness the day when it regrets the message that this majority opinion sends to commanders." *Id.* at 22.

81. *See* MCM, *supra* note 5, R.C.M. 705(c)(2) (providing a nonexclusive list of bargainable terms for pretrial agreements). Practitioners should also consider the limitations of R.C.M. 705(c)(1), which provide the general categories of terms that cannot be subjected to bargaining. *See*, *e.g.*, United States v. Conklan, 41 M.J. 800 (Army Ct. Crim. App. 1995) (holding invalid a pretrial agreement which increased the quantum portion by one year if the accused raised a claim of de facto immunity).

82. 46 M.J. 52 (1997). Practitioners should also review the opinion of the Air Force Court of Criminal Appeals, which appears to examine more closely the practical considerations in processing and reviewing pretrial agreements prior to approval and during court-martial. *See* United States v. Rivera, 44 M.J. 527 (A.F. Ct. Crim. App. 1996).

83. *Rivera*, 46 M.J. at 53.

84. For a more complete review of the Air Force court's opinion, see Coe, *supra* note 3.

85. The court was careful to tell practitioners that the term might invalidate the agreement under a different set of facts. If the record indicated that there was a viable motion, the court might have ordered a post-trial hearing. *Rivera*, 44 M.J. at 530.

86. *Id.* at 529.

87. While the post-*Weasler* courts are willing to let the accused deal for terms which were previously questionable or inconsistent with R.C.M. 705 as a matter of public policy, the courts will not readily allow the accused to argue that, even though he benefited from the pretrial agreement, a term of the agreement violates public policy. One of the tools that the courts have employed to foreclose arguments of this kind is waiver. If it appears that the accused in engaging in sophistry—that is, if the argument is primarily based on public policy and the accused's actions appear to indicate acceptance of the potential detriment to the military justice system—he should not have standing to claim relief based on a wrong committed against the military justice system.

88. *See Rivera*, 46 M.J. at 53.

89. *Id.*

system of justice. The Court concluded, and the CAAF referenced, that waiver of some rights is expressly and implicitly prohibited because they are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discredit[ing] the federal courts."[94] The CAAF alluded to this language in *Weasler*, but signaled its significance by citing to it again in *Rivera*.

Indicative of post-*Weasler* cases, the CAAF completed an exacting review of the case to ensure that the accused was not deprived of any rights.[95] The CAAF affirmed, holding that the "waiver of all pretrial motions" was too broad and might result in waiver of a viable motion under other circumstances.[96] Rivera, however, failed to identify, and the record did not indicate, any viable motions.[97] In addition, the CAAF denied relief based on a potential deprivation of the right to make evidentiary motions, especially since the record indicated the absence of such motions and the accused waived these potential motions by failing to raise them at trial.[98]

Finally, the court disposed of the "testify without a grant of immunity" issue. The accused argued that both he and the military justice system were harmed by a term which required him to testify in cases related to his own without the protection of immunity. Such a term could subject the accused to prosecution if interpreted to require testimony about drug transactions that indirectly related to his providence inquiry. In addition, the accused argued that the term was a novelty. Rule for Courts-Martial 705(c)(2)(B) authorizes parties to negotiate terms which require an accused to testify in other cases, but it does not address the situation where an accused testifies with the benefit of a grant of immunity.[99]

The CAAF acknowledged the novelty of the accused's argument, stating that the drafters intended to leave this "gap" in the legal relationship between R.C.M. 705 and R.C.M. 704.[100] The basis for the "gap" is the policy in the military justice system to control the issuance of grants of immunity. Any court-martial convening authority can enter into a pretrial agreement on behalf of the government, but only a general court-martial convening authority can issue a grant of immunity.[101] As an analyt-

90. *See* UCMJ art. 36(a) (West 1995). Article 36(a) provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

91. 513 U.S. 196 (1995).

92. *Rivera*, 46 M.J. at 54.

93. *See Mezzanato*, 513 U.S. at 198. *See also* Fed R. Evid. 410(4) (providing that an accused's statements made to a prosecuting attorney during pretrial negotiations are excludable at trial). Military Rule of Evidence 410 almost mirrors the civilian federal rule. See MCM, *supra* note 5, Mil. R. Evid. 410.

94. *Rivera*, 46 M.J. at 54 (citing *Mezzanato*, 513 U.S. 196). It is important to note, however, that other language in *Mezzanato* is more sweeping. The Supreme Court commented that even "the most basic rights of criminal defendants . . . are subject to waiver . . . [and this might include] many of the most fundamental protections afforded by the Constitution." *Mezzanato*, 513 U.S. at 201. *See* Ricketts v. Adamson, 483 U.S. 1, 19 (1987).

95. A particularly exacting analysis is required because the implicit issue that the accused raises in most of the post-*Weasler* cases is a deprivation of fundamental fairness in the pretrial agreement negotiation, approval, and implementing processes.

96. *Rivera*, 46 M.J. at 54.

97. *Id*.

98. *Id*.

99. *See* MCM, *supra* note 5, R.C.M. 705(c)(2)(B) (providing that "[a] promise to testify as a witness in the trial of another person" is a permissible term in a pretrial agreement). The discussion to this provision directs practitioners to look at R.C.M. 704, which provides the rules regarding testimonial immunity. *See id*. R.C.M. 704(c) (providing that only a GCMCA may grant immunity).

100. *Rivera*, 46 M.J. at 54. The CAAF stated:

> Neither the rules nor the drafters' analysis expressly address the question of whether the convening authority and an accused can enter into a pretrial agreement, such as the one in this case, which could have the possible effect of not only depriving the accused of the benefit of his bargain if he does not testify, but also forcing him to further incriminate himself and subjecting him to prosecution for wrongful failure to testify.

Id.

101. *See* MCM, *supra* note 5, R.C.M. 704(c).

ical matter, the reason for the "gap" is clear. *Rivera* presents the result of the gap—an accused who must testify in future trials based on an expansive pretrial agreement term that might subject that accused to further prosecution based on the testimony. The result of the gap may not have been within the full contemplation of the drafters.

There are times when even the most artful arguments do not prevail. Such was the case in *Rivera*. The CAAF denied relief and also declined the opportunity to directly confront the "theoretical issues in this case."[102] The CAAF reasoned that it did not have to resolve the theoretical issues based on ripeness since the government had not yet called upon Rivera to testify.[103] Thus, there was no encumbrance on his Fifth Amendment right against self-incrimination. Second, under *Mezzanato*, the CAAF viewed the term as very favorable to the accused, especially considering that the record indicated an absence of overreaching.[104] The accused was able to "maximize what he ha[d] to sell" because he was "permitted to offer what the prosecutor [was] most interested in buying."[105] Consequently, Rivera's intent, demonstrated by entry of the plea, statements made during the providence inquiry, and failure to raise the issue at trial, constituted a knowing, intelligent, and voluntary *waiver* of the issue.

Rivera has clear lessons for practitioners. First, pretrial agreement terms must be carefully reviewed. Second, the CAAF reminded counsel about waiver—when it looks like the accused is getting the benefit of the bargain, and the questioned term might involve foregoing a fundamental right, no relief will be available if the accused proposed the term and then subsequently pleads without objection. In other words, the accused should not rely on the idea that public policy arguments will be available to support relief at the appellate stage. The time for the defense to assist the accused is confined to the pretrial, trial, and post-trial stages of the military justice process.[106]

The CAAF's failure to address fully the relationship between R.C.M. 705 and R.C.M. 704 is disappointing.[107] Rather than simply focusing on waiver, the CAAF could have determined the validity of the term and then applied a harmless error analysis.[108] This would have, at least, answered or clarified the relationship for practitioners. Fortunately, there is one case, albeit unpublished, that illustrates how a "testify without immunity" term should be interpreted. In addition, two other cases are instructive for counsel in the area of bargainable terms.[109]

More Drugs: United States v. Profitt

102. *Rivera*, 46 M.J. at 54.

103. *Id.*

104. The CAAF also used language from *Mezzanato* that indicates where the CAAF will draw the fine line of demarcation between what is permissible and what is prohibited. The CAAF adopted the following language from *Mezzanato*:

> The mere potential for abuse of prosecutorial bargaining is an insufficient basis for foreclosing negotiation altogether . . . . Instead, the appropriate response to respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion. We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive [the evidentiary objection to incriminating statements] is valid and enforceable.

Id. The CAAF's subscription to this concept is particularly prophetic considering *Bartley*, where the CAAF unanimously returned the case for further action to obtain information concerning whether the accused was aware of and knowingly waived an unlawful command influence issue to obtain a pretrial agreement. *See generally* United States v. Bartley, 47 M.J. 182 (1997).

105. *Rivera*, 46 M.J. at 54.

106. In my opinion, *Weasler* was the CAAF's first step in stating that there was no longer a need for heightened paternalism in the review of pretrial agreement terms. *Rivera* adds one other piece to the pie—the onus is on counsel, in these non-paternalistic times, to be even more vigilant, both in proposing maverick terms that may assist the accused-client and in making sure that the accused is aware that his waivers will stand for all time because it will be rare that the government, even inadvertently, will engage in overreaching.

107. The disappointment is purely from a practitioner's point of view. Trial and defense counsel, military justice managers, and military judges like to have clear-cut answers, if possible, when they are preparing for courts-martial.

108. In fact, Judge Sullivan, in a very short concurrence, writes that the immunity term was unlawful, but he also indicates his agreement that the legal error was harmless. *Rivera*, 46 M.J. at 55 (Sullivan, J., concurring).

109. The cases discussed in this article adequately illustrate the *Weasler-Rivera* trend and the general effect of pretrial agreements. There are two other cases that are not addressed here that practitioners should review. *See* United States v. Smith, 46 M.J. 263 (1997) (holding that a pretrial agreement term could not be interpreted to grant a SPCMCA the right to process a vacation action to completion without GCMCA action in a case where the sentence included a bad-conduct discharge); United States v. Acevedo, 46 M.J. 830 (C.G. Ct. Crim. App. 1997) (holding that a pretrial agreement that provided for suspension of a dishonorable discharge could not be read to preclude approval of an adjudged unsuspended bad conduct discharge). *See also* United States v. Griffaw, 46 M.J. 791 (A.F. Ct. Crim. App. 1997) (holding that a sentence cap in a court-martial pretrial agreement is not a grant of clemency or a true plea bargain identical to civilian practice and has no bearing on a convening authority's disposition of a clemency request).

In *United States v. Profitt*,[110] the Air Force Court of Criminal Appeals was again asked to reviewed a pretrial agreement that apparently contained novel terms. Consistent with his pretrial agreement, the accused entered guilty pleas to making a false official statement and use and distribution of LSD.[111] On appeal, the accused argued that three terms in his pretrial agreement violated public policy. The court considered whether a term that required the accused not to request convening authority funding for more than three witnesses violated public policy. The court reasoned that this term was another way of waiving the right to obtain personal appearance of witnesses at sentencing proceedings under R.C.M. 705(c)(2)(E).[112]

The accused also challenged the requirement that he not raise any "waiverable" pretrial motions. The Air Force court acknowledged that the term was confusing, but indicated that the military judge discussed the matter in "great detail at trial," the parties agreed that the term did not require the waiver of any constitutional motions, and the record was "devoid" of any viable pretrial motions.[113]

Most importantly, the Air Force court reviewed the appropriateness of a term that required the accused to "testify without immunity against any other military member."[114] The accused presented the same arguments as the accused in *Rivera*, namely, that the requirement to provide truthful testimony included those cases that might have nothing to do with the accused's case. What is interesting to note in this case, however, is that the court clearly indicated that the government proposed the term. This might have led to a different result, but the court also indicated that there was no coercion or force in securing the accused's acceptance of the term.[115]

The court told practitioners that the best way to understand a "testify without immunity" term is to apply a "common sense" analysis.[116] The court said that such an analysis "dictates that the convening authority was requiring appellant to testify in future trials related to the drug offenses in which he was involved."[117] Like the CAAF in *Rivera*, the Air Force court stated that the adverse impact of the term on appellant was speculative, because the accused had not yet been called to testify. The court, however, provided practitioners with an answer to the question of the relationship of R.C.M. 705 and R.C.M. 704.[118]

In another significant case involving wrongful use of drugs, the Navy-Marine Corps Court of Criminal Appeals reviewed the appropriateness of terms for pretrial agreement practice. In *United States v. Davis*,[119] the accused was charged with unauthorized absence, wrongful possession of drug paraphernalia, wrongful use of marijuana and cocaine, and making and uttering bad checks.[120] The accused's pretrial agreement required, inter alia, that he enter into a confessional stipulation and present no witnesses or other evidence on the merits.[121] The accused was not required to enter a guilty plea.

At trial, the military judge examined the accused about his confessional stipulation, which admitted every element of the

110. No. ACM 32316, 1997 WL 165434 (A.F. Ct. Crim. App. Apr. 4, 1997), *petition for grant of rev. filed*, 47 M.J. 69 (1997).

111. The accused was sentenced to 30 months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority granted clemency by reducing the confinement from 30 to 20 months. *Id*. at 1.

112. *Id*. at 2. Rule for Courts-Martial 705(c)(2)(E) provides that "[s]ubject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional condition: A promise to waive . . . the opportunity to obtain personal appearance of witnesses at sentencing proceedings." MCM, *supra* note 5, R.C.M. 705(c)(2)(E).

113. *Profitt*, 1997 WL 165434, at 3. One of the goals of a pretrial agreement is to make a trial a little easier to process. Including a term that requires an accused not to raise any "waiverable" motions creates a greater possibility for appellate litigation and potential reversal of a case. In this case, expedience probably required that the parties negotiate and then specifically list the motions that the accused intended to waive. This may cause more time in negotiation and processing, but it will yield greater benefits in the future.

114. *Id*. at 2.

115. As is important with any term, it is incumbent on the military judge to obtain the accused's understanding and consent to inclusion of the term in the pretrial agreement.

116. *Profitt*, 1997 WL 165434, at 2.

117. *Id*.

118. *See id. See also* MCM, *supra* note 5, R.C.M. 704, 705. The court indicates that the relationship is one of form and substance. The drafters intended that immunity be controlled. To that end, the *MCM* provides that only a GCMCA may grant immunity. Pretrial agreement practice recognizes this; however, pretrial agreement practice is based on the accused trading something to get a benefit. An agreement to testify in another trial recognizes that such an agreement is confined to those matters revealed during the stages of the accused's own court-martial. It makes sense, then, that to require any more from an accused necessitates going to the GCMCA and getting a grant of immunity. Still, a term that commingles immunity and testimony in a pretrial agreement raises structural and constitutional issues. Practitioners, particularly trial counsel, should be mindful of this and avoid the issue altogether or specifically explain the meaning of the term in the pretrial agreement.

119. 46 M.J. 551 (N.M. Ct. Crim. App. 1997).

120. *Id.* at 552.

offenses, but there was no providence inquiry because the accused pleaded not guilty to the offenses. During the trial, the defense counsel did not make an opening statement on findings and presented no motions or evidence on the merits. During sentencing, the defense presented "persuasive evidence and testimony, and then argued vigorously, in an effort to limit his punishment."[122]

The issue in this case of first impression was whether a pretrial agreement which does not require a guilty plea is appropriate under R.C.M. 705 and public policy. The Navy-Marine Corps court held that the pretrial agreement was "not inconsistent" with due process.[123] Reviewing cases which prohibit practices that tend to reduce the providence inquiry to an "empty ritual,"[124] the court held that the pretrial agreement was valid based on the military judge's ingenuity in questioning the accused. Instead of permitting the accused to oxymoronically plead not guilty to all charges consistent with the pretrial agreement, the military judge conducted a *protracted* and *intensive* inquiry under *United States v. Bertelson*.[125] The military judge informed the accused of the elements of the offense, asked whether he understood those elements, and also went over the entire pretrial agreement with accused and counsel.[126]

But the court did not terminate the analysis there. Noting that the military judge's experience and caution saved the day for the government, the court interpreted the actions of counsel as an intentional plan to avoid the providence inquiry. The providence inquiry is an integral part of the guilty plea,[127] and practices which attempt to avoid it are improper.[128]

What, then, should trial and defense counsel do in a case where the accused decides that a pretrial agreement is appropriate but that a guilty plea is impossible? The Navy-Marine Corps court did not foreclose completely the option of doing exactly what was done in *Davis*. Counsel, however, must ensure that the accused understands that his actions may result in waiver of fundamental rights. The court, showing its disapproval of such an option, stated: "In zealously representing the competing interests of their clients, practitioners should follow . . . well-established procedures."[129] The well-established procedure is that an accused, pursuant to a pretrial agreement, pleads guilty to at least some charges in exchange for convening authority action. The most correct avenue of approach, therefore, is to secure a favorable agreement that permits the accused to enter at least mixed pleas.[130]

Equally important, what should a military judge do in a case involving a novel pretrial agreement? *Davis* reminds military judges that "caution and questioning" is the rule. It never hurts to conduct an overly careful inquiry in such a situation. Additionally, while the most important information to place on the record is the accused's responses to key questions, military judges should also obtain counsel's understanding and assurances about the pretrial agreement. Counsel's understanding of terms is an important component of pretrial agreement terms analysis.[131]

More Drugs: Entrepreneurs and Restitution

121. *Id.* at 554. The accused must have been a superb Marine. The approved pretrial agreement also required the accused to proceed in a military judge alone forum and to complete in-patient drug rehabilitation "at the earliest practicable time." *Id*. In return, the convening authority promised to suspend all confinement in excess of twelve months. The military judge sentenced the accused to one year confinement, total forfeitures, reduction to the grade of E-1, and a bad-conduct discharge. The pretrial agreement had no effect on the sentence. Nevertheless, it is an extremely favorable agreement considering the offenses. *Id.*

122. *Id.* at 554.

123. *Id.*

124. *See* United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957) (holding that a pretrial agreement should not transform the trial into an "empty ritual"). *See also* United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (holding that pretrial agreements should concern themselves with bargaining only on the charges and the sentence); United States v. Cantu, 30 M.J. 1088 (N.M.C.M.R. 1989) (holding that practices that involve "a not guilty plea in name only" are questionable).

125. 3 M.J. 314 (C.M.A. 1977) (holding that a confessional stipulation is admissible only after the military judge conducts questioning of the accused and the accused's responses show a knowing, intelligent, and voluntary consent to its admission).

126. *Davis*, 46 M.J. at 554. The military judge was satisfied that the accused knew what he was doing.

127. *See* United States v. Care, 18 C.M.R. 247 (C.M.A. 1969); MCM, *supra* note 5, R.C.M. 910.

128. *See* United States v. Clevenger, 42 C.M.R. 895 (A.C.M.R. 1970) (holding that a policy which affirmatively encourages an accused to forsake his right to plead guilty for purposes of expediency is improper).

129. *Davis*, 46 M.J. at 556.

130. The other option, of course, is to contest the charges. In dissent, Judge Lucas adamantly raised the issue of ineffective assistance of counsel based on the defense counsel's failure to present evidence on the merits. The practical reality of the defense counsel's "total inaction," in his opinion, deprived the accused of his right to due process and was contrary to public policy. *See id*. at 566 (Lucas, J., dissenting). In addition, like Judge Sullivan and the late Judge Wiss in *Weasler*, Judge Lucas took the view that validating the term will overshadow the majority's cautions to practitioners. *Id*.

131. *See*, *e.g.*, *id*. at 554; United States v. Profitt, No. ACM 32316, 1997 WL 165434 (A.F. Ct. Crim. App. Apr. 4, 1997).

The Navy-Marine Corps Court of Criminal Appeals added one final case on pretrial agreement terms.[132] In *United States v. Mitchell*,[133] the court reviewed a pretrial agreement that required the accused to repay $30,733.62 to financial institutions that he defrauded.[134] At the time the accused proposed the restitution term in his pretrial agreement, he had returned to military custody from a five-and-one-half year period of unauthorized absence. During that time, he used his entrepreneurial skill to set up business opportunities in England and the Bahamas.[135] At trial, an officer and enlisted panel sentenced the accused to confinement for ten years, total forfeitures, and a dishonorable discharge. The pretrial agreement, in addition to requiring the restitution, provided that the convening authority would suspend all confinement in excess of sixty months.

While in confinement, the accused made partial restitution until his business ventures failed.[136] The convening authority then vacated the suspension pursuant to R.C.M. 1109.[137] The accused challenged the vacation based on indigence.

The Navy-Marine Corps court held that an accused who does not make full restitution pursuant to the term of a pretrial agreement is not deprived of the benefit of that bargain when a convening authority takes adverse action contemplated by the agreement. An important basis for the court's decision was the law of indigence and how it relates to an accused who makes partial restitution and then cannot complete the obligation because of changed circumstances. The court held that indigence could operate to release an accused from a restitution obligation.[138] In military practice, old case law regarding indigence has changed only to permit relief from a restitution obligation if there has been "government-induced misconduct."[139] There was no misconduct under the facts of this case; hence, there was no legal basis to permit the accused to withdraw from a pretrial agreement that he proposed.[140]

The key to the court's analysis is the new status of an accused and defense counsel in negotiating terms to a pretrial agreement. The court held that the accused proposed the term "at arms-length" and after full consultation with counsel.[141] The accused was an "astute" individual who could "certainly [foresee] that his financial empire would suffer reversals during his time in confinement."[142] The accused, moreover, told the convening authority and the military judge that he understood the term requiring restitution.[143] Finally, the court looked to the "four corners" of the pretrial agreement and the record and determined that the accused received other substantial benefit from the agreement.[144]

Mitchell underscores that counsel need to be very careful in proposing and negotiating terms for an accused. In addition, public policy arguments are not given great weight, especially if the accused proposes the term and actions at trial indicate waiver. Counsel must also understand that indigence "through no fault of [the accused]" means exactly what it says. Unless there is "government-induced misconduct," indigence will not

132. Two other cases involving interpretations of pretrial agreement terms were also decided in 1997, but they are not discussed in this article. *See* United States v. Villareal, 47 M.J. 657 (N.M. Ct. Crim. App. 1997) (holding that the government's withdrawal from a pretrial agreement and then forwarding the case to a neutral convening authority did not amount to unlawful command influence); United States v. Silva, No. NMCM 95 01450, 1997 WL 652095 (N.M. Ct. Crim. App. May 14, 1997) (holding that a term requiring the accused to "waive all motions" violates neither the *MCM* nor public policy).

133. 46 M.J. 840 (N.M Ct. Crim. App. 1997).

134. *Mitchell*, 46 M.J. at 842. The accused also entered guilty pleas to unauthorized absence, escape from confinement, forgery, making and uttering checks with insufficient funds, and possessing and altering military identification cards. *Id.* at 841.

135. The accused was also a successful college student.

136. *Mitchell*, 46 M.J. at 842.

137. *Id. See* MCM, *supra* note 5, R.C.M. 1109.

138. *Mitchell*, 46 M.J. at 842. *See* United States v. Foust, 25 M.J. 647 (A.C.M.R. 1987). Consequently, the accused's argument that R.C.M. 1113(d)(3) prohibited the convening authority from vacating the suspension because of indigence was misplaced. That provision only pertains to a situation where the convening authority is considering imposing confinement in lieu of a fine. *See* MCM, *supra* note 5, R.C.M. 1113(d)(3). An accused, upon a proper showing that it is impossible to pay the fine, can avoid imposition of confinement. *Mitchell*, 46 M.J. at 842.

139. *Mitchell*, 46 M.J. at 842.

140. The Navy-Marine Corps Court of Criminal Appeals indicated that this would result in a significant windfall for the accused. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* The convening authority agreed not to present evidence on charges related to desertion, conspiracy, other bad checks, and an unrelated unauthorized absence.

release an accused from the requirement to provide restitution as part of a pretrial agreement.

Gambling & Arson: Something New for the Military Judge

Review of the *Weasler-Rivera* line of cases is incomplete without a quick examination of the decisions involving the providence inquiry.[145] While the cases detail the need to establish a basis in law and fact to support a guilty plea, the primary focus is on the role of the military judge in the process and in some specific areas of UCMJ violations where soldiers have started committing more offenses.

In *United States v. Green*,[146] the Army Court of Criminal Appeals addressed what was required to support an accused's guilty plea to bad checks, the proceeds of which are used for gambling. The accused, knowing that he had no money in his checking account, wrote checks totaling $850.00 at the post club. During the accused's providence inquiry, he told the military judge that he used some of the money to gamble at slot machines that were located in the post exchange. The military judge did not inquire further regarding how much money was spent on gambling.

On appeal, the accused argued that the public policy rule of *United States v. Allbery*,[147] regarding the courts' reluctance to assist with the enforcement of gambling debts, barred an Article 123a[148] conviction because the checks were written to facilitate an on-site gambling operation.[149] The Army court was forced, under this public policy bar, to affirm but modify the conviction, because the military judge failed to ascertain how much of the proceeds from the bad checks were used in the slot machines and how much time elapsed between cashing the checks and gambling.[150] The court held that, to negate the public policy that courts may not punish soldiers for check offenses arising from gambling debts, the providence inquiry or stipulation of fact must reflect what moneys were used for gambling and the character of the business activities of the check cashing facility.[151] The court reversed the check specification dealing with the gambling because there were no facts in the providence inquiry that indicated that the post club did not cash the checks to facilitate on-site gambling.[152]

In *United States v. Thompson*[153] and *United States v. Greenlee*,[154] the Army court directed its attention to the portion of the proceeds used for gambling or other purposes. In *Thompson*, the accused was convicted of four specifications of drawing and uttering worthless checks with intent to defraud; the four specifications represented forty-two checks totaling $6457.60.[155] The facts indicated that the accused used $10.00 of the proceeds

145. The court addressed the adequacy of a providence inquiry in a number of cases in 1997. Listed below are other cases the courts decided regarding factual predicates and pleas that may be important for practice. *See* United States v. Willis, 46 M.J. 258 (1997) (holding that the accused's guilty plea for the attempted murder of his uncle was provident under either transferred intent or concurrent intent theory); United States v. Milton, 46 M.J. 317 (1997) (holding that a guilty plea to assault by showing a concealed weapon and threatening victim with future harm if victim did not stay away from his wife was provident and constituted assault by offer); United States v. Outhier, 45 M.J. 326 (1996) (holding that a military judge must reopen providence and resolve a conflict between the facts and the plea where, in case of aggravated assault likely to cause death or grievous bodily harm, facts brought out during sentencing were inconsistent with plea); United States v. White, 46 M.J. 529 (N.M. Ct. Crim. App. 1997) (holding that pleas of guilty to larceny of basic allowance for quarters and variable housing allowance were provident where the accused admitted to knowing receipt of allowance delivered solely for purpose of defraying cost of civilian housing for accused and her dependents); United States v. Ray, 44 M.J. 835 (Army Ct. Crim. App. 1996) (holding that a plea to aggravated assault was provident, although the military judge failed to define "grievous bodily harm" and to discuss its meaning with the accused and failed to inquire into the accused's specific intent to inflict grievous bodily harm); United States v. Thomas, 45 M.J. 661 (Army Ct. Crim. App. 1997) (holding that the military judge committed reversible error in providence inquiry by misstating that force and lack of consent could be established by mere fact that sodomy victims were under age 16 and by failing to inquire into mistake of fact defense regarding consent of victims).

146. 44 M.J. 828 (Army Ct. Crim. App. 1996).

147. 44 M.J. 226 (1996) (applying the rules of *United States v. Wallace*, 36 C.M.R. 148 (1966)). *See* United States v. Slaughter, 42 M.J. 680 (Army Ct. Crim. App. 1995) (holding that check offenses are punishable under the UCMJ if there is no connection between the check cashing service and the gambling activity).

148. *See* MCM, *supra* note 5, pt. IV, ¶49.

149. *See Allbery*, 44 M.J. at 229.

150. *Green*, 44 M.J. at 830. The accused pleaded guilty to larceny and three specifications of making and uttering bad checks. The court reversed the finding on the one specification regarding making and uttering worthless checks at the check cashing facility in the post club. *Id.*

151. *Id.* The military judge must ask the accused, during the providence inquiry, or the stipulation of fact should indicate: whether all or a portion of the proceeds were used for purposes other than gambling; whether nongambling patrons were permitted to cash checks at the facility; what other services the check-cashing facility performed; and the hours of operation for both check cashing and gambling.

152. *Id.*

153. 47 M.J. 611 (Army Ct. Crim. App. 1997).

154. 47 M.J. 613 (Army Ct. Crim. App. 1997).

155. *Thompson*, 47 M.J. at 612 n.2.

of each of the three checks in question (which totaled $50.00 each) for gambling. During the providence inquiry, the accused told the military judge that, after she cashed the checks, she did not intend to use all of the proceeds for gambling.[156] When the Army court originally considered the case, it held that the public policy protection was not triggered at all, since the accused did not, at the time she cashed the checks, intend to use all of the money for gambling.[157] On reconsideration, the court modified its earlier decision by holding that it was unfair to grant the accused full protection for the total amount of the checks. The court determined that the accused's intent at the time she cashed the checks was the place to draw the line of public policy protection.[158]

In *Greenlee*, the Army court synthesized *Green* and *Thompson* into an intelligible rule for practitioners in gambling cases. Greenlee cashed forty-three worthless checks at various on-post clubs. For each $150.00 check he wrote, he requested $50.00 in quarters for gambling. During the providence inquiry, the accused disclaimed the *Allbery* public policy protection, although he acknowledged its existence.[159] The court held that $50.00 of each check was covered by the *Allbery* public policy protection.[160] While the accused indicated that, subsequent to his initial use of the $50.00, he might have used more of the proceeds for gambling, the Army Court of Criminal Appeals indicated that there was no protection for those proceeds. Applying the rules of *Thompson*, the *Allbery* protection only extends to proceeds of bad checks that the accused intended to use for gambling at the time worthless checks are cashed.[161]

The Army court cautioned practitioners, and particularly military judges, that in addition to ensuring that the providence inquiry reflects answers to the *Green* questions, the record should also reflect "the exact nature of how an accused intended to use the proceeds at the time he or she cashed the worthless checks."[162]

In *United States v. Peele*,[163] the government preferred charges against the accused for aggravated arson and damage to military property through neglect. The facts indicated that sometime between midnight and 0200, the accused entered his company dayroom, which contained combustible chemicals that workers temporarily stored there as part of a construction project. The accused kicked over a bucket of the flammable remodeling chemicals and threw books and papers onto the floor. He then set the mixture on fire with his cigarette lighter. He returned later to assist in extinguishing the fire, but not before the building was damaged.[164]

Based on a pretrial agreement, the accused entered into a stipulation of fact and entered guilty pleas to simple arson and negligent damage of the same property. The accused acknowledged, in the stipulation of fact and during the providence inquiry, that he "willfully and maliciously" burned the building. He also acknowledged that, "through neglect," he damaged the same building through arson. The military judge, noting the "nonsequitur in the two pleas," quizzed the defense counsel to ascertain if the accused understood the apparent inconsistency with the plea.[165] The defense counsel replied that "that was how the *appellant* wanted to plead."[166] The trial counsel joined defense counsel in supporting the accused's plea. The appellant's use of the cigarette lighter to light the fire constituted the willful and malicious conduct supporting the arson offense.[167] Leaving the dayroom as the fire spread constituted the neglect supporting the damage to government property offense.[168] The military judge then accepted the accused's pleas.

156. *Id.*

157. *Id.*

158. *Id* at 612.

159. *Greenlee*, 47 M.J. at 613. The accused stated that he was not entitled to claim the *Allbery* protection because he used a fraction of the proceeds of the worthless checks for gambling.

160. *Id.* at 613-15.

161. *See id.*

162. *Id.* at 615. The new "wrinkles" in the *Wallace/Allbery/Thompson* doctrine might require the CAAF to resolve how it is to be applied. It seems unfair to have a public policy against enforcement of gambling debts and then draw a line, although logical, at the intent at the time of the check cashing when actual proceeds of a worthless check are later used for gambling. Practitioners who desire to read a case where the military judge did everything right should consult *United States v. Hill*, No. 9600595 (Army Ct. Crim. App. June 6, 1997). For a complete discussion of *Wallace* and *Allbery* in the context of substantive criminal law, see Major William T. Barto, *Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice*, ARMY LAW., Apr. 1997, at 50, 58-60.

163. 46 M.J. 866 (Army Ct. Crim. App. 1997).

164. *Id.* at 867. The damage to the building was $600.00.

165. *Id*. at 868. The military judge asked defense counsel, "You realize, of course, that you pled him guilty to willfully, maliciously, burning property, but through neglect he damaged it." *Id*.

166. *Id.*

The Army court, noting the responsibility of the military judge to inquire into the providence of the plea,[169] and of trial and defense counsel to ensure that the plea is consistent with law and regulation,[170] set aside the Article 108 offense. The court noted that the accused's acts of setting the fire and leaving the scene as the fire spread were both intentional acts.[171] The military judge, therefore, should have rejected the pleas as improvident.

Most significant for military judges and practitioners is a footnote in the case that describes the difficult mission and precarious position of military judges. While the military judge erred in accepting the plea, the Army court stressed that counsel was also to blame.

> [The military judge was] unfairly placed in the position by a staff judge advocate, trial counsel, and trial defense counsel who all erroneously believed that they could allow the [accused] to manipulate the facts in order to satisfy his desire to explain away misconduct to a less serious degree and thereby reduce the maximum period of confinement he was facing from ten years to one year.[172]

Peele reminds military judges of the onerous task of establishing a factual predicate for the plea—the military judge acts as the final arbiter of the government's and defense's case. The military judge is often placed in an awkward position. Counsel must realize their importance to the system by not taking action in the name of an accused or in pursuit of a pretrial agreement that harm the system. In *Peele*, trial and defense counsel (and even the staff judge advocate, according to the court) were intent on working out a deal that suited expedience and the accused's interests.[173] Trial and defense counsel could have accomplished their interests without placing the military judge in an awkward position.[174]

SOMETHING NEW (CONTINUED): COURT-MARTIAL PERSONNEL

More McKinney

The military justice action involving former SMA McKinney is perhaps the most famous case of the year in Army jurisprudence. Practitioners recall this action, not only because of the accused's identity, but because the issues in the case span many areas.[175] In *McKinney v. Jarvis*,[176] the Army Court of Criminal Appeals took another look at Articles 22, 23, and 1(9)[177] regarding convening authority disqualification in processing military justice actions.

167. *Id.*

168. *Id*. at 869. The military judge went through the elements of the arson offense and established a factual predicate for that plea. The military judge then proceeded to ask the accused about the element of neglect that was different from the arson offense. The military judge asked the accused, "I would gather that the neglect here was leaving the room with the fire still burning. Would you agree that that was neglect on your part?' The appellant stated in response, "Yes, Your Honor." It appears that defense counsel, desiring to secure the benefit of the bargain for the appellant, and trial counsel, desiring to make sure that the case proceeded without any hitches, sat silent at counsel tables.

169. *See generally* United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Clark, 26 M.J. 589 (A.C.M.R. 1988), *aff'd*, 28 M.J. 401 (C.M.A. 1989); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

170. *See generally* United States v. Watkins, 32 M.J. 527 (A.C.M.R. 1990).

171. *Peele*, 46 M.J. at 869.

172. *Id.*

173. *Id.* The court stated that an accused should not be permitted to admit guilt to a less serious offense that he did not commit in order to avoid pleading guilty to a more serious offense that appears to be supported by the total facts of a case.

174. The military judge most certainly could have rejected the plea and then would not have been in an awkward position. What this case illustrates is the "give-and-take" associated with courts-martial and trials in general. The parties to a trial depend on one another to conduct themselves not only consistent with procedural rules but also within the rules of professional courtesy. It is certainly reasonable for all of the parties to expect that an accused's guilty plea is consistent with law and regulation and that, if the plea is an odd one, counsel (and especially the defense counsel) know what they are doing. With this idea of "professional courtesy" in mind, the military judge's action of splitting the accused's conduct into intentional and negligent acts was reasonable.

175. Earlier, this article discussed the CAAF's fashioning of a new rule on closure in *McKinney v. Jarvis*, 47 M.J. 363 (1997). There has been much discussion in the press regarding *McKinney*, raising the issues of race and justice, treatment of officers versus treatment of enlisted soldiers in military justice, and the continuing disposition of adultery and sexual misconduct offenses in the military justice system.

176. 46 M.J. 870 (Army Ct. Crim. App. 1997).

177. Article 22(b) disqualifies an accuser from convening a general court-martial. UCMJ art. 22(b) (West 1995). Article 23(b) disqualifies an accuser from convening a special court-martial. *Id*. art. 23(b). Both provisions require a convening authority who is an accuser to forward a case to a superior competent authority. Both articles are dependent upon Article 1(9), which defines an accuser as a "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." *Id*. art. 1(9).

In *McKinney*, the accused asked for a writ of prohibition at the intermediate appellate court. The basis of the writ was that the SPCMCA should be disqualified from appointing an IO since the SPCMCA also preferred the charges.[178] For reasons not expressed in the opinion, the command withdrew preferral authority up to the SPCMCA level.[179] The accused also argued that the SPCMCA should be disqualified from further action in the case because of his position as both accuser and appointing authority.[180] The Army court's thorough opinion reviews the law of convening authority disqualification and should be a mainstay in every practitioner's trial notebook.[181]

Holding that the Article 32 IO appointment was proper and that the convening authority was not disqualified from further action in the case, the Army Court of Criminal Appeals noted that the *MCM* is clear regarding accuser disqualification. An accuser may not perform the following referral and post-referral duties: refer charges to[182] or convene a general or special court-martial; act as a military judge in the same case;[183] act as a trial counsel or Article 32 IO;[184] act, at court-martial, as an interpreter, bailiff, reporter, escort, clerk, or orderly;[185] or perform the judge advocate review of a court-martial.[186] Conversely, an accuser expressly can: serve as defense counsel with the consent of the accused;[187] forward charges to a superior commander for disposition; and convene and act as the summary court-martial of the same charges.[188] Rule for Courts-Martial 405(c) grants authority to convening authorities to appoint Article 32 IOs.[189] No *MCM* provision prohibits the appointment action of which the accused complained. Consequently, there was no express congressional or presidential intention to disqualify a convening authority who is an accuser from appointing an Article 32 IO.[190]

In addressing the accused's argument that the SPCMCA had an "other than official interest"[191] in the case by virtue of the fact that he was also the accuser, the court relied on two cases to hold that there was an absence of an "other than official interest." First, the court held that there was no logic to the argument that because the SPCMCA was the accuser, his preliminary review of the evidence was prejudicial to the accused.[192] In *United States v. Wojciechowski*,[193] the SPCMCA stated, upon hearing that an accused was involved in additional allegations of drug distribution, that he was going to send the accused to a general court-martial.[194] In *McKinney*, the court followed *Wojociehowski*, indicating that, by the time a convening authority directs an Article 32 investigation, he believes a

178. *McKinney*, 46 M.J. at 871.

179. Withholding the authority to act in particular cases is a common practice. For example, a GCMCA will withhold authority to act in cases involving an officer or senior noncommissioned officer accused. This authority is at R.C.M. 306(a), which provides in part that: "[a] superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld." MCM, *supra* note 5, R.C.M. 306(a).

180. *McKinney*, 46 M.J. at 871.

181. The court also considered its authority to review this matter, since the case involved an issue at the Article 32 stage. In an almost identical analysis to that of *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996), the Army court held that the case was within its supervisory authority over Army courts-martial. *See McKinney*, 46 M.J. at 872-73.

182. MCM, *supra* note 5, R.C.M. 601(c).

183. UCMJ art. 26(d) (West 1995).

184. MCM, *supra* note 5, R.C.M. 502(d)(4)(A), 405(d).

185. *Id*. R.C.M. 502(e)(2)(A).

186. *Id*. R.C.M. 1112(c).

187. *Id*. R.C.M. 502(d)(4).

188. *Id*. R.C.M. 307(a), 1302(b). *See* United States v. Kajander, 31 C.M.R. 479 (C.G.B.R. 1962).

189. *See* MCM, *supra* note 5, R.C.M. 405(c).

190. *See* McKinney v. Jarvis, 46 M.J. 870, 875 (Army Ct. Crim. App. 1997). Additionally, the court indicates that it did not view R.C.M. 504(c)(1), 601(c), and 404(e) as disqualifying the SPCMCA from appointing an investigating officer. The court held that the appointment of an Article 32 IO is not a "disposition" of the charges. *Id*. It is merely a recommendation to the appointing authority that he or she will use to "discharge . . . responsibilities in determining how the allegations should best be disposed." *Id*. at 876 n.6 (quoting United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990)).

191. *See* UCMJ art. 1(9) (West 1995).

192. *McKinney*, 46 M.J. at 875-76.

193. 19 M.J. 577 (N.M.C.M.R. 1984).

general court-martial may be appropriate to dispose of the case.[195]

Moreover, the SPCMCA had an official interest in the case by virtue of the official acts exception of Article 1(9).[196] Since 1952, courts have determined the existence of an other than official interest by exploring "whether, under the particular facts and circumstances . . . a reasonable person would impute to [the accuser] a personal feeling or interest in the outcome of the litigation."[197] In an affidavit, the SPCMCA disavowed anything but an official interest in the case. The affidavit was enough for the Army court to hold that the SPCMCA performed "a command function embraced or reasonably anticipated" in processing court-martial actions.[198]

The two most important parts of the opinion, however, address the withholding of action from subordinate to higher levels of command and the court's interpretation of *United States v. Nix*.[199] As noted earlier, the command preferred charges at the SPCMCA level due, in part, to the accused's status as the SMA and the attendant publicity. Withdrawal of preferral authority from subordinate commanders to the SPCMCA level ensured that an experienced commander with many years of service and wisdom by virtue of rank determined appropriate disposition.[200]

The court cautioned, however, that trial counsel and military justice managers must give great consideration to withdrawal actions. In *McKinney*, withdrawal "tied the hands" of the SPCMCA regarding his power to take certain actions. After becoming the accuser, the SPCMCA lost his authority to refer the case to a special court-martial.[201] While the SPCMCA retained his authority to dispose of the matter through summary court-martial and nonjudicial proceedings, these alternatives could not be pursued without the SMA's consent and would not result in discharge or confinement.[202] The only action the SPCMCA could take without the SMA's consent was to dismiss the charges.[203] In the routine case, withdrawal of preferral authority will not have a negative impact on the process. In high profile cases, however, there may be some desire to dispose of a matter quickly at the lowest level. Withdrawal of authority to act may create additional steps in processing.

The court also held that, while the convening authority could forward the charges to higher authority for disposition, he was required to note his disqualification.[204] In doing so, the court reinterpreted *Nix*. In *Nix*, the accused was charged with maltreating subordinates, wrongful use of marijuana, and consensual sodomy. The SPCMCA had previous dealings with the accused, having ordered him to cease all contact with a woman the SPCMCA would later marry.[205] Part of the accused's relationship with the SPCMCA's future spouse included engaging in "sexual bantering" and "sexual innuendo."[206] The SPCMCA, upon receipt of the charges against the accused, forwarded them to the GCMCA without noting his disqualification. Formerly, *Nix* was interpreted to mean that a disqualified convening authority is precluded from making any recommendation regarding the disposition of a case. In *McKinney*, however, the Army Court of Criminal Appeals held that the type of disqualification determines whether a convening authority can make a recommendation on disposition.[207] A personal disqualification like that in *Nix* precludes a convening authority from making a recommendation on disposition. Conversely, a statutory disqualification, like that involved in

194. *Id.* at 578.

195. *McKinney*, 46 M.J. at 875. "[A] subordinate convening authority who directs an Article 32 investigation is not required to be absolutely neutral and detached. By ordering such an investigation, he has already determined that the offenses possibly merit a general court-martial. It is the investigating officer who must be impartial." *Id.* (quoting *Wojciechowski*, 19 M.J. at 579).

196. *See* UCMJ art. 1(9).

197. *See generally* United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952). *See also* United States v. Nix, 40 M.J. 6 (C.M.A. 1994); United States v. Jeter, 35 M.J. 442 (C.M.A. 1992); United States v. Conn, 6 M.J. 351 (C.M.A. 1979).

198. *McKinney*, 46 M.J. at 876.

199. 40 M.J. 6 (C.M.A. 1994).

200. This is just my opinion. No conclusions regarding the *McKinney* case were coordinated with the staff judge advocate or the command that processed the case.

201. *See McKinney*, 46 M.J. at 875.

202. *See id*.

203. *See id*. The SPCMCA could have forwarded the action to the GCMCA, but the court was concerned with the potential impact of the withdrawal up to the SPCMCA on future action at the SPCMCA level. *Id*.

204. *Id.*

205. United States v. Nix, 40 M.J. 6 (C.M.A. 1994).

206. *Id.*

McKinney, would permit a convening authority to make a recommendation.[208]

One Potato, Two Potato: Ruiz, Lewis, and Panel Selections

Convening authorities must use the Article 25 criteria to select members.[209] In selecting members, a convening authority cannot exercise "institutional bias . . . to achieve a particular result."[210] The systematic exclusion or inclusion of a particular group that is unrelated to the Article 25 criteria violates the law.[211] Two 1997 cases deal with issues involving panel selection and further clarify this area of the law for practitioners.

In *United States v. Ruiz*,[212] the Air Force Court of Criminal Appeals had to consider whether it was proper for a convening authority to exclude from selection personnel from the accused's medical group command. The court also considered whether the convening authority used rank as a criterion for selecting members. The accused was charged with adultery and fraternization.[213] When the case was presented to the convening authority for panel selection, he was informed that members of the accused's medical group were excluded from consideration.[214] The staff judge advocate took this action because medical group personnel "would know appellant and some might be familiar with the case or have discussed the case."[215] In addition, when the convening authority rejected senior ranking individuals from the list of nominees, he asked for replacement nominees of the same rank.[216] The resulting panel consisted of five commanders, a vice-commander, and a deputy commander. The ranks consisted of four lieutenant colonels, three majors, and three captains.[217]

The Air Force court held that the convening authority's actions were entirely proper under Article 25 and case law.[218] In doing so, the court upheld the proposition that a convening authority has the power to include a cross-sectional representation, or in this case, a balance of ranks, on the panel.[219] The lesson for practitioners is that the government should provide strong support for the convening authority's action. The convening authority testified that he believed that the exclusion of the medical group was a "good idea" because it eliminated the possibility of having people on the panel who were "too close to the case."[220] The convening authority also testified that his intent was to produce a balance of ranks on the panel. When the accused raises an issue involving improper panel selection, the government has a heavy burden to produce "clear and positive" evidence that an improper selection did not occur.[221] *Ruiz* demonstrates the quantum and character of evidence necessary to carry the government's burden of proof.[222]

207. *McKinney*, 46 M.J. at 875 n.5.

208. A statutorily disqualified convening authority is precluded from subsequent action. It stands to reason, therefore, that a commander who is the victim of an offense or the person who issued an order that the accused chose to disobey may have an "other than official interest" in the matter and is both statutorily and personally disqualified. It is arguable whether the commander is only statutorily disqualified, but it may be asking too much to have that commander prefer charges. In this situation, trial counsel should have another officer in the command prefer the charges.

209. *See* UCMJ art. 25 (West 1995).

210. United States v. Beehler, 35 M.J. 502, 503 (A.F.C.M.R. 1992).

211. *See* UCMJ art. 25 (providing the criteria for panel selections). A commander must make selections based on judicial temperament, experience, training, age, length of service, and education. *Id*.

212. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id*. at 510-11.

219. *See generally* United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988) (holding that cross-sectional representation of military community on court-martial panel is permissible, though not constitutionally required); United States v. Carter, 25 M.J. 471 (C.M.A. 1988) (holding that there is no Sixth Amendment right to a cross-sectional representation of the military community on a panel). The Court of Military Appeals has held that a "cross-sectional" representation of ranks on a panel is permissible. *See* United States v. Marsh, 21 M.J. 445 (C.M.A. 1986).

220. *Ruiz*, 46 M.J. at 511.

221. *See* United States v. Smith, 27 M.J. 242 (C.M.A. 1988); United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975); United States v. Beehler, 35 M.J. 502 (A.F.C.M.R. 1992). *See also* United States v. Loving, 41 M.J. 213 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

Similarly, *United States v. Lewis*[223] addressed the quantum of evidence necessary to sustain an improper selection motion. In *Lewis*, the accused was charged with attempted voluntary manslaughter, assault, and aggravated assault on his wife, who was also a service member.[224] The original convening order consisted of ten members, five of whom were females. When defense counsel requested enlisted members,[225] the convening authority relieved two female officers from the panel and added one female enlisted member. The final panel consisted of five males and four females.[226]

As support for its improper selection motion—allegedly, the panel was improperly stacked with female members—the defense offered the following evidence: a listing of all of the general and special courts-martial at the base; a unit strength report that indicated that there were 2347 enlisted members in the unit, of which 342 were female; a unit strength report that indicated that there were 195 officers, 28 of whom were female; and witness testimony that the high percentage of female membership on the panel was an anomaly.[227]

In order to support a motion for improper selection based on systematic exclusion or inclusion, a party must show the pool of members available and eligible to serve as court members.[228] The accused was not able to meet this test in *Lewis* because the statistics did not indicate what percentage of officer and enlisted personnel were disqualified or unavailable. Moreover, the list of courts-martial detailing the number of females who sat on cases, particularly sexual misconduct cases where the victim was a female, according to the CAAF, only showed that women routinely sat on courts-martial.[229] The CAAF found that the case was an anomaly and that there was no improper stacking of female members.[230]

Lewis indicates that, while the government has a difficult burden of proof in an improper selection motion, the defense has an equally tough burden. Merely presenting information to the fact-finder without meaningful interpretation likely will not constitute sufficient evidence. In addition, the defense counsel, for reasons not apparent in the opinion, did not call to the stand the noncommissioned officer who actually prepared the nominee action in the case.[231] The "clear and positive" evidence standard demanded of the government does not absolve defense counsel of the requirement to provide a sufficient evidentiary basis for motions regarding selection of members.

Substantial Compliance and Forum Selection: United States v. Turner

Last year, in *United States v. Mayfield*,[232] the CAAF held that a court-martial composed of a military judge alone was not deprived of jurisdiction because the military judge failed to specifically obtain an accused's oral or written request for trial by military judge alone on the record.[233] A military judge could properly hold a post-trial Article 39(a) session to correct the

222. The military judge did a superb job of permitting counsel liberal questioning of the convening authority and the staff judge advocates involved. The Air Force Court of Criminal Appeals indicated that testimony on this issue took up 78 pages of the record of trial. The military judge also made extensive findings of facts. *See Ruiz*, 46 M.J. at 510-11. Since the government is held to a strict liability (clear and positive proof) standard for these types of motions, it is incumbent upon the trial counsel to present as much evidence as possible to withstand appellate review. *See* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

223. 46 M.J. 338 (1997).

224. *Id.* at 339

225. *Id.* The defense counsel's response was excellent and should be included in the defense practitioner's list of options for this type of situation. Requesting enlisted members would, hopefully, produce a more balanced panel because, as the defense may have thought, more men would potentially be detailed. If that did not occur and the same amount of females were detailed as enlisted members, the defense would have some evidence that females were being detailed to achieve a particular result. The opinion does not reflect whether the defense made this specific argument in support of the motion.

226. *Id.* at 339.

227. *Id*. at 340. The sergeant in charge of preparing the lists of nominees for courts-martial testified. The staff judge advocate also testified. The sergeant who actually prepared the list of nominees *did not* testify. The military judge considered an affidavit from the GCMCA.

228. United States v. Loving, 41 M.J. 213 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

229. *Lewis*, 46 M.J. at 342.

230. *Id*.

231. In his concurrence, Judge Sullivan discusses this defense failure. He indicates that this inaction estopped the accused from raising the issue on appeal. *Id*. at 324 (Sullivan, J., concurring). Judge Sullivan notes one of the trends prevalent in recent pretrial and trial procedure cases, particularly those that discuss pleas and pretrial agreement cases. He states that "[a]n accused must make some hard choices at a court-martial and must live with the consequences of these choices in the appellate process." *Id*. These hard choices often translate into waiver.

232. 45 M.J. 176 (1996).

233. *Id*. at 177.

deficiency. The CAAF reasoned that such action did not violate Article 16[234] because the record indicated that it was "certainly clear"[235] to all the parties that even though there was a change in military judges, the accused's actions indicated his desire to proceed to trial with that new military judge. In *Mayfield*, the military judge simply forgot to obtain the forum request on the record before proceeding with the guilty plea inquiry.[236] What then, would be the appropriate thing to do if the *defense counsel*, on behalf of the accused, made an oral request for trial by military judge alone on the record and no post-trial session was held to obtain the accused's forum election? The CAAF answered this question in *United States v. Turner*.[237]

In *Turner*, a military judge alone in a contested court-martial found the accused guilty of sodomy, assault, indecent acts with a child, and attempting to impede an investigation.[238] The military judge advised the accused of his forum rights in a pretrial session two months before trial on the merits. At that time, the accused deferred the decision on forum selection. Just before entering pleas and trial on the merits, the military judge conferred with defense counsel and obtained a written military judge alone request that only defense counsel signed.[239] The defense counsel then orally confirmed the forum choice on the record.[240]

The Navy-Marine Corps Court of Criminal Appeals held that, under *Mayfield*, the request was defective. While the CAAF in *Mayfield* held that Article 16 was violated when the military judge failed to initially obtain from the accused a written or oral request for a judge alone trial, there was in fact such a request obtained in the post-trial Article 39(a) session.[241] The rule of *United States v. Dean*,[242] which requires strict compliance with Article 16, deprived the *Turner* court-martial of jurisdiction. The Navy-Marine Corps court correctly noted that in *Mayfield* the CAAF did not overrule *Dean*; it applied an expansive interpretation of what actions constitute compliance with Article 16.[243]

The CAAF was equally adept in *Turner* and held that, although there was a technical Article 16 violation, the request substantially complied with the statute based on a totality of the circumstances.[244] The CAAF concluded that the record was clear that reversal was not required because the accused did not suffer any prejudice from the technical Article 16 violation. The military judge properly advised the accused of his forum

234. *See* UCMJ art. 16(1) (West 1995). In a military judge alone court-martial, the accused must make an oral or written request for forum on the record before the court is assembled. *Id*. The accused must be aware of the identity of the military judge and consult with defense counsel before making the forum request. *Id*. *Mayfield* raises the issue of how the accused's knowledge of the identity of the military judge fits into the analysis. The CAAF did not discuss this component of Article 16 in *Mayfield*.

235. *Mayfield*, 45 M.J. at 178.

236. *See id*. at 177. The opinion indicates that the accused submitted "pretrial paperwork" that contained a request for trial by military judge alone, but this paperwork was never attached to the record of trial. The opinion of the Navy-Marine Corps Court of Criminal Appeals indicates that this "pretrial paperwork" was not a formal request for trial by military judge alone, and, in any event, because defense counsel signed the request instead of the accused, it was ineffective under Article 16. *See* United States v. Mayfield, 43 M.J. 766, 768-70 (N.M. Ct. Crim. App. 1996).

237. 47 M.J. 348 (1997). For a complete discussion of the jurisdiction issue in *Turner*, see Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., Apr. 1998, at 1.

238. *Turner*, 47 M.J. at 348. The military judge sentenced the accused, a chief warrant officer, to dismissal and confinement for nine years.

239. United States v. Turner, 45 M.J. 531, 532 (N.M. Ct. Crim. App. 1996). The written request was: "Please accept this as notice that the accused had authorized me to state that he will select judge alone as the forum for the aforementioned case. CWO2 Turner has been advised of his rights to trial by members, and has knowingly, voluntarily, and intelligently waived trial by members." *Id*. at 532 n.3.

240. *See id*. The discussion between the military judge and defense counsel was:

> TC: Sir, I believe the defense has provided a written request for judge alone. Would you like to add that to the record or orally take care of that?
> MJ: We can add that to the record.
> TC: Judge, we can take care of that orally, if you prefer.
> MJ: I have it, and I'll mark that Appellate Exhibit VII [sic]. Any other documents?
> MJ: Lieutenant Seacrist, I take it from this request that the decision has been made to go judge alone?
> DC: Yes, sir.

Id.

241. *See* UCMJ art. 39(a) (West 1995).

242. 43 C.M.R. 562 (C.M.A. 1970).

243. For a general discussion of the relationship between *Dean* and *Mayfield*, see Coe, *supra* note 3, at 38-39. The key fact in the CAAF's analysis was the post-trial Article 39(a) session, which the court said was appropriate under R.C.M. 1102(d). *See* MCM, *supra* note 5, R.C.M. 1102(d).

244. United States v. Turner, 47 M.J. 348 (1997).

rights. The accused deferred decision on forum, and defense counsel followed that deferral, after consulting with the accused, with a written request that indicated the accused's intentions. The defense counsel, in the presence of the accused, presented the written request to the court. It was appended to the record of trial. The accused then sat idly by while the defense counsel confirmed the oral request on the record.[245] Based on the CAAF's review of applicable case law, the accused intentionally waived his right to personally write or make an oral forum request on the record.

Like *Mayfield*, *Turner* reflects the CAAF's inclination to dispose of court personnel issues based on practicality, rather than on the technical application of statutes. The trend, started in *United States v. Algood*,[246] has reached fruition in *Mayfield* and *Turner*. So, practitioners do not have to guess about the CAAF's position on issues in this area. *Turner* also cautions military judges and counsel that Article 16 is still very important to the court-martial process. A military judge must diligently continue to inform an accused of his forum rights and to obtain either a written or oral waiver of forum from the accused on the record.[247]

Waiver, Replacement of Military Judges, and Judicial Restraint: United States v. Kosek

In *United States v. Kosek*,[248] the accused was charged with possession and use of cocaine. After his general court-martial was assembled, he asked the military judge to suppress his confession based on a violation of his Article 31 rights.[249] The military judge granted the motion, and the government appealed under Article 62.[250] The Air Force Court of Criminal Appeals reversed the military judge's ruling. The CAAF then set aside the Air Force court's reversal and directed that the case be returned "to the military judge for reconsideration of [his] ruling."[251] Before the case was returned for reconsideration, the original military judge was reassigned as an appellate military judge.

A new military judge reconsidered the original ruling and then reconvened the court-martial.[252] He informed the accused of his forum rights and offered the accused the opportunity to execute a challenge for cause against the military judge.[253] The accused declined. The new military judge then heard the motion and denied relief. The military judge found the accused guilty and sentenced him to a bad-conduct discharge, confinement for fourteen months, total forfeitures, and reduction to the lowest enlisted grade.[254] The surprised accused appealed, arguing that the replacement was improper under R.C.M. 505(e)(2).[255]

The CAAF noted that when it set aside the Air Force court's decision reversing the military judge's suppression ruling in favor of the accused, it contemplated that the original military judge would reconsider the motion. An Article 62 appeal, the court stated, "necessarily involves an ongoing court-martial."[256] Under R.C.M. 505(e)(2), since the court-martial had been assembled, replacement of the military judge could only occur upon a showing of good cause.[257] In addition, the CAAF indicated that the accused could have challenged the military judge based on disqualification under R.C.M. 902.[258] There was no

245. *Id*. at 351 (Sullivan, J., concurring). Concurring in the result, Judge Sullivan took the position that there was no Article 16 violation at all. Under federal law, Judge Sullivan wrote, "[c]ommon sense must prevail." *Id*. Ostensibly, when the accused sat as the defense counsel entered the written request and confirmed it orally, that substantially complied with *all* of the requirements of Article 16.

246. 41 M.J. 492 (1995) (looking at the practical effect of referring a case to trial using members selected by a previous commander of an installation that was deactivated under the Base Realignment and Closure Program).

247. *See Turner*, 47 M.J. at 350.

248. 46 M.J. 349 (1997).

249. *See* UCMJ art. 31 (West 1995).

250. *See id*. art. 62 (providing that the government may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact that is material in the proceedings).

251. *Kosek*, 46 M.J. at 350.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id*. Rule for Courts-Martial 505(e)(2) provides that, after assembly, a military judge may only be replaced for good cause shown. MCM, *supra* note 5, R.C.M. 505(e)(2). "Good cause" includes "physical disability, military exigency, and other extraordinary circumstances which render[s] the . . . military judge unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life." *Id*.

256. *Kosek*, 46 M.J. at 350.

need, however, for the court to delve into that analysis because the accused and counsel waived the opportunity to challenge the military judge.[259]

Kosek is important because it illustrates that defense counsel must always attack an accused's cause with foresight and ingenuity. Probably very few counsel have ever confronted the issue of replacement in a context similar to *Kosek*. The lesson to be learned from *Kosek* is that waiver must be considered regardless of the posture of the case. The accused's and defense counsel's waiver of the opportunity to challenge the military judge gave the CAAF an easy "avenue of approach" toward judicial restraint. Since 1988,[260] the cases that even indirectly interpret military judge replacement rules concern disqualification under R.C.M. 902.[261] No case resolves whether a military judge's reassignment as an appellate military judge constitutes a good cause under R.C.M. 505(e)(2) to warrant replacement with another judge in an ongoing court-martial.[262]

Something Borrowed: Peremptory Challenges

The CAAF Strikes Purkett: United States v. Tulloch

In *United States v. Tulloch*,[263] the Army Court of Criminal Appeals held that when a peremptory challenge is made and an opposing party makes a credible challenge that fully disputes the explanation offered to support the challenge, the moving party must come forward with an additional explanation that does more than "utterly fail to defend it as non-pretext."[264] The accused in *Tulloch* pleaded guilty to possessing and transporting a firearm and to usury. An officer and enlisted panel found him guilty of attempted robbery and conspiracy, contrary to his pleas. During voir dire, the defense counsel focused on the junior member of the panel, who was also a member of the same race as the accused. The defense counsel established that the junior member, at least from her responses, would be impervious to unlawful coercion in voting on the findings.[265] The government used a peremptory challenge against the member because she "seemed to be blinking a lot; [and] seem[ed] uncomfortable."[266] When the defense counsel further challenged the government's reason, the military judge sustained trial counsel's reason, relying on the trial counsel's "forthright[ness]" with the court in the past.[267] The Army court set aside the findings, holding that the proffered reasons were not sufficient to support the peremptory challenge under *Batson v. Kentucky*.[268] The court also held that the military judge erred

257. *Id*. *See* MCM, *supra* note 5, R.C.M. 505(e)(2) and (f).

258. *See Kosek*, 46 M.J. at 350. *See also* MCM, *supra* note 5, R.C.M. 902 (providing the specific and general bases for disqualification of military judges).

259. *Kosek*, 46 M.J. at 350.

260. *See* United States v. Hawkins, 24 M.J. 257 (C.M.A. 1987) (holding that an accused who failed to voir dire and to object to a new military judge, and executed a military judge alone request which included the replacement judge's name, could not claim on appeal that the replacement was improper, notwithstanding that there was no explanation given for the replacement).

261. *See*, *e.g*., United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988) (holding that the military judge should have disqualified himself when, even after placing the matter on the record and permitting voir dire, he indicated that he was the next door neighbor of, and his daughter was a close friend of, the child-victim of an assault and burglary that was pending before the court-martial).

262. The only case on point is *Hawkins*, 24 M.J. 257 (C.M.A. 1987), and the primary discussion concerns the time in a court-martial (after assembly) when a "good cause" basis is required to support replacement of a military judge. *Hawkins* also does not directly address R.C.M. 505(e)(2). *See* MCM, *supra* note 5, R.C.M. 505(e). Rather, it addressed UCMJ art. 29(d), which concerns the proper procedure for presenting evidence when a military judge is replaced. UCMJ art. 29(d) (West 1995).

263. 44 M.J. 571 (Army Ct. Crim. App. 1996).

264. *Id.* at 575.

265. *Id.* at 573. The following colloquy occurred between the defense counsel and the member:

> DC: Staff Sergeant E, you're the junior member of this panel, obviously, by the rank that you have. If you believe, at the end of the government's case, that they have not met—that they have failed to prove their case beyond a reasonable doubt and that, therefore, Private Tulloch was not guilty, and every other panel member disagreed with you and thought him to be guilty, would you, nevertheless, vote not guilty—
> SSG E: Yes.
> DC:—or could you be swayed to turn because of everybody else?
> SSG E: No.
> DC: So if you believe he was not guilty, no rank could influence you to change your vote?
> SSG E: [Negative response.]

Id.

266. *Id.* at 575.

267. *Id*.

268. 476 U.S. 479 (1986).

when he used the trial counsel's past forthrightness as a basis to sustain the peremptory challenge.[269]

The issue in *Tulloch* concerns the impact of *Purkett v. Elem*[270] in the military justice system. In *Purkett*, the Supreme Court appeared to return to pre-*Batson* times when it upheld a Missouri prosecutor's peremptory challenges against two black men because he "did not like the way they looked," "they looked suspicious," and one of the jurors had "long, unkempt hair, a mustache, and a beard."[271] Would the trial counsel's reason in *Tulloch* be sufficient and permissible under *Purkett*?[272]

Affirming the Army court's opinion, the CAAF completely negated the impact of *Purkett* in the military justice system. The court held that once a convening authority selects an individual under the Article 25 criteria as best qualified to serve on a panel, a trial counsel may not exercise a peremptory challenge against that individual based on a reason that is "unreasonable, implausible, or that otherwise makes no sense."[273]

The CAAF's route to that holding is important. First, the CAAF distinguished the source of the right, in the military justice system, to be tried by a panel "from which no cognizable racial group ha[d] been excluded."[274] The Court of Military Appeals recognized, in *United States v. Santiago-Davila*,[275] that the equal protection rules of *Batson* are not applicable to the military justice system through the Sixth Amendment, since the right to a jury trial does not apply to courts-martial under that Amendment.[276] Rather, the rights created by *Batson* are applicable through the Due Process Clause of the Fifth Amendment.[277] In *Santiago-Davila*, the Court of Military Appeals indicated that it would be inconsistent with the tradition of the armed forces, as a "leader in eradicating racial discrimination," not to apply *Batson* to the military justice system.[278]

Having established how *Batson* applies to the military justice system, the CAAF was forced to decipher why one of its progeny should not apply to it. Occasionally, the CAAF reminds practitioners that perhaps the most instructive case on why we do things differently than our civilian counterparts is *Parker v. Levy*.[279] In *Parker*, the Supreme Court held that the offenses of conduct unbecoming an officer and gentleman, and disorders and neglects to the prejudice of good order and discipline, were not void for vagueness.[280] The accused was on

269. *Tulloch*, 44 M.J. at 573, 575-76.

270. 115 S. Ct. 1769 (1995) (per curiam).

271. *Id.* at 1769.

272. The trial counsel's basis for the peremptory challenge was confusing at best. The trial counsel failed to relate how the member's blinking and uncomfortableness would affect the execution of duties as a panel member. *Purkett*, however, indicated that the basis for a peremptory challenge did not have to make sense.

The following colloquy occurred when the trial counsel made her peremptory challenge:

> TC: A little overly eager, sir. I'm sorry. The government would challenge Staff Sergeant E, sir. And in anticipation of the *Batson* issue—
> MJ: Yes?
> TC: —the government's position is that it was Staff Sergeant E's demeanor when [defense counsel] questioned him about whether he would be influenced at all by other members of the panel, and just his demeanor, in general. I was observing him during voir dire, and he seemed to be blinking a lot; he seemed uncomfortable. The government's not challenging him at all based on his race.
> MJ: And the fact that he's the junior member—does that have any bearing?
> TC: No, sir, it does not.
> MJ: Okay.

Tulloch, 44 M.J. at 573.

273. United States v. Tulloch, 47 M.J. 283, 287 (1997)

274. *Id.*

275. 26 M.J. 380, 389-90 (C.M.A. 1988).

276. *Id*. at 390. *See generally* United States v. Hutchinson, 17 M.J. 156 (C.M.A. 1984); United States v. Wolff, 5 M.J. 923 (N.C.M.R. 1978).

277. *See Tulloch*, 47 M.J. at 285. *See also* United States v. Moore, 26 M.J. 692 (C.M.A. 1988).

278. *See Santiago-Davila*, 26 M.J. at 380. In *Tulloch*, the CAAF noted that the Army Court of Military Review did not apply *Batson* to Army courts-martial because of a history of discrimination in Army justice. Rather, the Army court believed that "the use of stereotypes for any purpose within the court-martial system" had to be avoided. *Id*. at 390.

279. 417 U.S. 733 (1974). In a 1996 concurring opinion in *United States v. Eberle*, Judge Sullivan reminded practitioners of the importance of *Parker*. *See* 44 M.J. 374 (1996) (Sullivan, J., concurring) (holding that the offense of indecent acts encompassed the conduct of an accused who physically forced female victims to participate by restraining them as he masturbated, ejaculated, and fondled their breasts).

280. *Parker*, 417 U.S. at 753-57.

notice, therefore, that his conduct of making public statements to black Americans that they should disobey orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children" were offenses under the UCMJ.[281] The hallmark of the opinion, however, was the Court's recognition that "the military is, by necessity, a special society separate from civilian society."[282] With regard to military law, the Court stated that "[j]ust as military society has been a society apart from civilian society, so [m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[283] In *United States v. Moore*,[284] the Army Court of Criminal Appeals borrowed, and the Court of Military Appeals affirmed, this analysis to distinguish why *Batson* ought to apply to the military justice system without the requirement that the party objecting to a peremptory challenge provide sufficient evidence of institutional discrimination by the party exercising a peremptory challenge.[285]

The Army court provided the following justifications for why *Batson* applies differently in the military justice system: courts-martial are not subject to the jury trial requirements of the Constitution; military accused are tried by a panel of their superiors, not by a jury of their peers; military panel members are selected by a convening authority on a best-qualified basis and are not drawn from a random cross-section of the community; military counsel are provided with only a single peremptory challenge, in contrast to the numerous peremptory challenges permitted by most civilian jurisdictions; and in civilian jurisdictions, the numerous peremptory challenges are used to "select" a jury, but in courts-martial, a peremptory challenge is used to eliminate those who are already selected by the convening authority."[286] Considering these distinguishing features, the CAAF concluded that *Purkett* could only apply to civilian jurisdictions because it reflected the Supreme Court's sensitivity that "there are virtually no qualifications for jury service—instinct necessarily plays a significant role in the use of peremptory challenges to ensure that both the [g]overnment and the accused are able to present the case to jurors capable of understanding it and rendering a fair verdict."[287]

In dissent, Judge Sullivan indicated that the government stated the basis for its peremptory challenge with enough specificity to satisfy *Batson*.[288] In a more strongly worded dissent, Judge Crawford condemned the majority for departing from Supreme Court precedent without adequate justification.[289] She indicated that there was no reason to apply a different rule, let alone even apply *Batson* to the military justice system, because there was no historical evidence that unlawful discrimination was employed in the exercise of peremptory challenges.[290]

Instead of focusing on the selection process and the convening authority's choice of the "best qualified" individuals to serve on panels, Judge Crawford focused on the trial attorneys themselves.[291] The military legal corps and the military communities where they practice are relatively small in comparison to civilian communities. Everyone knows everyone. It is both difficult and foolish, in Judge Crawford's opinion, for a judge who is living in such a small and close community to mask a peremptory challenge based on race or gender. Also, Judge Crawford pointed to the fact that the case law is replete with the validation of peremptory challenges based on "hard" (actual bias) and "soft" (hunches) data.[292] The government's basis for the peremptory challenge here was demeanor, a soft data justification that is normally permissible. Finally, Judge Crawford took issue with the Army court's adoption and the majority's affirmance of a requirement that the military judge make factual findings when the parties dispute the factual predicate for a

281. *Id*. at 756-57.

282. *Id.* at 743.

283. *Id.* at 744.

284. 26 M.J. 692 (A.C.M.R. 1988).

285. The Court of Military Appeals affirmed *Moore*. *See* United States v. Moore, 28 M.J. 366 (C.M.A. 1989). A military judge resolves *Batson* objections using a three-step process: the opposing party must object to establish a prima facie case of unlawful discrimination; the moving party must come forward with an explanation that does not have to be persuasive or plausible, but must be a facially race-neutral explanation; and the military judge must then decide whether the accused has proven purposeful racial discrimination. *Id*. In civilian jurisdictions, there may be a requirement for the objecting party to provide a history of institutional discrimination in order to proceed with the objection.

286. *See* United States v. Tulloch, 47 M.J. at 285 (quoting *Moore*, 26 M.J. at 700).

287. *Id.* at 287.

288. *Id.* at 289 (Sullivan, J., dissenting).

289. *Id*. (Crawford, J., dissenting).

290. *See id.* at 292.

291. *See id*.

292. *See id*. at 293 nn.5-8 (listing the hard and soft data cases).

peremptory challenge. This was a primary basis for the Army court's reversal of the accused's conviction. Judge Crawford indicated that the CAAF never imposed such a requirement on military judges at the time of the Army court's ruling.[293]

Tulloch teaches practitioners that, in addition to having a clear mind during voir dire to collect information for the intelligent exercise of causal challenges, *trial counsel* must also pay closer attention to soft data bases for peremptory challenges. A trial counsel will prevail on a peremptory challenge only upon stating a clear and unambiguous race-neutral reason.

The Goose, the Gander, and the Defense:
United States v. Witham

What is good for the goose is good for the gander . . . *and the defense counsel*. In *United States v. Witham*,[294] the companion case to *Tulloch*, the CAAF formally affirmed the Navy-Marine Corps Court of Criminal Appeals' determination that gender is an impermissible basis for the exercise of a peremptory challenge.[295] In addition, the CAAF held that the *Georgia v. McCollum*[296] rule, which applies *Batson* to the defense in state and federal civilian proceedings, is equally applicable to military defense counsel.

In *Witham*, the defense counsel sought to peremptorily challenge the only female member from the panel.[297] The military judge denied the request after establishing that defense counsel based the challenge on the fact that the member was a female.[298]

The CAAF easily disposed of the defense's arguments that *Batson* should not be applicable to the defense. The appellant challenged application of *Batson* to the defense on three grounds: (1) the accused is not a state actor; (2) the accused should not suffer for the government's past discrimination in peremptory challenges; and, (3) peremptory challenge is the only way for the accused to affect panel composition.[299] This

293. Judge Crawford referred to *United States v. Perez* as support for the majority's general proposition. *Id*., *citing* United States v. Perez, 35 F.3d 632 (1994). In *Perez*, the accused and several co-accuseds, all having Spanish surnames, were charged with drug conspiracy. During jury selection, one of the first twelve names drawn was Ruth Santiago. After a sidebar conference, the government exercised a peremptory challenge against Ruth Santiago. The government's basis for the challenge was that Ruth Santiago worked in the inner city as a receptionist at a public housing authority and could have been exposed to drugs. In response to the government's reason, the trial court stated, "I understand," and sustained the peremptory challenge. The U.S. Court of Appeals for the First Circuit held that the challenge was based on "something other" than race and was valid under *Batson*, but noted that even after the district judge made that finding, *the defense continued in its disagreement*. *Perez*, 35 F.3d at 636. The court also held that, in such situations, a trial court should "state whether it finds the proffered reason for a challenged strike to be facially race neutral or inherently discriminatory and why it chooses to credit or discredit the given explanation." *Id.* Such a procedure "fosters confidence in the administration of justice without racial animus . . . eases appellate review of a trial court's *Batson* ruling . . . [and] ensures that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal." *Id.* While the CAAF may not have expressly required this procedure, it appears that such a procedure is implicit in the duties of a trial court and implicit in the three-step analysis which the Army court announced and the Court of Military Appeals affirmed in *United States v. Moore*, 26 M.J. 692, 701 (A.C.M.R. 1988).

294. 47 M.J. 297 (1997), *petition for cert. filed*, 62 Crim. L. Rep. 3132 (U.S. Jan. 14, 1998). The accused was charged with making a false official statement and filing a false travel claim. The officer and enlisted panel acquitted the accused of kidnapping and rape.

295. *Id.* at 300. *See* J.E.B. v. Alabama *ex. rel*. T.B., 511 U.S. 127 (1994) (holding that gender is a suspect classification under *Batson* and that a trial should be free from "state sponsored" group stereotypes). One can quibble with this part of the CAAF's holding. In holding that *J.E.B.* applies to courts-martial, the CAAF stated that it has "repeatedly held that the *Batson* line of cases . . . [of which *J.E.B.* is a part] applies to the military justice system." *Witham*, 47 M.J. at 300. The problem with that assertion is that *J.E.B.* postdates all of the cases that the CAAF cited as extending the *Batson* line of cases. Moreover, practitioners who follow the cases know that the CAAF might opine that a specific case does not appropriately apply in a court-martial context. *Tulloch* is a perfect example.

296. 505 U.S. 42 (1992) (holding that a criminal defendant may not engage in purposeful racial discrimination in the exercise of a peremptory challenge).

297. *Witham*, 47 M.J. at 299-300. During voir dire, the defense established that Staff Sergeant H, the member in question, had previously been held up at gunpoint and knew, but did not socialize with, the alleged victim of the rape. She indicated that the sex of a witness would not influence whether she believed the witness' testimony. The opinion indicates that the defense counsel was playing the "numbers game" in an attempt to achieve a number of panel members that would favor the defense on voting during panel deliberation. After the military judge denied the peremptory challenge against the lone female member, the defense exercised its challenge against another member, which reduced the panel to six members. This required four votes for conviction. The military judge permitted the defense to withdraw its peremptory challenge, increasing panel membership to seven, which required five votes for conviction.

298. *Id.* at 299.

> TC: Your Honor, in light of the fact that the victim's sex is female and the member being challenged is female, the Government would ask that the defense be required to show a—some type of a reason other than—
> MJ: Are you talking about the *Batson* case and so on—
> TC: Yes, sir. *McCollum*, I believe, is the authority.
> MJ: Is there anything—I'm sorry. Did the sex of Staff Sergeant Haynes—for the record, she is female. Did that enter into your decision to preempt?
> DC: Yes, it did sir.

Id.

299. *See id.* at 301.

was in stark contrast to the government's ability, through panel selection, to pick and to choose who it wanted on the panel.

Responding to the "state actor" argument, similar to *McCollum*, the CAAF held that the accused does not have a constitutional right to a peremptory challenge. Rather, the accused exercises that right based on a statute, Article 41, and that right is not absolute.[300] The exercise of a peremptory challenge involves the military judge, who must discharge the challenged member. If an accused is permitted to exercise a peremptory challenge based on gender discrimination, he essentially uses the state apparatus to effect that purpose. In *McCollum*, the Supreme Court specifically prohibited the defense from using the state to advance unlawful discrimination in the exercise of a peremptory challenge.[301] The CAAF dismissed the other arguments based on unfairness by indicating that, while the convening authority does influence the membership on the panel, selections must be consistent with the congressional intent embodied in Article 25. A convening authority who chooses members bases those selections not on personal considerations but on official statutory criteria.[302]

Contrary to *Tulloch*, the CAAF held that the rules of *Parker* did not reveal a "military exigency or necessity" that created a need to apply a different rule of peremptory challenges to the defense.[303] The Article 36[304] requirement to adopt rules of procedure used in the federal courts, where practicable, was appropriate for this situation.[305]

Like *Tulloch*, *Witham* communicates that defense counsel must also employ excellent advocacy skills in the exercise of a peremptory challenge. One can view the defense counsel in *Witham* as a victim of inartful questioning. The defense counsel was placed in a "catch-22" when the military judge asked him the pregnant question whether gender played a role in his decision to exercise his peremptory challenge. The interesting thing about this case is that there was adequate foundation to support a challenge for cause.[306] If the defense counsel had a better plan for the challenges phase of trial, perhaps he would have used some of the information from voir dire to support the peremptory challenge.

An Incomplete Circle: Batson Odds and Ends

Two other 1997 cases involving *Batson* deserve comment. In *United States v. Clemente*,[307] the accused, a Filipino, pleaded guilty to attempted larceny, larceny, and stealing and opening mail.[308] After voir dire, the government used its peremptory challenge against the only Filipino member of the panel.[309] The defense counsel objected and requested that the military judge require the government to state a basis for the challenge.[310] The

300. *See* UCMJ art. 41 (West 1995) (providing one peremptory challenge to each the defense and the government). The statute also describes the rules in using peremptory and causal challenges when panel membership is reduced below a quorum.

301. *See Witham*, 47 M.J. at 302.

302. *Id.* at 302-03.

303. *Id.* at 302.

304. UCMJ art. 36.

305. In concurrrences, Chief Judge Cox and Judge Effron specifically referenced this basis for the opinion, noting that the opposite conclusion was required in *Tulloch* "to address the unique role of the [g]overnment in shaping the composition of a court-martial panel." *Witham*, 47 M.J. at 303 (Effron, J., concurring). Chief Judge Cox once again stated his opinion that the government has an unlimited number of peremptory challenges and, thus, an unfair advantage over the defense. *Id.* at 304 (Cox, C.J., concurring).

306. *See id*. at 299. The member knew the victim from "prior interactions" and had been previously held up at gunpoint. Another issue that *Witham* indirectly raises is the potential application of the dual motivation analysis doctrine to the military justice system. That doctrine provides that when two reasons are given in support of a peremptory challenge and one of the reasons is purposely discriminatory, in violation of *Batson*, the peremptory challenge is valid despite a discriminatory purpose if the juror would have been struck anyway for the non-discriminatory purpose. *See* Wallace v. Morrison, 87 F.3d 1271 (11th Cir. 1996). In *Morrison*, the U.S. Court of Appeals for the Eleventh Circuit held valid a prosecutor's exercise of peremptory challenges based on the fact that jurors were black Americans *and* on his gut reaction after assigning each juror a numerical number after their responses to his voir dire questions. *Id.* The prosecutor stated that black jurors did not tend to get lower scores by virtue of their race. *Id. See generally* Howard v. Senkowski, 986 F.2d 24 (1993); Village of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252 (1977). *But see* State v. King, 572 N.W.2d 530 (Wis. 1997) (holding that a prosecutor's peremptory challenge based on the fact that jurors were "older" and "female" violated *Batson* because the gender reason was impermissible). The Wisconsin court refused to follow the federal dual motivation analysis rule. What would have occurred in *Witham* if the defense counsel stated that the basis for the peremptory challenge was gender and the fact that the member was held up at gunpoint and knew the victim? The way the case law is at present, a military judge would commit prejudicial error by issuing a ruling consistent with *Wallace*. The Court of Military Appeals expressly prohibited dual motivation justifications in *United States v. Green*. *See Green*, 36 M.J. 274 (C.M.A. 1993) (holding that explanations for peremptory challenges cannot be viewed in the disjunctive for *Batson* purposes if one of the explanations offered patently demonstrates an inherent discriminatory intent).

307. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

308. *Id*. at 716.

309. *Id*. at 719.

government explained that the member had leave scheduled during the court-martial, and the military judge, over defense objection, upheld the trial counsel's race-neutral explanation. The defense counsel failed to request additional voir dire of the challenged member, and on appeal, the defense asserted that the government justification was a pretext for intentional race-based discrimination in violation of *Batson*.[311]

The Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in ruling that the peremptory challenge complied with *Batson*.[312] The court described the assignment of responsibilities in raising and justifying a *Batson* objection. The court held that, while a party exercising a peremptory challenge has the responsibility to give a race-neutral reason to support the challenge, the objecting party still has the burden of persuasion to establish purposeful discrimination.[313] The military judge's responsibilities do not include a sua sponte duty to question a challenged member regarding a peremptory challenge. When the defense counsel failed to request additional voir dire of the member, he waived the *Batson* objection. *Clemente* is instructive in communicating to defense counsel the need to conduct additional voir dire in *Batson* issues so that all relevant information is on the record and available to the military judge for use in deciding the objection.

In *United States v. Ruiz*,[314] the Air Force court held that when a military judge considers a *Batson* objection based on gender, the per se rule of *United States v. Moore*[315] is not always applicable.[316] The rule in *Moore* provides that a prima facie case of discrimination is established once an opposing party makes a *Batson* objection.[317] In *Ruiz*, the government exercised its peremptory challenge against the only female member of the panel. The defense objected to the challenge, citing the then very recent case *J.E.B. v. Alabama ex. rel. T.B*.[318] Noting that *Batson* only applied to race-based peremptory challenges, the military judge did not require the government to state a gender-neutral reason.[319]

The Air Force court, in holding that the military judge acted consistent with the per se rule of *Moore*, reasoned that the per se rule specifically applied to *Batson*-type challenges *where the government exercised its peremptory challenge against a member of the accused's race*.[320] The court acknowledged that gender "can be used as a pretext for racial discrimination,"[321] but also held that there are situations where application of the per se rule would produce absurd results.[322] One of those situations is gender in a military justice system.

The Air Force court viewed *J.E.B.* as a direct response to problems only prevalent in a civilian jurisdiction.[323] The court

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

315. 28 M.J. 366, 368 (C.M.A. 1989). The per se rule of *Moore* relieves an objecting party in a *Batson* situation from providing extrinsic evidence of intentional discrimination. Once the *Batson* objection is made, the party who made the peremptory challenge must articulate a supporting race-neutral reason.

316. *Ruiz*, 46 M.J. at 508.

317. *Moore*, 28 M.J. at 368.

318. 511 U.S. 127 (1994).

319. *Ruiz*, 46 M.J. at 506. Ruiz was tried in an overseas location, and this made it difficult for the parties to obtain a copy of the case. The Air Force court stated that the overseas location had "limited research materials available." *Id.* The military judge was not aware of *J.E.B.* and directed counsel to locate a copy of the case and return the following morning. Neither party could obtain a copy of the case. The government's reason for the peremptory challenge, however, was that the member was a contracting officer. The trial counsel concluded that contracting officers held the government to a very high standard of proof. *Id.*

320. *Id.* at 508.

321. *Id.* at 506.

322. *Id.* at 508. The court indicated the absurdity of applying *Batson-Moore* to a peremptory challenge of a male in a predominantly male court, where the accused is a male; but this is not as absurd as the Air Force court indicates. *See*, *e.g.*, Fritz v. State, 946 S.W.2d 844 (Tex. 1997). In *Fritz*, the Texas Court of Criminal Appeals holds that a prosecutor may not exercise a peremptory challenge (seven challenges of male jurors) based on the fact that the jurors are the same sex (male) and approximately the same age (under 30) as the defendant and would share a potential bias and shared identity with the defendant. *Id.* The jurors were dismissed based on their sex and because of stereotypes associated with young men, exactly what *J.E.B.* was designed to prevent. This is a civilian case, but it is conceivable that trial or defense counsel may desire to strike based on the fact that the panel member is a male and in a particular age group.

323. *Ruiz*, 46 M.J. at 507. The court pointed out that there is a different procedure for juror selection in civilian jurisdictions and that civilian juries must represent a cross section of society.

found that in a court-martial the composition of the panel is more likely to reflect the military society and community.[324] Normally, there will never be more than a handful of females, if any, on a panel because females make up fewer than twenty percent of the military population.[325] The court concluded that, when the government makes a peremptory challenge based on gender, the societal composition of the military supports that the challenge was exercised in good faith.[326] The court reasoned that the Supreme Court in *J.E.B.* recognized the need for a prima facie case of intentional discrimination in gender situations before a party is required to explain the basis for a peremptory challenge.[327] The Air Force court said that trial judges, based on their experience, would be able to decide whether a gender-neutral reason is necessary on a case-by-case basis.[328]

Ruiz is an interesting decision, and practitioners must remember that the Air Force court issued it before the CAAF decisions in *Tulloch* and *Witham*. On one hand, its reasoning is sound because it recognizes that gender might be viewed differently from race in a predominantly male military society. On the other hand, the court's dichotomy of race and gender in the application of the *Moore* per se rule appears to be an unauthorized reversal of established military case law. Permitting military judges to choose when to require a gender-neutral reason in *Batson* situations has the capacity to produce additional litigation and inconsistent results. The opinion continues the incomplete circle of *Batson's* application to the military justice system by establishing yet another wrinkle in its implementation.[329]

SOMETHING BLUE . . . A DIRGE FOR OVERUSE OF THE IMPLIED BIAS DOCTRINE

A new partnership can be happy, even though the partners disagree. Such was the situation on the CAAF in deciding how and when to apply the implied bias doctrine in causal challenges. The implied bias doctrine operates to prohibit a member from sitting on a panel when, based on that member's implicit bias, retaining the member on the panel would cause substantial doubt as to the legality, fairness, and impartiality of the proceeding.

In 1996, the CAAF applied the implied bias doctrine in *United States v. Fulton*.[330] Using the "catch-all" provision of R.C.M. 912(f)(1)(N),[331] the CAAF held that a military judge did not abuse his discretion in denying a challenge for cause against a member who was the chief of security police operations and also held bachelors and masters degrees in criminal justice.[332] Chief Judge Cox wrote the majority opinion, in which Judges Crawford and Gierke joined. Judge Sullivan strongly dissented based on *United States v. Dale*,[333] a case in which Judge Crawford dissented based on her disagreement with the court's movement toward a per se rule against law enforcement personnel serving as court members.[334]

324. *Id.*

325. *Id.* at 506.

326. *Id.* at 508. The facts of *Ruiz* involve a government peremptory challenge. The opinion, however, applies to "either party." *Id.*

327. *Id.*

328. *Id.* at 509.

329. *See* Captain Denise J. Arn, *Batson*: *Beginning of the End of the Peremptory Challenge?*, ARMY LAW., May 1990, at 33; Lieutenant Colonel James A. Young, *The Continued Vitality of Peremptory Challenges in Courts-Martial*, ARMY LAW., Jan. 1992, at 20; Colonel (Ret.) Norman G. Cooper and Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of* Batson v. Kentucky *and Its Progeny?*, ARMY LAW., Oct. 1992, at 10; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Eugene R. Sullivan and Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141 (1996). In my opinion, the peremptory challenge is a mainstay of the American legal system. There will be a significant passage of time before one can talk about a serious movement to abolish it.

330. 44 M.J. 100 (1996). *See* Coe, *supra* note 3. The member in *Fulton* had contact with the convening authority only on matters involving "high level decisions" that did not include the accused's misconduct. *Id.*

331. MCM, *supra* note 5, R.C.M. 912(f)(1)(N). This rule provides that a member may be challenged for cause and removed when it is clear that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." *Id.* This provision embodies both the actual and implied bias standards. Actual bias is when a member indicates that some belief or situation will prevent him from performing duties on a panel. Successful rehabilitation resolves an actual bias issue. Implied bias is raised by status or implicit bias resulting from some belief or previous activity which would cause substantial doubt as to the legality, fairness, and impartiality of the proceeding if the member were retained on the panel. Implied bias operates to exclude a member, even if the member is "successfully" rehabilitated after disavowing the implied bias. The *appearance* of fairness determines whether a challenge for cause based on implied bias is granted.

332. *Fulton*, 44 M.J. at 100-01.

333. 42 M.J. 384 (1995) (holding that a member represented "the embodiment of law enforcement" based on his position as deputy chief of security police and his practice of attending the "cops and robbers" briefing for the base commander).

334. *Id.* at 386.

Four months after *Fulton*, the CAAF decided *United States v. Daulton*.[335] In *Daulton*, the accused was charged with indecent acts on children. The CAAF reversed the accused's conviction, holding that the military judge erred by refusing to grant a challenge for cause against a member whose sister was the victim of child sexual abuse.[336] The member's sister was the same age as the accused's victim when the sexual abuse occurred.[337] Both Judges Sullivan and Crawford dissented from that part of the majority opinion regarding implied bias.[338] The CAAF considered the 1997 implied bias cases against this backdrop.

Vixens, Married OSI Agents,[339] and "More Money": United States v. Minyard

In *United States v. Minyard*,[340] the accused was charged with seven specifications of larceny and wrongful appropriation of an American Express Card.[341] During voir dire, an officer member stated that she was married to the Office of Special Investigations agent who investigated the case against the accused. The member indicated that she and her husband "don't discuss cases."[342] She also stated that she may have heard her husband make a reference to the case in a telephone conversation.[343] The defense made a challenge for cause based on implied bias.[344] The military judge denied the challenge, and the CAAF reversed the conviction.[345]

The CAAF concluded that the military judge abused his discretion in denying the challenge for cause. The court reiterated that the standard of review for causal challenges based on actual bias is one of credibility, and military judges are given great deference in making this determination.[346] On appeal, causal challenges are reviewed for an abuse of discretion. Regarding causal challenges based on implied bias, the court reiterated that an objective standard applies. The relevant question is whether a reasonable member of the public would have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings.[347]

The CAAF held that there would be substantial doubt about the legality, fairness, and impartiality of the proceeding if this

335. 45 M.J. 212 (1996). Aside from the challenge issues, the CAAF reversed Daulton's conviction because the accused was denied his Sixth Amendment right to confrontation when he was excluded from the courtroom during the victim's testimony, although he was permitted to observe by closed-circuit television. *Id*.

336. *Id*. at 217-18.

337. *Id.* at 218. The member's responses in voir dire indicated that she was shocked when she found out that her grandfather had sexually abused her sister. Regarding her duties as a member, she indicated that she "believed" she could separate the incident from the case. *Id*. She also indicated that the incident "shouldn't" have a bearing on the case. She finally stated that she would have no difficulty sitting as a member in the case. *Id*. Judge Gierke wrote the majority opinion. Chief Judge Cox and Senior Judge Everett concurred.

338. *Id.* at 220-25. Judge Sullivan opined that, since the defense counsel did not base the challenge for cause on implied bias, the majority's reliance on the objective standard in determining whether there was an abuse of discretion was misguided. *Id*. Since the challenge for cause was based on actual bias, the military judge made a credibility determination based on the member's responses to questions, and there was no abuse of discretion. Judge Crawford opined that the majority inappropriately substituted its judgment in an area where great deference is given to military judges. *Id.* Similar to Judge Sullivan, she concluded that the case involved actual bias. However, she saw the majority action as an improper extension of the implied bias doctrine because the case did not represent an "extreme situation." *Id.* at 221.

339. Office of Special Investigations (the Air Force operation that conducts criminal investigations).

340. 46 M.J. 229 (1997).

341. *Id.* at 230.

342. *Id.*

343. *Id.* The member described the circumstances and the phone call as follows:

> It was a conversation on the telephone, but I don't know who he was talking to because I didn't answer the telephone when we were at home. He made a comment like "More money?" So, when he got off the phone, I said, "What are you talking about, 'more money?'" I didn't know who he was talking to. He said "Oh, it is a case that is being worked on. Somebody said that this guy took more money." That would be something that I might associate with this case.

Id.

344. *Id*. at 233. The trial counsel responded that the agent would likely not testify. In fact, it appears that the agent did not testify. The military judge denied the challenge for cause after making a credibility determination that the member's responses were "significantly direct and sincere " and "I don't see a challenge for cause . . . based on the fact that she is the spouse of that particular agent." *Id.* at 230-31.

345. *Id.* at 230.

346. *Id*. *See* United States v. White, 36 M.J. 284 (1993) (holding that a military judge has wide latitude in determining the scope and conduct of voir dire and must be given the same latitude in deciding challenges, since the military judge has an opportunity to view the demeanor of a member and hear the member's responses to questions).

member sat in judgment of an accused investigated by her husband.[348] The court stressed that the decision in no way questioned the member's integrity. Moreover, the decision should not be viewed as moving toward a per se rule disqualifying law enforcement personnel and their relatives from service on panels.[349] Judges Sullivan and Effron, in a concurrence, indicated that they "would allow neither the fox nor the vixen to guard the hen house."[350]

Judge Crawford wrote a strong dissent, lamenting the decision as an improper extension of the implied bias doctrine.[351] Citing Supreme Court case law, Judge Crawford indicated that there has never been an instance in which that court has disqualified a juror based on implied bias.[352] In addition, Judge Crawford indicated that the majority opinion "undermined the practice of rehabilitation in [f]ederal, state, and military courts."[353] The member, she stressed, emphatically indicated to the military judge that she would follow the court's instruction, keep an open mind, and lawfully weigh the evidence heard during trial. Equally important, Judge Crawford decried the fact that the member's husband never testified and there was no evidence other than the voir dire that he was involved in the investigation pertaining to the accused.[354]

While the dissent is quite strong, *Minyard* fits in the orderly progression of law dealing with causal challenges and law enforcement personnel. In *Fulton* and *Dale*, the CAAF told practitioners that challenges for cause involving law enforcement personnel would be reviewed on a case-by-case basis. Practitioners were also told that the CAAF was still sorting out this issue. *Minyard* indicates that the CAAF has sorted out its plan of attack. There is no per se rule regarding law enforcement personnel or their relatives. As Judges Sullivan and Effron stated in *Minyard*, "[w]e are talking about *'the'* policeman and *'his'* wife."[355]

"Where goest thou"[356] With Implied Bias?: Lavender and Youngblood

United States v. Lavender[357] and *United States v. Youngblood*[358] contain the CAAF's latest statement on the application of implied bias. Both cases indicate the course the CAAF has charted for this doctrine.

In *Lavender*, the accused pleaded guilty to larceny, forgery, making and uttering bad checks, and wrongfully charging personal phone calls to the government.[359] During deliberations on findings, one of the panel members informed the president, in the presence of all of the members, that twenty dollars was stolen from her purse. That member-victim then informed the military judge, who held an Article 39(a) session to determine any possible impact on the deliberations.[360] The military judge questioned the members about the impact of the larceny, and all of the members indicated that they could still execute their responsibilities fairly. During the course of the questioning, however, another member indicated her belief that money was taken from her purse as well.[361] This member also indicated

347. *See* MCM, *supra* note 5, R.C.M. 912(f)(1)(N).

348. *Minyard*, 46 M.J. at 231.

349. *See id.* It is interesting to note that Judge Crawford, while supporting the result in *United States v. Napoleon*, stated in a concurrence that the holding should be based only on actual bias. *Id.* at 233-35 (Crawford, J., dissenting). *See Napoleon*, 46 M.J. 279 (1997) (holding that, under the actual and implied bias standards, the military judge properly denied a challenge for cause against a member who had *official* contacts with a special agent-witness, who was "very credible because of the job he has" and gained knowledge of the case through a staff meeting).

350. *Minyard*, 46 M.J. at 232.

351. *Id.* (Crawford, J., dissenting).

352. *Id.* at 234 (citing Smith v. Phillips, 455 U.S. 209 (1982); Dennis v. United States, 339 U.S. 162 (1950); United States v. Wood, 299 U.S. 123 (1936)).

353. *Id.*

354. *Id*. at 235.

355. *Id.* at 232. One can also view *Minyard* as an example where the military judge did not employ an abundance of caution in deciding the challenge. Military judges are supposed to use the *Moyar* mandate to liberally grant challenges for cause. *See* United States v. Moyar, 24 M.J. 635, 638, 639 (A.C.M.R. 1987). Judge Crawford indicated, without citing to the case, that this would avoid many issues. *Minyard*, 46 M.J. at 235.

356. *Minyard*, 46 M.J. at 235 (Crawford, J., dissenting). Judge Crawford asked the majority where they intend to take the implied bias doctrine.

357. 46 M.J. 485, *cert. denied*, 118 S. Ct. 629 (1997).

358. 47 M.J. 338 (1997).

359. *Lavender*, 46 M.J. at 486.

360. *Id.*

that the theft would have no impact on her as a member. The defense counsel's voir dire consisted of recalling one of the victim-members to ask if the member knew when the money was taken.[362]

The defense challenged the entire panel for cause. The rationale for the challenge was that all of the panel members knew about the alleged larceny and would hold it against the accused during sentencing once they found out that the accused earlier pleaded guilty to larceny.[363] The military judge denied the challenge, and the accused appealed based on the implied bias doctrine.

The CAAF did not apply the implied bias doctrine because the facts did not constitute "a rare exception."[364] The CAAF stated that the rare exception is illustrated by *Hunley v. Godinez*,[365] a burglary and robbery case in which a jury should have been excused after the trial judge determined that some of them were victims of a burglary similar to the one that was being tried.[366]

Applying *Hunley* to *Lavender*, the CAAF held that implied bias does not apply to reverse a conviction when: the defense counsel conducts limited voir dire and does not inquire into prejudicial information that the panel might have; panel members do not "stand in the same shoes as the victim" (panel member larcenies occurred under different circumstances than the accused's taking and forging checks from the checkbook of a woman with whom he was living); the offenses the accused commits are not intimidating (here, the panel members were victims of a theft of unattended property, not murder); affected panel members are removed from panel duties; and, the crime did not affect the remaining panel members (the accused was found guilty of the lesser included offense). The CAAF stated that the implied bias doctrine applies to the most rare circumstances. Judge Crawford concurred, noting that she would apply a different standard for the implied bias doctrine.[367] Judge Effron concurred, expressing disagreement with the limitation of the implied bias doctrine to rare cases. He noted the structural differences between the military justice system and civilian jurisdictions in selecting members/jurors, number of peremptory challenges available, and the liberal grant mandate for causal challenges.[368]

Judge Effron's concurrence, however, proved to be quite important in *Youngblood*,[369] a case involving unlawful command influence. In *Youngblood*, the accused was convicted of wrongful distribution and use of LSD, larceny of military property, and wrongfully altering military identification cards.[370] Prior to Youngblood's general court-martial, the three most senior panel members attended a staff briefing,[371] at which the general court-martial convening authority (GCMCA) and the staff judge advocate (SJA) indicated that commanders who disposed of military justice actions inconsistent with their beliefs might have difficulty progressing in the Air Force.

361. *Id.* at 487. The member indicated that the money could have been taken between 0800 and 1150. Two of the three enlisted members on the panel indicated their belief that the money was stolen from the purses during a morning break before lunch.

362. *Id.*

363. *Id.* The members might think that the appellant stole the money based on a similarity of facts, which indicated that the accused took a checkbook from a friend's purse, forged her signature on some of the checks, and then cashed them without his friend's permission. *Id*. The panel convicted the accused of the lesser included offense of wrongful appropriation and sentenced him to a bad-conduct discharge, partial forfeiture of pay for 24 months, and reduction to the lowest enlisted grade.

364. *Id.* at 488 (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

365. 784 F. Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992). In *Hunley*, the accused was found guilty of burglary and murder. After an unforced entry into an apartment to steal items, he was surprised by the occupant, and he killed her with a kitchen knife. The jurors began deliberations on findings, were deadlocked, and terminated activities at 10:00 p.m. The jury was divided eight to four in favor of conviction. While the jurors were asleep in a sequestered hotel, someone entered their rooms with a pass key and stole the property of four of the jurors. All twelve jurors discussed the burglary. When deliberations resumed, the jury was no longer deadlocked. The jury delivered a unanimous conviction in less than one hour. The trial judge denied the defense request for a mistrial based on *in camera* proceedings where the jurors indicated that they were unaffected by the burglary. The trial judge also ruled that the strong evidence in the case decreased the likelihood that the burglary adversely affected the jurors. A federal district court reversed the state cases affirming the conviction, and the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgment. *Hunley*, 975 F.2d at 316.

366. *Hunley*, 975 F.2d at 320. The court applied the following factors to determine whether the implied bias doctrine should apply: whether the members were placed in the shoes of the victims; the similarity between the offenses; whether the issues in the cases were close; the status of the deliberations; and whether all jurors are notified of an event and whether they express concern over it. *Id.*

367. *Lavender*, 46 M.J. at 490. Judge Crawford would ask whether the military judge *clearly* abused his discretion, as opposed to whether there was an abuse of discretion. *See* United States v. Napoleon, 46 M.J. 271, 285 (1997). This is a much higher standard than the one the CAAF currently uses to review implied bias cases.

368. *Lavender*, 46 M.J. at 489-90.

369. United States v. Youngblood, 47 M.J. 338 (1997). This article discusses unlawful command influence only in the context of implied bias.

370. *Id.* at 338.

371. *Id.* at 339.

During voir dire, counsel and the military judge asked members who attended the briefing about the matters discussed. Member #1 indicated that the SJA's remarks indicated that a previous commander "underreacted and . . . shirked his or her leadership responsibilities" in handling and punishing a child abuser.[372] This member also stated that, with respect to the child abuse matter, the GCMCA indicated displeasure with that commander's handling of the case and "forwarded a letter to that commander's new duty location expressing the opinion that 'that officer had peaked.'"[373] This member also stated that he occasionally coordinated, after the fact, with the GCMCA regarding disciplinary matters to explain his actions.

Member #2 indicated that the SJA expressed an opinion that the commander who underreacted "should have been given an Article 15 for dereliction of duty."[374] She reiterated that the GCMCA was in the process of contacting a former commander's gaining command to express that his career might not be a "lengthy one."[375] Member #3 remembered the comments regarding a "letter to a former commander's superiors. He also interpreted the GCMCA's comments as being 'dissatisfied with the way things had happened.'"[376] All three of the members indicated that they could fairly discharge their responsibilities as panel members. The military judge granted the defense challenge for cause against Member #1, but denied the challenges to Members #2 and #3.

The CAAF indicated that cases involving unlawful command influence are the *Hunleys*[377] of the military justice system. This and other command influence cases are different from the line of cases ending with *Lavender* because of the "subtle pressures" that a commander brings to bear on subordinates.[378] A commander and an SJA act with the "mantle of authority."[379] The CAAF held that the military judge failed to recognize that the "sword of Damocles was hanging over the heads" of the remaining members who attended the briefing.[380] Implied bias is appropriate for unlawful command influence situations because "it is difficult for a subordinate [to ascertain] . . . the influence a superior has on that subordinate."[381]

In another strong dissent, Judge Crawford questioned application of the implied bias doctrine to unlawful command influence.[382] Consistent with previous analyses, she noted that use of the implied bias doctrine was an affront to the rehabilitative process of court members and placed military judges in an awkward position of being second-guessed every time they exercise discretion under the wide latitude grant of *United States v. White*.[383]

While there still appears to be disagreement over when to use the implied bias doctrine,[384] *Lavender* and *Youngblood* communicate valuable lessons for practitioners. *Lavender* teaches that the time for defense counsel to establish a basis for a challenge is at court-martial through voir dire. *Youngblood* is a caution to every SJA that, even in an age on enlightenment,

372. *Id.* at 340.

373. *Id.*

374. *Id.* at 340.

375. *Id.*

376. *Id.*

377. *See supra* notes 365-366 and accompanying text.

378. *See Youngblood*, 47 M.J. at 338. The CAAF cited *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986), to support this proposition and to communicate that eliminating unlawful command influence is a paramount concern in military justice. The CAAF has long recognized that the intent of a commander in making comments is not the important factor in deciding whether unlawful command influence was used in the military justice process. Rather, it is the message perceived by the listener. *See*, *e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).

379. *See Youngblood*, 47 M.J. at 341. Member #1 indicated that the GCMCA stated "that we should use the SJA because he speaks for the Wing Commander." *Id. See generally Kitts*, 23 M.J. 105.

380. *Youngblood*, 47 M.J. at 342.

381. *Id.* (citing United States v. Gerlich, 45 M.J. 309, 313 (1996)).

382. *Id*. at 338, 343. Judge Sullivan concurred in part and dissented in part. He would have disposed of the case on an unlawful command influence analysis alone. Judge Crawford also noted that this case should be decided on the issue of unlawful command influence alone. She, however, did not see any unlawful command influence. *Id*. at 344-45 (Crawford, J., dissenting) (characterizing the commander's briefing as a general or informational course in military justice). This conclusion should puzzle experienced practitioners, as it does Judge Sullivan, considering the case law and the fact that the record was replete with GCMCA and SJA comments that could be perceived as unlawful command influence.

383. 36 M.J. 284 (C.M.A. 1993).

384. Judge Effron disagrees with the view that the implied bias doctrine applies only to rare cases. *See* United States v. Lavender, 46 M.J. 485, 489-90 (1997) (Effron, J., concurring).

unlawful command influence can still exist in a military environment. Controlling it is very difficult, but not impossible. *Youngblood* is also a reminder that there are some special circumstances where the law of challenges is applied differently—it is incumbent upon defense counsel to be creative in representing an accused's cause at trial.

Conclusion

"Something Old, Something New, Something Borrowed, and Something Blue"—this theme recognizes the new CAAF and places in context the trailblazing character of the recent pretrial and trial procedure cases. In pretrial procedures, the CAAF expanded the accused's rights at the Article 32 stage by granting a qualified right to an open investigation. In pretrial agreements, the CAAF reinforced its position that an accused who proposes, negotiates, and benefits from novel terms might be foreclosed from appellate relief. In court personnel cases, the CAAF reminded practitioners that the court will examine issues based on their practical effect rather than through a technical application of statute. In voir dire and challenges, the court charted the course for the military justice system in the exercise of peremptory challenges and application of the implied bias doctrine.

A consistent theme in many of the cases, particularly the *Batson* and implied bias cases, is the recognition that the special nature of a military society demands application of a modified rule of law different from that imposed in civilian society. Where appropriate, however, the CAAF indicated that the military justice system is not so separate as to be unaffected by civilian case law. In fact, in a majority of the cases, the CAAF recognized the relevance of Article 36 and the requirement to adopt procedures of the federal district courts where practicable. While the CAAF did not answer all of the pretrial and trial procedure questions posed in 1997, practitioners have a bright beacon of light in many areas of the law to help them perform their military justice missions.

New Developments in Search and Seizure and Urinalysis

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Introduction

"I ordered the inspection of my soldiers after I got information that some of my men were using crack. I did it because we drive tanks, and I can't take that risk."

—Commander

"I stopped him because he didn't use his turn signal. And yes, the real reason I stopped him was because I thought his passenger was selling heroin in the food court, and I wanted to get him out of the car and see what would develop."

—Military Policeman

Primary purpose and pretext once again loomed large over Fourth Amendment jurisprudence. As the fictional quotations above suggest, decisions this year helped to clarify the nature and extent of a commander's authority in conducting urinalysis inspections and the scope and authority of police in conducting traffic stops.

Notwithstanding these and other important cases, it was a slow year for the Fourth Amendment. Of the few road signs erected by the courts, the most visible continues to be the push, highlighted above, for even broader police authority over motorists and extensions of these new rules into other search and seizure contexts. Although there are no discernible trends or patterns flowing from the Court of Appeals for the Armed Forces (CAAF) or the service courts, the cases contain important developments for trial lawyers and law enforcement organizations.

The Touchstone

The Supreme Court maximizes every opportunity to remind practitioners that the touchstone of the Fourth Amendment is reasonableness.[1] This point was made abundantly clear in two important cases this year. In both *Chandler v. Miller*,[2] a suspicionless urinalysis case from Georgia, and *Richards v. Wisconsin*,[3] a no-knock warrant case, the Court reemphasized that the reasonableness of a search is not always dependent on whether there is a warrant supported by probable cause. Indeed, when viewed together, the cases crystallize the overarching prerequisite of reasonableness in Fourth Amendment analysis. Only with a focus on reasonableness can one explain why a suspicionless search might be lawful and why a search made pursuant to a warrant might be unlawful. Both trial and defense counsel, therefore, must understand the role that reasonableness plays in the garden-variety criminal investigation.

Suspicionless Search, Special Needs, and Primary Purpose

In *Chandler*, the State of Georgia enacted a statute which required political candidates to submit a urine sample as a prerequisite to candidacy. This requirement was not linked to identified abuse. Thus, the state had neither reasonable suspicion nor probable cause to believe any particular candidate was using drugs.[4] Georgia explained that, although unable to demonstrate a drug problem among candidates, elected officials are responsible for important affairs of state, to include public safety, the economic well-being of the citizens, and law enforcement. Such a prerequisite ensures that officials exercise sound judgment in these matters and are not subject to blackmail as a result of drug use. This was Georgia's expressed "special need."[5]

1. *See* Ohio v. Robinette, 117 S. Ct. 417 (1996) (stating, "We have long held that the 'touchstone of the Fourth Amendment is reasonableness'"); Florida v. Jimeno, 500 U.S. 248, 250 (1991). The Fourth Amendment has two principal clauses. The first clause provides that citizens will be free from *unreasonable* searches and seizures. U.S. Const. amend. IV, cl. 1. The second clause requires that warrants will issue only if based upon probable cause, supported by oath, and describing with particularity the place to be searched. *Id*. cl. 2. Historically, these two clauses were viewed as interdependent, that is, that one modified the other. A search could only be *reasonable* if it was done pursuant to a *warrant* based on *probable cause*. The modern view finds the two clauses utterly independent of one another. A search can be entirely reasonable and not be done pursuant to a warrant. The reasonableness prong, therefore, has emerged as the overarching principal of the Fourth Amendment. *See generally id.* amend. IV.

2. 117 S. Ct. 1295 (1997).

3. 117 S. Ct. 1416 (1997).

4. *Chandler*, 117 S. Ct. at 1299.

5. *Id.* at 1299-1300.

Certain candidates objected,[6] arguing that this suspicionless search was unreasonable and in violation of the Fourth Amendment. The district court and the Court of Appeals for the Eleventh Circuit disagreed and found it a reasonable search under the Fourth Amendment. The Eleventh Circuit found that Supreme Court precedent permits exceptions to normal Fourth Amendment requirements[7] for individualized suspicion if special needs, beyond the normal need for law enforcement, are identified. Under the reasonableness prong of the Fourth Amendment, a context-specific inquiry is made to assess the competing public and private interests involved. Finding the Georgia law in concert with the Supreme Court's decisions sustaining suspicionless drug testing programs,[8] the court of appeals held that the State of Georgia satisfied the special needs test for a suspicionless urinalysis test.

In an eight to one opinion, the Supreme Court found that Georgia failed to show a real and substantial safety threat to the citizens of Georgia. The Court, therefore, held the law unconstitutional and reversed.[9] Justice Ginsburg, writing for the majority, begins by making clear that suspicionless collection and testing of urine "effects a search."[10] In certain settings, however, a suspicionless search can be reasonable and lawful.

Although a search must ordinarily be based on individualized suspicion, the touchstone of the Fourth Amendment is reasonableness.[11] In suspicionless searches, the test for reasonableness is whether a "special need" is shown.[12] A special need must be something other than crime detection and is typically viewed as a demonstrated risk to public safety. This context-specific inquiry examines whether the risk is substantial and real. Ultimately, a special need is reasonable if a substantial and real public interest outweighs the private interest.[13] "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[14]

The special need identified by Georgia "rests primarily on the incompatibility of drug use with holding high office."[15] In Georgia's view, the requirement deterred unlawful drug use. The Court quickly dismissed this notion. Georgia, said Justice Ginsburg, failed to provide any evidence of a "concrete danger demanding departure from the Fourth Amendment's main rule."[16] Indeed, Georgia acknowledged that the statute was not enacted in response to any fear or suspicion of drug use.

Justice Ginsburg then spent considerable time reviewing precedent wherein the Court approved such testing. Common to each case was a demonstrated safety risk to which the urine test responded. In *Skinner v. Railway Labor Executives' Ass'n*,[17] "surpassing safety interests" in railway safety justified the testing scheme.[18] In *Treasury Employees Union v. Von Raab*,[19] customs agents who were directly involved in drug interdiction or those carrying firearms were tested. Given their unique mission as the nation's first line of defense in drug

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6. *Id*. at 1299. Libertarian Party candidates filed suit, alleging violations of the First, Fourth, and Fourteenth Amendments.

7. *See* U.S. Const. amend. IV. The Fourth Amendment normally requires that, prior to a search, government agents will obtain a warrant or authorization supported by probable cause.

8. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (approving random drug testing of students who participate in interscholastic sports); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (approving drug tests for United States Customs Service employees who seek transfer or promotion to certain positions); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (approving drug and alcohol tests for railway employees who were involved in train accidents and for those who violate particular safety rules).

9. Chief Justice Rehnquist filed the lone dissent, lamenting that the "novelty of [the statute] led the Court to distort Fourth Amendment doctrine." *Chandler*, 117 S. Ct. at 1305 (Rehnquist, C.J., dissenting).

10. *Id.* at 1300.

11. Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

12. *Chandler*, 117 S. Ct. at 1301.

13. *Id.*

14. *Id.* (citing *Skinner*, 489 U.S. at 624).

15. *Id.* at 1303.

16. *Id.*

17. *Skinner*, 489 U.S. 602.

18. *Id.* at 634.

19. 489 U.S. 656 (1989).

smuggling, and the ultimate safety of those involved, suspicionless testing was deemed reasonable.[20]

In *Chandler*, however, the safety threat was neither substantial nor real. Further, and significant for all military practitioners, since suspicionless testing is grounded in safety, a law enforcement or crime detection purpose is not a permissible special need. If crime detection is the animating concern, the normal requirements for probable cause and authorization control.

Practice Pointers

Chandler is significant for two reasons. First, the court restates its view that the Fourth Amendment is, fundamentally, an amendment concerned with the reasonableness of state action. Thus, searches not based on probable cause and a warrant may, nonetheless, be lawful, so long as they are *reasonable*.

Second, and perhaps not so obvious, is that *Chandler* crystallizes the Department of Defense (DOD) urinalysis program. The urinalysis program, in fact, falls within the reasonableness clause of the Fourth Amendment because it uses the special needs scheme. At its core, the DOD program permits suspicionless testing of military personnel so long as certain special need prerequisites are satisfied. The DOD's special need includes the deterrence of drug use, which ensures the health and welfare of military personnel.[21] Indeed, when upholding the urinalysis program in other contexts, the CAAF has cited with approval the special needs cases of the Supreme Court.[22]

More specifically, practitioners must remember that the special needs test is embodied in the subterfuge test of Military Rule of Evidence (MRE) 313(b).[23] In any inspection, counsel should examine whether the primary purpose (that is, the special need) was administrative (safety, health, and welfare) or for crime detection and prosecution. If the primary purpose is the latter, the test is presumptively a search, and the government must show by clear and convincing evidence that the primary purpose was, instead, administrative.[24]

Chandler is instructive in that it captures the nature of the Army's urinalysis program and reemphasizes the fundamental purpose behind the commander's inspection authority.

The Reasonableness Prong and Warrant Cases

While *Chandler* focuses on reasonableness when there is no warrant or probable cause, *Richards v. Wisconsin*[25] shows that reasonableness is important even when probable cause and a warrant are present. Indeed, as *Richards* and other cases show, evidence seized pursuant to a warrant based on probable cause may be suppressed because of an *unreasonable execution*.[26]

Background to Richards

In 1995, the Supreme Court, citing centuries-old English common law, made the knock-and-announce rule a constitutional imperative. In *Wilson v. Arkansas*,[27] the Court held that the Fourth Amendment reasonableness clause requires that police knock-and-announce their presence and authority prior to entry.[28] Failure to do so, or insufficient delay after a knock,[29] may render a search unreasonable. In such circumstances, the evidence may be suppressed—even when there is a warrant based on probable cause.

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20. *Id.* at 668. It is interesting to note that, like Georgia, there was no demonstrated drug problem to which the *Von Raab* testing responded. Instead, the program was justified and approved by the Court, given the Customs Service's unique mission relating to drugs.

21. U.S. Dep't of Defense, Dir. 1010.1, Military Personnel Drug Abuse Testing Program (9 Dec. 1994). It is DOD policy to "use drug testing to deter Military Service members . . . from abusing drugs . . . [and] to permit commanders to detect drug abuse and [to] assess the security, military fitness, readiness, good order, and discipline of their commands." *Id.*

22. *See* United States v. Taylor, 41 M.J. 168, 171 (1994).

23. Manual for Courts-Martial, United States, Mil. R. Evid. 313(b) (1995) [hereinafter MCM]. The "subterfuge" rule grants the commander broad authority to conduct preemptive strikes on drugs and contraband without probable cause. Using his inspection authority, the commander may order, for example, an "examination of the whole or part of a unit . . . as an incident of command . . . ." *Id.* When the inspection is conducted immediately after the report of an offense and was not previously scheduled, or personnel are targeted differently or are subjected to substantially different intrusions, the examination is presumed to be an unlawful search. If such is the case, the government must prove by clear and convincing evidence that the commander's primary purpose was administrative, not disciplinary. *Id.*

24. *Id.*

25. 117 S. Ct. 1416 (1997).

26. Suppression may occur despite arguments of inevitable discovery. *See* People v. Condon, 592 N.E.2d 951 (Ill. 1992); Griffin v. United States, 618 A.2d 114 (D.C. 1992).

27. 514 U.S. 927 (1995).

28. Prior to *Wilson*, there was only the federal statute which codified this requirement. *See* 18 U.S.C. § 3109 (1994). *Wilson*, given its constitutional mantle, applied this requirement to the states.

In *Wilson*, the court highlighted two exceptions to the knock-and-announce rule. When either danger to police is present or the destruction of evidence is likely, officers may dispense with the knock-and-announce requirement. Typically, police seek no-knock warrants from the magistrate, who gives ex ante permission to omit the knock-and-announce requirement. As often happens, police are unsuccessful in getting no-knock warrants from the magistrate because the proof of danger or destruction fails to persuade. The police often break-in, nonetheless, after hearing suspicious noises that suggest danger or destruction of evidence. In either setting, after *Wilson*, police, magistrates, and courts struggled with the amount and nature of evidence needed to justify a no-knock warrant.

No-Knock and Reasonable Suspicion

Richards is the most visible and vocal response to *Wilson*. Steiney Richards was targeted by Milwaukee police as a drug dealer who was operating out of a hotel. Police requested, and the magistrate denied, a no-knock warrant. Although their request for a no-knock warrant had been denied, the police, nevertheless, knocked on Richards's door at 3:40 a.m. and announced, "maintenance man." At the door was a cleverly disguised police officer in a maintenance uniform. Behind him was a "concealed" uniformed officer. When Richards opened the door, he immediately saw the uniformed officer and slammed the door, whereupon the officers kicked-in the door and found Richards escaping out of the window. A search of the hotel room uncovered cocaine in the ceiling.[30]

At trial, the judge denied a motion to suppress based on the failure to knock-and-announce, and Richards was convicted.[31] The Wisconsin Supreme Court affirmed and announced that *Wilson* had no impact on Wisconsin's pre-*Wilson* bright-line rule that the knock-and-announce rule is inapplicable in felony drug cases. Given the modern drug culture, the inherent danger of harm, and the likelihood of destruction of evidence in felony drug cases, a no-knock warrant must be the default standard.[32]

A unanimous Supreme Court rejected Wisconsin's presumptive no-knock position.[33] Blanket exceptions are no substitute for a case-specific inquiry. The Court stated two chief concerns with blanket exceptions. First, many drug investigations that pose no special risks would be insulated from judicial review. Second, the knock-and-announce rule would be meaningless if blanket exceptions were allowed by excepting out certain criminal categories.[34] Instead, "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement."[35]

The Test

After casting overboard Wisconsin's blanket exception, the Court provided essential guidance to police, magistrates, and judges. To justify a no-knock warrant, officers must have *reasonable suspicion* that the knock-and-announce would be "dangerous" or must believe that destruction of evidence is likely. The Court observed that reasonable suspicion, not probable cause, "strikes the appropriate balance between legitimate law enforcement" interests and the individual privacy interest affected.[36]

Interestingly, despite the jettisoned bright-line rule, the Court found that under the facts of this case the police were reasonable in thinking that destruction of evidence was likely and affirmed the conviction. Richards' reaction to the presence of police was sufficient to conclude that he would flee or destroy evidence.[37]

Practice Pointers

29. Courts debate the time police must wait for occupants to open the door. *See* United States v. Markling, 7 F.3d 1309 (7th Cir. 1993) (holding seven seconds a sufficient wait); Commonwealth v. Means, 614 A.2d 220 (Pa. 1991) (holding a five to ten second delay unreasonable).

30. *Richards*, 117 S. Ct. at 1418-19.

31. *Id.* The trial court ruled that Richards' reaction gave cause to believe that he might destroy evidence. This obviated the need to knock and announce.

32. *Id.* at 1419-20.

33. *Id.* at 1418.

34. *Id.* at 1421.

35. *Id.* On 13 January 1998, the Court heard arguments in *United States v. Ramirez*, 118 S. Ct. 992 (1998). In *Ramirez*, officers executing a no-knock warrant broke a windowpane to effect the no-knock entry. The defendant argued that the damage to his property made the search unreasonable. He argued that, when damage is caused, the police must satisfy a higher standard to justify a no-knock. *Id.* The Court disagreed and announced that the reasonableness prong requires no greater showing of exigency to justify a no-knock entry, whether or not there is damage to property. *Id.* at 996.

36. *Richards*, 117 S. Ct. at 1421.

37. *Id.* at 1422.

Trial and defense counsel must be especially sensitive to the threshold evidentiary showing to a magistrate or military judge to obtain a no-knock warrant, or to justify one after the fact, in a suppression motion. At a minimum, the police must show that there is either reasonable suspicion of danger to police or the likelihood of destruction of evidence. Law enforcement agents must be trained in how to identify, to prove, and to articulate this threshold requirement.

Of equal importance is the training of trial attorneys and especially law enforcement agents in the knock-and-announce arena. Although frustrating to some, if counsel decides that a warrant is required to search a barracks room, for example, the default position should be to knock-and-announce. Essentially, by seeking a search authorization for a barracks room, the government has conceded some expectation of privacy. In such a setting, a knock-and-announce is required.[38]

Expectations of Privacy

Since 1993 and the case of *United States v. McCarthy*,[39] a debate has raged over whether soldiers have an expectation of privacy in a barracks room. An expectation of privacy is one of the threshold requirements for protection under the Fourth Amendment and is determined by application of a two-part test.[40] First, does the soldier have a subjective expectation of privacy in the area to be searched? Second, does society view the expectation as objectively reasonable?[41] In *McCarthy*, the Court of Military Appeals ignited the debate by holding that soldiers have no expectation of privacy in their barracks rooms.[42]

While the debate has fermented and practitioners have treated *McCarthy* as either an investigative free-fire zone in the barracks, or alternatively, limited it to its facts, all have awaited a new barracks case in the hopes that the CAAF would clarify its view of privacy in the barracks. The CAAF may have that opportunity in *United States v. Curry*.[43] In *Curry*, the Navy-Marine Corps Court of Criminal Appeals considers a number of Fourth Amendment issues in the barracks room context, including expectations of privacy and plain view.

In this premeditated murder case, marine investigators received an anonymous tip of a murder in progress in a barracks room. Arriving at the room, the marines knocked on the door and received no answer. The room, which was fronted by a common-area walkway, had a window with drawn curtains that faced the walkway. *An officer was lifted and managed to peer into the room through a gap between the top of the drawn curtains and the ceiling.* He saw a man on the bed who was apparently unconscious. After knocking again and observing no reaction from the man on the bed, the police entered the room with a passkey and without the commander's authorization.[44] They discovered that the accused had just attempted suicide[45] and found letters on a desk linking the accused to a murder committed one week earlier.

The accused moved to suppress evidence gathered in the room that implicated him in the murder. He argued that the "peek" through the window was an unlawful search because it violated his expectation of privacy and thereby tainted all subsequent seizures.[46] The Navy-Marine Corps court held that the observation was not a search and, therefore, there was no Fourth Amendment violation. In reaching this result, the court tackled the sometimes difficult interplay between what it mistakenly called "plain view" and expectations of privacy.

Plain view, strictly speaking, is a rule of seizure and refers to an exception to the warrant/authorization requirement. It traditionally requires three elements. First, there is a valid prior intrusion into a lawfully protected area, such as a home. Second, an item of evidence is in plain view. Third, there is probable cause to believe that the item in plain view is evidence of a crime. If all three elements are met, the item may be seized immediately and without prior authorization.[47]

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38. Fourth Amendment protection normally exists if a person has a reasonable expectation of privacy in the place to be searched. Katz v. United States, 389 U.S. 347 (1967). When such an expectation of privacy exists, a warrant or authorization supported by probable cause is required before entering the location to be searched.

39. 38 M.J. 398 (C.M.A. 1993).

40. The test was first announced in *Katz*. 389 U.S. at 361 (Harlan, J., concurring).

41. *Id.* at 351.

42. *McCarthy*, 38 M.J. at 403. In *McCarthy*, a military policeman entered McCarthy's room at 0400 hours with the Charge of Quarters key. He did not have authorization to enter, and the accused moved to suppress evidence found. The court denied the motion, holding that no authorization was needed since there was no expectation of privacy.

43. 46 M.J. 733 (N.M. Ct. Crim. App. 1997).

44. *Id.* at 736.

45. Indeed, it was the accused who called police and, arguably, "invited" them to his room. *Id.*

46. *Id.*

Significantly, the *Curry* court is *not* dealing with this more traditional plain view doctrine, despite the court's misleading use of this term. Instead, the court is dealing with what is more commonly referred to as the *public view* exception, or what the concurring judge refers to as "plain view from a public area."[48] A public view is, by definition, *not a search* under the Fourth Amendment. Fundamentally, this is because a public view is made into an area where there is no expectation of privacy. Specifically, in order to classify this "intentional official government observation"[49] as a non-search, two requirements must be met. First, the police must be in a place where they have a right to be. Second, the place must be one where the public would regularly make such observations.

The *Curry* court had little difficulty addressing the first prong. Clearly, the officers had every right to be in the barracks hallway. As to the second prong, however, the court evaluated the legal significance of lifting the officer up to look from a vantage point from which the public would not normally look. Whether this act constitutes an unlawful search turns on the existence of a reasonable expectation of privacy.[50] Significantly, the court observed that had this been a private home with its associated curtilage[51] there is no doubt that an expectation of privacy would have been violated.

The court noted, however, that a barracks room is not a home. Given this reality, the court found that there is a *reduced* expectation of privacy. The court wrestled with the troublingly broad language of *United States v. McCarthy*, concluding defensively, "[w]e need not read *McCarthy* to say that there is no circumstance under which a military member would have a reasonable expectation of privacy in a . . . barracks room . . . ."[52] The court recognized the broad language and potential interpretation of *McCarthy* that soldiers have no expectation of privacy in the barracks, yet sidestepped this reading. Charting a slightly different course, the court acknowledged *McCarthy* but held that Curry had a *reduced* expectation of privacy.

The finding of a reduced expectation of privacy was critical to the court's public view analysis and its ultimate finding that the observation was not a search. First, the court noted that there was no physical entry into the room. Second, all observations were with the naked eye, unaided by technology. Third, "the police looked from a place, a public sidewalk, where they had a right to be although not at a height from which the public would regularly be expected to look into the room."[53]

The importance of finding a reduced expectation of privacy now becomes evident.

> This latter factor [the height from which the officer observed] would be determinative if the observation were of a home or its curtilage, but not in a place where one would have a reduced expectation of privacy . . . . Since the appellant had a reduced expectation of privacy in the barracks room, the observation by the police through the gap at the top of the curtains from a place where they had a right to be and without physical intrusion *was not a search*.[54]

Practice Pointers

The finding of a reduced expectation of privacy was absolutely critical to the court's analysis of the public view exception and the ultimate lawfulness of the subsequent search once inside the room. Although the court talks of the "curtain peek" as a plain view inquiry, practitioners should view it more appropriately as a public view analysis. For Fourth Amendment purposes, this distinction is significant in regard to what test is used to determine lawfulness. The court's use of the term plain view is imprecise and misleading.

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47. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See also* 1 Wayne R. LaFave, Search and Seizure 396-99 (3d ed. 1996). The authorization is omitted, since waiting for an authorization may result in the loss or destruction of evidence.

48. *Curry*, 46 M.J. at 743 (Dombroski, J., concurring).

49. *Id.*

50. *See* Florida v. Riley, 488 U.S. 445 (1989) (holding that an observation of a fenced-in greenhouse from a hovering helicopter at 400 feet was not a search); California v. Ciraolo, 476 U.S. 207 (1986) (holding that an observation of a fenced-in marijuana plot from an airplane at 1000 feet is not a search).

51. Curtilage is defined as:

> The inclosed space of ground and buildings immediately surrounding a dwellinghouse . . . . [It] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.

Black's Law Dictionary 346 (5th ed. 1979).

52. *Curry*, 46 M.J. at 740.

53. *Id.*

54. *Id.*

Significantly, the first court to revisit *McCarthy* in the barracks setting retreats from *McCarthy's* broad language. Nonetheless, while the court may feel better about finding a reduced expectation of privacy, it produces the same result. Most intriguing is whether the CAAF certifies the case for appeal. Practitioners must stay tuned to the CAAF's disposition of this case.

Exigent Circumstances and the Medical Emergency Exception

United States v. Curry, discussed above, is a bonanza of Fourth Amendment issues. In addition to arguing suppression based on a violation of his expectation of privacy, the accused also argued that entry into his room was unjustified and, therefore, unlawful. The government responded that the apparent medical emergency created exigent circumstances.[55]

The Navy-Marine Corps court had little difficulty finding a medical emergency. After receiving the report of a murder and seeing a man (the accused) on the bed who did not respond to repeated knocks on the door, the officers entered and rendered first aid. The court found that the officers clearly had probable cause to believe a crime was being or had been committed and that there appeared to be a medical emergency.[56]

When faced with the potential need for urgent medical care, the authorization requirement of the Fourth Amendment dissipates. It is also evident that the court was hypersensitive to the accused's moxie and potential windfall. The officers who entered his room likely saved his life. The accused cannot be heard to complain about an entry that ultimately saved his life. Although the Navy-Marine Corps court professes that it did not consider this merits evidence, it is noteworthy that it was the *accused's* phone call that brought the police to his room.[57]

Probable Cause and Authorization

In a landmark case, the CAAF upheld the admissibility of hair analysis to prove drug use. In *United States v. Bush*,[58] the accused was convicted of cocaine use based on hair analysis. The accused argued that not only is hair analysis inadmissible in a court-martial as the sole proof of drug use, but also, and more fundamentally, there was, in his case, no probable cause even to order a urinalysis.

During a normal unit inspection, the accused provided a urine sample. Three months later, the lab determined that the sample was saline.[59] Aware that drug use is only detectable for a short period of time in urine, the command opted for hair analysis.[60] Evidence of drug use may be present in hair for months. The commander, after a briefing by a CID agent, granted a search authorization for Bush's hair. Probable cause was based on the submission of the saline three months before. The evidence was plucked and sent to the lab, where it tested positive for cocaine.[61]

At trial, Bush was convicted of dereliction of duty for his original failure to provide a urine specimen and of use of cocaine based on the hair test results.[62] Hair analysis was the sole basis for the finding of use.

Probable Cause

On appeal, Bush argued that the search authorization was based on insufficient probable cause. He argued that the agent knew that hair grows about one-half inch per month.[63] As a result, any drug filled hair from three months before would now be at the one to one and one-half inch length. The agent further knew that the accused's hair was only about one-half inch long, that is, that any drug-filled hair would be on the barbershop floor. Worse yet, according to Bush, the agent failed to give this critical information to the commander. Given this, a reasonable person would not conclude that his current one-half inch hair contained drugs.

In a four to one opinion, the court rejected this probable cause argument. The CAAF observed that the agent did not

55. *Id.*

56. *Id.*

57. *Id.* at 736.

58. 47 M.J. 305 (1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 19, 1997) (No. 97-1026).

59. At trial, the government introduced evidence that the accused was capable of "reverse catheterization," replacing the urine in his bladder with a saline solution. *Id.* at 307.

60. *Id.*

61. *Id.*

62. *Id.* at 306.

63. *Id.* at 307.

know the accused's exact hair length. Most important, the agent and commander were not required to apply a "strict mathematical formula" to determine probable cause.[64] Probable cause is, instead, the practical judgment of the commander that the sample seized would be reasonably likely to contain evidence of drugs.[65] It is worth noting that the determination that the submitted sample was saline provided the bulk of probable cause for the authorization.

As a strict matter of probable cause, the accused's argument is quite persuasive. Given the accused's hair length, there was no reason to think his hair still contained evidence of drug use from three months before. The commander used this same common sense staleness analysis when he originally concluded that a urine sample could not be taken. Why is the assessment of hair length any more difficult than the assessment of the body's drug retention capacity? The court's resolution of this issue, therefore, tastes a bit contrived. More illuminating is that both the Air Force court and the CAAF reveal that their real concern is the success or failure of the accused's artifice. His submission of a manufactured sample and the resulting delay should not, indeed must not, defeat probable cause. The lower court was explicit when it said the accused "may [not] by his own misconduct frustrate [the] inspection and require the government to produce probable cause for any subsequent search or seizure."[66] The accused must not profit by the "delayed discovery of his subterfuge."[67]

The fallacy of this view is that, indeed, the government *did* force itself to produce probable cause. The plucking of hair and chemical analysis was done pursuant to a search authorization. The stated probable cause was his prior submission of a sample composed largely of saline. As the lower court intimates, the government could have *reinspected* Bush without probable cause. Once a search is ordered, however, it must be based not on our sense of outrage but on probable cause. In *Bush*, although probable cause was found to exist, on close analysis it is still a very large pill to swallow.

Inadmissible Science

Bush's second argument focused on the unreliability of hair testing. He argued that this testing was unable to prove a one-time use and should automatically be excluded. He also argued that the scientific community views hair testing not as primary evidence of use but only as confirmatory evidence of use. Since there was no other evidence, he argued, the military judge was in error.

The CAAF disagreed. It found that MRE 702[68] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[69] "give the military judge broad discretion to regulate admission of scientific evidence at courts-martial with due regard to the advisory opinions of the scientific community."[70] The military judge did not err in admitting such evidence. Citing with approval the watershed case of *Daubert* and the trial judge's thorough ruling, the CAAF affirmed the admission of chemical analysis of hair. The court closed by observing the irony that the accused's ploy has led to permission to use a new and effective weapon in the war on drugs.[71]

Practice Pointers

It is unlikely that *Bush* will change military practice in any dramatic way. The DOD's money is still "in urine." The drug labs and the urinalysis program are deeply embedded features in the DOD landscape. Further, and notwithstanding the result in *Bush*, there is also great debate in the scientific community about the viability and accuracy of hair analysis.[72]

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64. *Id.* at 309.

65. *Id.* at 312.

66. United States v. Bush, 44 M.J. 646, 649 (A.F. Ct. Crim. App. 1996).

67. *Id.*

68. MCM, *supra* note 23, Mil. R. Evid. 702.

69. 509 U.S. 579 (1993), *aff'd on remand*, 43 F.3d 1311 (9th Cir. 1995). *Daubert* rejected the old *Frye* standard—"general acceptance within the scientific community"—and replaced it with a non-exclusive five-factor test. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The trial judge acts as the evidentiary gatekeeper when it comes to novel scientific techniques. The focus of this initial judicial inquiry shifts from acceptance of the scientific proposition itself to acceptability of the methodology used to reach it. The nonexclusive factors the trial judge uses in making this determination include: (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subjected to publication or peer review; (3) the error rate of the scientific method; (4) the existence of any control standards; and (5) the degree to which the technique or theory has been accepted within the scientific community. *Daubert*, 509 U.S. 579. For background on the application of *Daubert* to military practice, see Major Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, Army Law., Apr. 1997, at 92.

70. *Bush*, 47 M.J. at 310.

71. *Id.* at 312.

72. *Id.*

Nonetheless, hair analysis can be a valuable investigative tool, especially in settings where time has passed and urine is outside the window of detection. Counsel must remember that, since hair analysis can show accumulated use over a period of time, such evidence may rebut evidence of innocent ingestion or claims of a single use.

Commander's Authority

In *United States v. Hall*,[73] the Army Court of Criminal Appeals approved a commander's ability, while on leave, to assume command for a brief period of time for the purpose of authorizing a search. In *Hall*, a noncommissioned officer reported smelling burning marijuana outside the accused's barracks room. The acting commander went to the room with a military policeman to investigate.[74] After talking with the accused in his room, the acting commander and military policeman concluded that they, too, smelled marijuana. The acting commander then telephoned and briefed the commander. The commander, who was on leave, authorized a search of the room that uncovered marijuana. [75] The accused was apprehended and, during his interview, admitted using marijuana some months earlier.

At trial, the accused argued that the search was based on an improper authorization which tainted his subsequent confession. He argued that the acting commander's personal involvement disqualified not only him, but also the commander. The trial judge agreed and suppressed much of the evidence, including most of the accused's confession.[76] Nevertheless, he was convicted of one of two use specifications. On appeal, Hall argued taint as to the portion of his confession which the trial judge admitted.

The Army court affirmed, concluding that the acting commander was, indeed, disqualified, but that the commander *was not*. A commander may resume command at his discretion, at anytime, even for a brief period of time. Furthermore, the evidence disclosed no partiality in the commander's authorization and no basis for imputing the actions of the acting commander.[77]

Two important points emerge from *Hall*. First, trial counsel should always be aware that a commander can be brought back on-line, if only for a few minutes, to perform command functions. Although *Hall* involves an authorized leave setting, temporary duty or other settings presumably would be treated similarly. Second, the courts have repeatedly shown dislike for arguments which impute knowledge or behavior of subordinates to a commander.[78] Counsel who are aware of this can adjust their strategies accordingly.

Exceptions to the Authorization Requirement

Traffic Stops, Seizures, and Pretext

> *"Liberty comes not from officials by grace, but from the constitution by right."*[79]

In the last three years, the Supreme Court has significantly broadened the powers of police over motorists. In a series of cases, the Court has given its imprimatur to the use of pretext in traffic stops[80] and rejected a bright-line rule which would alert drivers when they were legally free to leave after traffic stops.[81]

Two years ago, in *Whren v. United States*,[82] the Supreme Court announced that, so long as probable cause exists for a traffic stop, police may stop a car to pursue other, more serious suspicions. "[S]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[83] Courts must use a purely objective test for evaluating the reasonableness of a stop. Thus, an officer may suspect a person of drug sales, have no probable cause or reasonable suspicion, but may, nevertheless, stop the person for some unrelated traffic infraction to pursue his more serious suspicions.

One year ago, in *Ohio v. Robinette*,[84] the Supreme Court ruled that a request to search a car after the conclusion of a law-

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73. 45 M.J. 546 (Army Ct. Crim. App. 1997).

74. *Id.* at 547.

75. *Id.* Practitioners should recognize that, typically, the smell of burning marijuana from a room creates exigent circumstances, which obviates the need for authorization. United States v. Lawless, 13 M.J. 943 (A.F.C.M.R. 1982). Waiting for authorization may result in loss of the evidence.

76. *Hall*, 45 M.J. at 547.

77. *Id.* at 548.

78. *See*, *e.g*., United States v. Taylor, 41 M.J. 168 (C.M.A. 1994) (holding that knowledge of a subordinate about the report of an offense is not imputed to a commander for purposes of triggering the subterfuge rule of MRE 313(b)).

79. Maryland v. Wilson, 117 S. Ct. 882, 891 (1997) (Stevens, J., dissenting).

80. Whren v. United States, 116 S. Ct. 1769 (1996).

81. Ohio v. Robinette, 117 S. Ct. 417 (1996).

ful traffic stop does not require a bright-line "you are free to go" warning for subsequent consent to be voluntary. The test, as with any consent issue, is the totality of the circumstances.

This year was no exception to this trend. In *Maryland v. Wilson*,[85] the Court continued this trend by extending the rule of *Pennsylvania v. Mimms*.[86] In *Mimms*, the Court held that police may, as a matter of course, order the driver of a lawfully stopped car to exit his vehicle. In *Wilson*, the Court announced that, in addition to the driver, an officer may now order a *passenger* out of a lawfully stopped car—even when there is no probable cause or reasonable suspicion as to the passenger.

In *Wilson*, a Maryland state trooper followed a speeding car and noticed two passengers. During the one and one-half mile chase, the passengers turned and looked at the trooper several times, ducked repeatedly out-of-sight, and reappeared. The car finally stopped. There was no question that the officer had probable cause to stop the car. The officer, however, was nervous about one passenger, Wilson, who was sweating and appeared nervous. The officer ordered Wilson out of the car, and crack cocaine fell to the ground.[87]

Wilson argued that ordering him out of the car was an unreasonable seizure since there was neither reasonable suspicion nor probable cause. The Supreme Court, in a 7-2 opinion, rejected this argument and found the seizure lawful. In the court's view, "the additional intrusion on the passenger is minimal."[88] The passenger was already stopped, given that the driver had halted the car. The officer's action, therefore, merely changed the location of the stop from inside the car to outside the car.[89]

"Regrettably, traffic stops [are] dangerous encounters," observed Justice Ginsburg.[90] The same "weighty interest in officer safety is present regardless of whether the occupant of the . . . car is a driver or passenger."[91] Given that the intrusion was minimal, the court announced that "an officer making a traffic stop may order passengers out of the car pending completion of the stop."[92]

On its face, *Wilson* seems to be a reasonable approach to officer safety, given the often dangerous work of modern day law enforcement. *Wilson* is troubling in part, however, because of its broad language. As the dissent correctly notes, while the facts in *Wilson* support a lawful *Terry*[93] stop of Wilson, the Court's language imposes no such limitation. Indeed, *Wilson*

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82. *Whren*, 116 S. Ct. 1769. In *Whren*, District of Columbia police were patrolling a known high drug crime area at night. They observed a car whose driver was looking into the lap of his passenger. When the officers made a U-turn to return to the car, the suspect's car immediately made a right turn without a signal and sped away. The officers made a stop based on the failure to signal and immediately observed cocaine in plain view in the passenger's lap. *Id.* at 1772.

At trial and on appeal, the defendant argued that the stop for a traffic violation was merely a pretext for investigating a hunch about a more serious drug crime. Given the potential for abuse, defendants argued, the test for whether a stop is constitutional is whether a reasonable officer *would have* made the stop, absent the improper purpose or pretext. *Id.* at 1773.

A unanimous Court rejected this test, stating that it is "plainly and indisputably driven by subjective considerations." *Id.* at 1774. Justice Scalia, who authored the opinion of the Court, continued, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 1775 (emphasis in original). "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *Id.* at 1772 (quoting United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995)) (emphasis in original). Adopting the "could have" test and rejecting the "would have" test, the Court flatly dismissed the idea that an ulterior motive might operate to strip the agent of legal justification. *Id.* at 1774.

Given that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," courts must use a purely objective test for evaluating the reasonableness of a stop. *Id.* Thus, so long as probable cause exists for a traffic stop, police may stop a car to pursue other, more serious suspicions.

83. *Id.* at 1774. *Whren* was recently applied to the military in *United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996).

84. 117 S. Ct. 417 (1996).

85. 117 S. Ct. 882 (1997).

86. 434 U.S. 106 (1977).

87. *Wilson*, 117 S. Ct. at 884.

88. *Id.* at 886.

89. Note that *Wilson* does not address whether the officer may forcibly detain a passenger for the duration of the stop. The Court refuses to address this issue and, in fact, recently denied a petition for certiorari in a case that squarely addresses this point. *See* Maryland v. Dennis, 693 A.2d 1150 (Md. Ct. App. 1997) (an officer ordered a passenger to *stay in the car* after passenger tried to exit).

90. *Wilson*, 117 S. Ct. at 885.

91. *Id.*

92. *Id.* at 886.

suggests that not even reasonable suspicion is needed to order the passenger to exit. "[The rule] applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the police officer."[94]

> [W]holly innocent passengers in a taxi, bus, or private car have a constitutionally protected right to decide whether to remain comfortably seated within the vehicle rather than exposing themselves to the elements and the observation of curious bystanders. The Constitution should not be read to permit law enforcement officers to order innocent passengers about simply because they have the misfortune to be seated in a car whose driver has committed a minor traffic offense."[95]

Worse yet is the synergistic effect of *Wilson* when combined with *Whren* and *Robinette*. This very combination is decried by the two dissents in *Wilson*. Using this combination, police officers may now follow a car while targeting the passenger and wait for a driver's infraction. Using the infraction as a *pretext* (*Whren*), the officer may then order the passenger out of the car without probable cause or reasonable suspicion. In this setting, the officer hopes that plain view or consent will activate to confirm what are otherwise suspicions and hunches.

In the wake of these cases, there can be little doubt that police departments nationwide, including military police, will establish the routine practice of ordering passengers to exit. When officer safety is involved, it will reign supreme when left in the hands of a local police chief. It is on the margins that the abuse of this new authority will manifest itself. The combination of *Whren's* pretext with *Wilson's* broad language represents a broad inroad into the liberty interests of motorists.

Urinalysis

Permissive Inference of Wrongfulness

The urinalysis arena was relatively quiet over the past year. In addition to *United States v. Bush*, discussed earlier, *United States v. Bond*[96] provided meaningful developments in urinalysis law. In *Bond*, the CAAF resolved a nagging question about the survivability of the permissive inference of wrongfulness in drug cases after introduction of an innocent ingestion defense.

Bond was a Navy patrolman who was relieved of his duties.[97] To salvage himself, he volunteered to work undercover to investigate drug use by dependent wives on base.[98] Bond's handlers learned that Bond was, in fact, using drugs. When confronted with this report, Bond consented to a urinalysis. It was then scheduled. Bond had full notice of the impending test, which was over a week away. On the day of the test, he gave a sample that was positive for cocaine.[99]

Following conventional proof of use at trial (a lab test explained by an expert witness), the defense counsel argued innocent ingestion and reasonable doubt based on common sense in defense. He argued that someone spiked Bond's beer at a baseball game because people knew he was undercover. In addition, he argued that Bond knew when the test would be given, and, therefore, he would not use cocaine since he knew the test was imminent.[100] As a result, the defense argued that the government must introduce evidence to rebut innocent ingestion and the common sense defense.

In one of its more humorous opinions, the CAAF first reminds practitioners of its standard of review—whether any rational trier of fact could find the essential elements of the offense. No further evidence is needed to rebut if the defense may be reasonably disbelieved. The permissive inference of wrongfulness remains.[101]

The court quickly dispatches the common sense defense by calling upon the trial counsel's closing argument. "Drug use and stupidity are not . . . mutually exclusive."[102] Continuing, the trial counsel reminds us that the accused "would not be the first stupid person to be convicted . . . of drug use."[103] With this, the

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93. *See* Terry v. Ohio, 392 U.S. 1 (1968).

94. *Wilson*, 117 S. Ct. at 887.

95. *Id.* at 889 (Stevens, J., dissenting).

96. 46 M.J. 86 (1997), *cert. denied*, 118 S. Ct. 181 (1997).

97. *Id.* at 87. He was relieved of his normal duties because of his failure to obey a lawful order. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 88-89.

101. *Id*. at 90.

102. *Id.*

court concludes that a rational trier of fact could conclude the accused's guilt beyond a reasonable doubt without further evidence.

Practice Pointers

Bond finally settles the issue whether additional evidence is required to rebut defense evidence of innocent ingestion.[104] It is, nevertheless, still important for counsel to recognize the limits of *Bond*. While the standard is clearly low for the government, every effort should still be made to rebut defense suggestions of innocent ingestion. Not only does the anticipated aggressive use of rebuttal temper defense tactical decisions, but also, it assists in argument and leaves the panel with its final impression of the evidence. In response, defense counsel may still argue that the permissive inference does not mean a *required* inference.

Innocent Ingestion

In *United States v. Graham*,[105] the Air Force Court of Criminal Appeals examined the admissibility of a prior urinalysis acquittal in a subsequent trial for wrongful use of marijuana. The court found the evidence admissible under MRE 404(b).[106]

In 1992, the accused was charged with marijuana use. He presented an innocent ingestion defense and was acquitted.[107] Less than four years later, he again tested positive for marijuana. He had, without debate, an "extraordinarily good military record, had nearly all 'firewall' performance reports, and had over 20 years of service" at the time of trial.[108] In the second trial in 1995, recognizing the potential difficulties of presenting an innocent ingestion defense a second time, the appellant offered instead a good soldier defense. Defense counsel, worried about the earlier positive urinalysis, sought a motion in limine to bar the government's use of the earlier positive. The military judge deferred ruling, acknowledged it was not admissible in the government's case-in-chief, but held that it might be admissible in rebuttal.[109]

After the government's case, the appellant took the stand in his defense and began to stray on direct. In response to one question denying that he knowingly used marijuana, he added, "there's no way I would knowingly use marijuana."[110] He described himself as "shocked, upset, flabbergasted,"[111] when he learned that his sample was positive. The large double doors swung open, and the trial counsel, waiting anxiously and breathing heavily in anticipation, rushed in.

On cross-examination, trial counsel maneuvered with the military judge to ask a number of questions to try to draw out the previous court-martial. The military judge would not allow it. The judge limited the trial counsel to one question and no follow-up. The judge was emphatic that counsel was not to mention the prior court-martial.

The stage was set. The defense counsel felt safe, as did his client, that they could dodge this swift bullet, even having appeared to open the door. Trial counsel asked the appellant if he had ever tested positive before. The appellant, reaching critical mass, answered, "Yes, but I was found not guilty."[112] The appellant was convicted, and the members sentenced him to confinement for six months, reduction to the lowest enlisted grade, and a bad conduct discharge. On appeal, the appellant argued that the prior acquitted misconduct was improperly admitted in the subsequent court-martial.

The court made quick work of this argument. Prior acquitted misconduct is admissible under MRE 404(b) to prove, as in this case, knowledge or absence of mistake. The appellant's earlier acquittal "did not mean that the court-martial had disbelieved that his urine had tested positive for THC. Ironically, what it meant . . . was that at least some . . . members entertained a reasonable doubt as to whether appellant had knowingly ingested that marijuana."[113] It is "axiomatic that uncharged misconduct cannot be used to demonstrate so-called 'propensity' evi-

103. *Id.*

104. In *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993), the Army court suggested that when the defense reasonably raises the innocent ingestion defense, this trumps the presumption of wrongfulness, and the accused must be found not guilty as a matter of law unless the government introduces additional evidence to establish the wrongfulness of the use. *Bond* resolves this issue.

105. 46 M.J. 583 (A.F. Ct. Crim. App. 1997).

106. MCM, *supra* note 23, MIL. R. EVID. 404(b).

107. The appellant alleged that a civilian had spiked a birthday cake with marijuana. *Graham*, 46 M.J. at 584.

108. *Id.*

109. *Id.* at 585.

110. *Id.*

111. *Id.*

112. *Id.*

dence."[114] This evidence, however, was admissible under MRE 404(b) because it proved knowledge and the absence of mistake or accident. Although his stated defense was good soldier, it was unmistakably a second innocent ingestion defense. As such, the evidence became relevant and extremely probative.

Judge Morgan closed by observing: "[a] first visit of the dope fairy to an unsuspecting innocent is at least plausible. A second visit to the same victim approaches statistical impossibility. Nobody is that unlucky."[115]

Graham has more than entertainment value. It is highly instructive to both trial and defense counsel on the tactical side of trial work. It reminds counsel about the limits of uncharged misconduct and the wide expanse of MRE 404(b). Generally, propensity evidence is inappropriate. Counsel, however, must aggressively use the various categories of MRE 404(b) to achieve success. It is also clear that counsel must gameplan the various ways such evidence may come in and, as always, prepare the client thoroughly.

Conclusion

Practitioners must continue to pay close attention to developments in the Fourth Amendment. The impact of these sometimes subtle changes immediately seeps into and affects the day-to-day activities of CID agents, military policemen, and the judge advocates who prosecute and defend their work-product. Judge advocates must take the time to understand these changes and to communicate them to law enforcement agents. Special attention in the areas of pretext, primary purpose under MRE 313(b), and expectations of privacy will pay big dividends to both trial and defense counsel.

113. *Id.*

114. *Id.* at 586. Note, however, that M.R.E. 413 and 414 *appear to allow* the use of prior sexual misconduct as propensity evidence in sexual assault cases. *See* MCM, *supra* note 23, MIL. R. EVID. 413, 414.

115. *Graham*, 46 M.J. at 586.

Widening the Door: Recent Developments in Self-Incrimination Law

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Introduction

Open confession is good for the soul[1]
—*Scottish Proverb*

There is nothing better than a good confession.[2] All of us at some point in our lives have harbored guilt and, when given the opportunity on our own terms to exorcise the evil feeling, have confessed. Afterwards, we felt relief and peace. From a prosecutor's perspective, there is nothing more exhilarating than presenting the court-martial panel with the accused's confession—words of guilt straight from the accused's mouth. The prosecutor sits back, watches the members read the confession, and waits for their reaction. Each member slowly looks up from the document and glares at the accused, who is fidgeting nervously in his seat. To experience this joy, however, the government must obey the rules of self-incrimination.[3]

From a defense perspective, there is nothing more *relieving* than *suppressing* the client's confession. The defense counsel zealously challenges the admissibility of the statement through pointed cross-examination of the investigator. He delightedly watches the investigator squirm on the witness stand as he highlights the government's failures. Then, the defense counsel triumphantly hears the military judge utter the word "granted" in response to the defense motion to suppress the confession, and counsel breathes a sigh of relief. Regardless of their positions, either prosecution or defense, military practitioners must be cognizant of self-incrimination law.

This year's self-incrimination cases, none of which are landmark decisions, either affirm an existing trend in the law or clarify a difference of interpretation among the appellate courts. Regardless of the overall impact, the specific outcome is often the same: the confession is admitted. This trend is similar to years past.[4]

This article first addresses developments relevant to Article 31(b):[5] the CAAF's continuing interment of this statute and the tolerance afforded an investigator who recites its warning requirements. After a brief discussion of the *Miranda* trigger[6] (specifically custody), the focus of this article shifts to recent cases evoking ambiguous and unambiguous requests for counsel. Finally, this article reviews cases which concern trial tactics relating to self-incrimination: the application of the corroboration rule and the effect of mentioning at trial that the accused has invoked the privilege against self-incrimination. Unfortunately, the opinions in some cases present an incomplete analysis. This article attempts to highlight such deficiencies, critique the courts' analyses, and assist the military practitioner in evaluating the aftermath of these cases.

Article 31(b): The Primary Purpose Test

Since 1950, the text of Article 31(b) has not changed. On its face, the meaning appears evident. Based on the plain reading of the text and its legislative history, Congress enacted Article 31(b) to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or posi-

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1. Dictionary of Quotations 120 (Bergen Evans ed., 1978).

2. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." Manual for Courts-Martial, United States, Mil. R. Evid. 304(c)(1) (1995) [hereinafter MCM]. An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* Mil. R. Evid. 304(c)(2).

3. *See generally id.* Mil. R. Evid. 304, 305.

4. *See* Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, Army Law., May 1997, at 3 (analyzing 1996 self-incrimination cases).

5. UCMJ art. 31(b) (West 1995). Article 31 has remained unchanged since its enactment in 1950. Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

6. *Miranda* warnings are triggered by custodial interrogation. Miranda v. Arizona, 384 U.S. 435, 467-73 (1966).

tion.[7] Yet, as years pass, the scope and applicability of Article 31(b) continues to evolve. No longer is the analysis focused on the perception of the person being questioned, the suspect or the accused.[8] Rather, the focus has shifted to the perceptions of the interrogator. From the interrogator's perspective, what was the purpose of the questioning? This trend began with *United States v. Duga*[9] and *United States v. Loukas*[10] and continues in the recent case of *United States v. Payne.*[11]

In 1991, the U.S. Army Criminal Investigation Command (CID) investigated Staff Sergeant Payne, an intelligence analyst possessing a security clearance, for raping a thirteen-year-old girl.[12] Payne denied the rape and, after consulting military counsel, refused to take a government-requested polygraph. Payne eventually was transferred to a new duty station, and the investigation went stagnant. As a result of the investigation, however, Payne's command suspended his security clearance. Once at his new duty station, Payne requested a revalidation of his security clearance. The Defense Investigative Service (DIS)[13] conducted the follow-up security investigation.[14]

The DIS considered the prior rape investigation an unresolved issue affecting security clearance approval. Therefore, the DIS launched its own investigation into the alleged rape. After exhausting other leads, the DIS decided to interview Payne, and Payne agreed to the interview and a polygraph.[15] In one of the interviews, Payne told the DIS that military counsel represented him during the earlier CID investigation. The DIS did not ask if military counsel still represented him, and they did not notify counsel about the questioning. After a series of interviews and polygraphs, Payne confessed to the rape.[16] He was later convicted at a general court-martial.[17]

On appeal, Payne argued that the military judge erred by denying the defense motion to suppress the confession. Specifically, the defense reasoned that the confession should be suppressed because the DIS did not notify Payne's counsel before interrogating him about the rape, as was required by the version of Military Rule of Evidence (MRE) 305(e) in effect when Payne was tried.[18] Under this version of MRE 305(e), if the accused was represented by counsel, investigators were required to notify counsel before conducting an interrogation.[19] This rule, however, only applied to situations in which Article 31(b) warnings were required. The defense argued that Article 31(b) warnings applied, and, therefore, counsel should have been notified.[20] The defense counsel argued further that, since counsel was not notified, the statement was inadmissible.

7. *See* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1 (1995).

8. *Miranda* focuses on the environment of the questioning. If it is a custodial setting in which there is going to be an interrogation, *Miranda* warnings are required. *Miranda*, 384 U.S. at 436. Custody is determined from the perspective of the suspect. The question is whether a reasonable person, similarly situated, would believe that his freedom was significantly deprived. *See* MCM, *supra* note 2, MIL. R. EVID. 305(d)(1)(A); Stansbury v. California, 114 S. Ct. 1526 (1994). The focus is on the perception of the reasonable suspect. Article 31(b) provides similar warnings and is triggered by a similar environment. For some reason, however, the military courts have focused not only on the perspective of the suspect, but also on the perceptions of the questioner.

9. 10 M.J. 206 (C.M.A. 1981). In *Duga*, the Court of Military Appeals determined that Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. As a result, the court set forth a two-pronged test to determine whether the person who is asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test is: (1) was the questioner subject to the UCMJ and acting in an official capacity in the inquiry; and (2) did the person whom was being questioned perceive that the inquiry involved more than a casual conversation. *Id.* If both prongs are satisfied, the person asking the questions must provide Article 31(b) warnings.

This, however, is not the end of the Article 31(b) analysis. It is also necessary to determine if there is "questioning" of a "suspect or an accused." Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980); United States v. Byers, 26 M.J. 132 (C.M.A. 1988). A suspect is a person whom the questioner believes or reasonably should believe committed an offense. United States v. Morris, 13 M.J. 297 (C.M.A. 1982). An accused is a person against whom a charge has been preferred. BLACK'S LAW DICTIONARY 21 (5th ed. 1979).

10. 29 M.J. 385 (C.M.A. 1990). In *Loukas*, the court narrowed the *Duga* test by holding that Article 31(b) warnings are only required when the questioning is done during an official law enforcement investigation or disciplinary inquiry. *Id. See also* United States v. Good, 32 M.J. 105 (C.M.A. 1991) (applying an objective test to the analysis of whether questioning is part of an official law enforcement investigative or disciplinary inquiry). In short, whenever there is official questioning of a suspect or an accused for law enforcement or disciplinary purposes, Article 31(b) warnings are required. *See also supra* note 9 and accompanying text.

11. 47 M.J. 37 (1997).

12. *Id.* at 38.

13. *Id.* at 43. The DIS is a civilian agency outside the Department of the Army, but part of the Department of Defense.

14. The primary mission of the DIS is to conduct personnel security investigations. Its mission does not include law enforcement. Nevertheless, DIS agents are required to report information regarding crimes to law enforcement agencies. *Id.* at 38.

15. *Id.*

16. On the day of the confession, DIS agents advised Payne of his rights under the Privacy Act, his right to remain silent, and his right to counsel. *Id.* at 39.

17. Payne was convicted of rape and sentenced to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 38.

The CAAF disagreed. The court determined that the counsel notification rule under MRE 305(e) did not apply, because Article 31(b) was inapplicable.[21] First, the CAAF reasoned that the DIS agents were not persons "subject to the code," since they were not "employed by or acting under the direction of military authorities."[22] Since the DIS agents were not subject to the code, they were not bound by Article 31(b). Second, assuming that the DIS agents were subject to the code, the court found that they were "not acting in a law enforcement or disciplinary capacity and, thus [were] not required to give Article 31(b) warnings."[23] In reaching this point, the court looked to the primary mission or purpose of the DIS questioning. The articulated purpose was a personnel security investigation.[24] The duty to disclose incriminating information to law-enforcement officials was merely incidental and was not the primary purpose of the questioning.

The *Payne* decision fits nicely into the trend of the CAAF's Article 31(b) jurisprudence.[25] Based on *Payne*, the *primary purpose* of the questioning must be for law-enforcement or disciplinary reasons before Article 31(b) will apply. Trial counsel should add *Payne* to their expanding arsenal of cases which narrow the scope and application of Article 31(b).[26] Defense counsel should attempt to limit the holding in *Payne* to the facts of the case.

Does "Sexual Assault" Mean "Rape"?

Once Article 31(b) is triggered, the questioner must, as a matter of law, provide the suspect or accused three warnings.[27] They are: (1) the nature of the misconduct that is the subject of the questioning, (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.[28] There has been little appellate focus on the meaning and scope of these three warnings. That changed this year, at least with regard to the first warning—the nature of the accusation.

In *United States v. Rogers*,[29] the CAAF held that informing a suspect that he was being questioned for sexual assault provided adequate notice of the offense of rape.[30] In reaching its holding, the court gave guidance on how to determine whether the requirement for this warning has been satisfied.

The accused in *Rogers* was suspected of sexually assaulting a woman and raping his sister.[31] A military investigator questioned the accused. Before questioning, however, the investi-

18. *Id.* at 39. The version of Military Rule Evidence 305(e) in effect when Payne was tried provided:

> When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

Manual for Courts-Martial, United States, Mil. R. Evid. 305(e) (1984). Effective 9 December 1994, Military Rule of Evidence 305(e) was amended by deleting the notice requirement to defense counsel. *See* MCM, *supra* note 2, Mil. R. Evid. 305(d), (e).

19. This rule was taken from *United States v. McComber*, 1 M.J. 380 (C.M.A. 1976).

20. *Payne*, 47 M.J. at 41.

21. *Id.* at 43.

22. *Id*. In reaching the conclusion that the DIS was not acting under the direction of military authorities, the court considered the following: (1) there was no ongoing CID investigation; (2) the DIS investigation was initiated at the request of the accused; (3) the DIS worked under the supervision of a separate command; and (4) the DIS investigation was not undertaken for the purpose of investigating a crime. *Id.*

23. *Id.* at 43.

24. *Id.* at 38.

25. *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990); United States v. Duga, 10 M.J. 206 (C.M.A. 1981). *See also supra* notes 9-10 and accompanying text.

26. *See* United States v. Moses, 45 M.J. 132 (1996) (holding that questioning the accused while investigators were engaged in an armed standoff was not for law enforcement or disciplinary purposes); United States v. Bell, 44 M.J. 403 (1996) (holding that questioning a witness who was testifying in an Article 32(b) investigation was not for disciplinary or law enforcement purposes; rather, the questioning was for judicial purposes, and therefore, Article 31(b) warnings were not required); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (holding that a treating physician was not required to give Article 31(b) warnings to the accused when questioning him about a child's injuries, even though the doctor believed child abuse was a distinct possibility); United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (holding that questioning which was motivated by personal curiosity does not trigger Article 31(b) warnings); United States v. Jones, 24 M.J. 367 (C.M.A. 1987) (holding that questioning the accused for personal reasons does not trigger Article 31(b) warnings).

27. *See Loukas*, 29 M.J. 385; *Duga*, 10 M.J. 206. *See also supra* notes 9-10 and accompanying text. Article 31(b) is a statutory procedural rule. Article 98 is a punitive article, which makes a knowing and intentional failure to comply with procedural rules a criminal offense. UCMJ art. 98 (West 1995).

28. UCMJ art. 31(b).

29. 47 M.J. 135 (1997).

gator advised the accused of his rights under Article 31(b) and *Miranda*.[32] Regarding Article 31(b) warnings, the investigator informed the accused that "he was suspected of 'sexual assault.'"[33] The accused waived his rights and consented to an interview.

First, the investigator questioned the accused about the sexual assault. After about one and one-half hours of questioning, the accused made a statement. The investigator then questioned the accused about an unrelated matter.[34] After this, the investigator said: "I need you to tell me what happened with your sister."[35] Upon returning from a short break, the investigator questioned the accused, and the accused eventually admitted to the rape of his sister. At no time during the interview did the investigator say that he was going to question the accused about "rape."

On appeal, the accused argued that his statements regarding the rape of his sister were inadmissible because he was not properly advised of the nature of the offense as required by Article 31(b).[36] The CAAF held otherwise. The court found that, based on the totality of the circumstances, the accused was "adequately advised of the nature of the accusation."[37] In reaching its conclusion, the court emphasized that the purpose of this warning requirement is merely to orient the accused to the alleged misconduct that is the subject of the interrogation.[38] It is not necessary to spell out in detail the suspected offense. The crux of Article 31(b) warnings is to inform the suspect that there is no obligation to make a statement, not to inform him with specificity of the nature of the offense.[39]

From the facts in *Rogers*, it is fair to say that "sexual assault" encompasses the offense of "rape." This case gives practitioners the sense that not much is needed to satisfy the "nature of the offense" warning requirement under Article 31(b). The CAAF holding, however, is not novel; it just reaffirms precedent. Nevertheless, practitioners can take away from *Rogers* the lesson that the obligation to inform a suspect or accused of the nature of the offense, however slight, still exists.

Reaffirming the Definition of Custody

In 1966, with the case *Miranda v. Arizona*,[40] the Supreme Court held that, prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney.[41] In 1967,

30. *Id.* at 138. Judge Crawford, writing for the majority, schematically portrays the triggering events and content of warnings for both Article 31(b) and *Miranda* as follows:

	Art. 31 (b)	Miranda
Who Must Warn	Person Subject to Code	Law Enforcement Officer
Who Must Be Warned	Accused or Suspect	Person Subject to Custodial Interrogation
When Warning Required	Questioning or Interrogation	Custodial Interrogation
Content of Warning	1. Nature of Offense	1. Right to Silence
	2. Right to Silence	2. Consequences
	3. Consequences	3. Right to Counsel

Id. at 137.

31. *Id.* at 135. The accused's sister reported the rape when she discovered that the other woman reported the sexual assault. The rape occurred four years before the sexual assault.

32. *Id.* at 136.

33. *Id.*

34. *Id.* The investigator questioned the accused about an incident that occurred in Turkey, but which was never charged.

35. *Id.*

36. *Id.* at 135.

37. *Id.* at 138.

38. *Id.* at 137 (citing United States v. Rice, 29 C.M.R. 340 (C.M.A. 1960)).

39. *Id.* (citing United States v. O'Brien, 11 C.M.R. 105 (C.M.A. 1953)).

40. 348 U.S. 436 (1966).

the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia.*[42]

The trigger for *Miranda* warnings is custodial interrogation.[43] The test for custody is an objective examination, from the perspective of the subject, of whether there was a formal arrest or restraint or otherwise deprivation of freedom of action in any significant way.[44] The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.[45] Early this year, in *United States v. Miller*,[46] the CAAF reaffirmed the test for custody under *Miranda.*

In *Miller*, the accused was suspected of abusing his fiancé.[47] A civilian investigator called the accused and invited him to the station house to discuss the alleged assault.[48] Within minutes, the accused arrived. The investigator cordially invited the accused inside the station house and escorted him to an interview room.[49] No warnings were given. The investigator told the accused about the reported abuse and then asked the accused for his side of the story.[50] In response, the accused made some incriminating statements. At trial, the defense moved to suppress the statements, arguing that the accused was in custody when the questioning occurred and that the investigator should have advised the accused of his rights under *Miranda.* The military judge denied the defense motion, ruling that *Miranda* warnings were not required because the accused was not in custody.[51] The accused was convicted of assault, in addition to other offenses. The Army Court of Criminal Appeals affirmed the conviction.[52]

Before the CAAF, the accused again argued that *Miranda* warnings were triggered because he was subject to a custodial interrogation.[53] The court held, however, that the accused was not in custody, because "a reasonable person would have felt that he was at liberty to terminate the interrogation and leave."[54] In reaching this conclusion, the CAAF weighed heavily the fact that the investigator was "very cordial during the entire interview."[55] Of little significance, however, was the accused's subjective belief that he was not free to leave the station house.

Miller reaffirms the test for custody as it applies to *Miranda.* The unique aspect of the decision is the application of the "mixed question of law and fact" standard of appellate review.[56] From a practitioner's perspective, *Miller* identifies several fac-

41. *Id.* at 465. The Court found that, in a custodial environment, police actions are inherently coercive, and therefore, police must give the subject warnings concerning self-incrimination. The warnings are intended to overcome the inherently coercive environment. In support of the Court's opinion that warnings are necessary, the Court referred to the military's warning requirement under Article 31(b). *Id.* at 489. Unlike Article 31(b) warnings, the *Miranda* warnings do not require the interrogator to inform the subject of the nature of the accusation. Article 31(b) warnings, however, do not confer a right to counsel. *See supra* note 30.

42. 37 C.M.R. 249 (C.M.A. 1967).

43. *Miranda*, 384 U.S. at 444.

44. *Id. See* Berkemer v. McCarty, 468 U.S. 420, 428 (1985); MCM, *supra* note 2, Mil. R. Evid. 305(d)(1)(A). *See also supra* note 8 and accompanying text.

45. Stansbury v. California, 114 S. Ct. 1526 (1994).

46. 46 M.J. 80 (1997).

47. *Id.* at 81.

48. *Id.* Officer Greathouse, employed by the Marina Department of Public Safety, was a California certified police officer and a California certified fire fighter. In addition, he had arrest power on the day he questioned the accused. *Id.* at 82.

49. *Id.* The station house was always locked from the outside. You could, however, exit the building without having the doors unlocked. The interview room could be locked from the inside, but, on the day of the questioning, the door was unlocked.

50. *Id.*

51. *Id.* at 83.

52. *Id.* at 81. On 18 May 1995, the Army Court of Criminal Appeals affirmed the findings and the approved sentence without opinion.

53. *Id.* at 84.

54. *Id.* at 85 (citing the recent case of Thompson v. Keohane, 116 S. Ct. 457, 460 (1995), in which the Supreme Court held that the "in-custody" determination is a mixed question of law and fact: (1) what were the circumstances surrounding the interrogation (fact issue)? and (2) would a reasonable person have felt that he was not at liberty to terminate the interrogation and leave (law issue)?).

55. *Id.* at 83. Factors the court considered in deciding the issue of custody were: (1) the officer (in uniform and armed) *invited* the accused to come to the station; (2) within five minutes, the accused arrived at the station; (3) the door to the station house was locked, so the officer let the accused inside (the door automatically locks to prevent entrance, not exit); (4) they went to an interview room (8'x10' and no windows); (5) the officer did not tell the accused that he was free to leave (but the accused never asked); and (6) the officer was very cordial during the entire interview. *Id.*

56. *Id.* at 84 (quoting *Thompson*, 116 S. Ct. at 465). *See supra* note 54 and accompanying text.

tors to consider when determining custody. A notable factor to focus on is the attitude of the investigator. If possible, trial counsel should portray the questioner as cordial and pleasant, whereas defense counsel should characterize him as obnoxious and overbearing. As illustrated in *Miller*, the interrogator's attitude is significant when deciding custody.

What is an Ambiguous Request for Counsel?

In *Edwards v. Arizona*,[57] the Supreme Court created a second layer of protection.[58] If a subject invokes his right to counsel in response to *Miranda* warnings, not only must the current questioning cease, but a valid waiver of that right cannot be established by showing only that the subject responded to further police-initiated custodial interrogation.[59] Having expressed a desire to deal with the police only through counsel, a person is not subject to further interrogation until counsel is made available,[60] unless the subject initiates further communication with the police.[61] Further, in *Davis v. United States*,[62] the Supreme Court determined that if a subject initially waives his *Miranda* rights and agrees to a custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirement.[63]

In *United States v. Nadel*,[64] the Navy-Marine Corps Court of Criminal Appeals considered whether a purported request for counsel was ambiguous. Sergeant Nadel was suspected of indecent assault and oral sodomy.[65] After obtaining a valid waiver of rights under Article 31(b) and *Miranda*, investigators interrogated Nadel about the suspected misconduct. During the questioning, Nadel indicated that "he would not like to discuss oral sodomy without first getting advice from a lawyer."[66] The interrogation continued, but Nadel was not questioned about the sodomy offense. Nadel eventually confessed to the indecent assault. At trial and on appeal, Nadel argued that he was denied "the exercise of his right to counsel" and that his confession was, therefore, inadmissible.[67]

The Navy-Marine Corps court disagreed. The court held that Nadel's "reference to a lawyer was only in relation to questioning about oral sodomy."[68] The court found that "[t]his was not a clear assertion of the right to have counsel present during the interview, especially since no questions were asked about oral sodomy."[69] Since Nadel did not invoke his right to counsel, the investigators did not have to stop questioning, and the confession was admissible. This result is not troubling, but the court's analysis is.

Applying the service court's rationale, the message to practitioners is that whenever a suspect makes an offense-specific request for counsel when being questioned about several offenses, the request is ambiguous. This guidance is wrong. In *McNeil v. Wisconsin*,[70] the Supreme Court clearly stated that

57. 451 U.S. 477 (1981).

58. *See* Miranda v. Arizona, 384 U.S. 435 (1966). *Miranda* provides the first layer of protection. *See also supra* note 8 and accompanying text.

59. *Edwards*, 451 U.S. at 484. This precept is commonly called the *Edwards* rule. It is important to note that the *Edwards* rule is not offense-specific. *See* Arizona v. Roberson, 486 U.S. 675 (1988).

60. *Edwards*, 451 U.S. at 485. If the subject remains in continuous custody after invocation of the right to counsel, counsel must be present before police can reinitiate an interrogation. McNeil v. Wisconsin, 501 U.S. 171 (1991); Minnick v. Mississippi, 498 U.S. 146 (1990). If, however, the subject is released from custody subsequent to requesting counsel, and the subject has a "real opportunity to seek legal advice" during the release, the government can reinitiate the interrogation. *See* United States v. Faisca, 46 M.J. 276 (1997) (holding that re-interrogating the accused after a six-month break in custody was permissible); United States v. Vaughters, 44 M.J. 377 (1996) (holding that re-interrogating the accused after being released from custody for 19 days provided a meaningful opportunity to consult with counsel); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (holding that re-interrogating the accused after a six-day break in custody provided a real opportunity to seek legal advice).

61. *See McNeil*, 501 U.S. at 177. *See also* MCM, *supra* note 2, Mil. R. Evid. 305(d)-(g).

62. 512 U.S. 452 (1994).

63. *Id.* Following an initial waiver, the accused told investigators, "Maybe I should talk to a lawyer." *Id*. The Supreme Court held that this was an ambiguous request for counsel and that investigators were not required to clarify the purported request or to terminate the interrogation. *Id.*

64. 46 M.J. 682 (N.M. Ct. Crim. App. 1997).

65. *Id.* at 686.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*, *citing* Davis v. United States, 512 U.S. 452 (1994).

70. 501 U.S. 171 (1991).

"[o]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."[71] Nadel made a clear request for the assistance of counsel regarding sodomy; therefore, the *Edwards* rule would preclude questioning on any other criminal offense.

Further, the Navy-Marine Corps Court of Criminal Appeals emphasized that the investigators honored Nadel's request not to question him about the sodomy offense without counsel.[72] However, applying the Supreme Court's holding in *Davis*, if Nadel's request for counsel was truly ambiguous, the investigators could have talked to Nadel about sodomy.[73] If the investigators had questioned Nadel about sodomy, the court probably would have reached a contrary conclusion.

The *Nadel* court could have applied a different analysis and still reached the same result. Assume that Nadel did invoke his right to counsel and that the *Edwards* rule applied. The investigators could not question Nadel about any offense unless counsel was made available or Nadel re-initiated the interrogation.[74] Under the facts, it appears that Nadel re-initiated the interrogation, but only to the indecent assault offense.[75] In regards to the sodomy offense, Nadel intended to remain silent. Since there was a re-initiation by Nadel, the *Edwards* rule was overcome, and the confession is admissible. This suggested analysis accounts for Supreme Court precedent, yet reaches the same result as the appeals court.[76]

Counsel should skeptically rely on the *Nadel* holding. The court's analysis is incomplete and confusing. It is doubtful that the Navy-Marine Corps court intended to ignore longstanding Supreme Court precedent. One can only hope that the CAAF will review *Nadel* and clarify its rationale.

After Invocation of Counsel Rights

Questioning must stop when a suspect unequivocally invokes counsel rights during a custodial interrogation.[77] If the police continue the interrogation, however, statements made by the accused are inadmissible.[78] In *United States v. Young*,[79] the Army Court of Criminal Appeals faced this scenario.

In *Young*, the accused was apprehended as a suspect in a robbery and was taken to a military police station for questioning.[80] Prior to the interrogation, the investigator informed the accused of his rights under Article 31(b) and *Miranda*.[81] The accused initially waived his rights, but later invoked his right to counsel. Upon invocation of counsel rights, the investigator stopped questioning the accused. While leaving the interrogation room, however, the investigator turned to the accused and said: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance."[82] Before the investigator left the room, the accused "told him to stop and that there was something he wanted to say."[83] The investigator re-advised the accused of his rights. The accused clearly indicated that he did not want to speak to a lawyer, and he later confessed.[84] On appeal, the accused challenged the admissibility of the confession, arguing that the investigator's comments were comments likely to elicit an incriminating response[85] and that they were, therefore, a police-initiated interrogation, in violation of Young's counsel rights.[86]

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71. *Id.* at 177.

72. *Nadel*, 46 M.J. at 686.

73. *Davis*, 512 U.S. 452.

74. *See McNeil*, 501 U.S. 171; Edwards v. Arizona, 451 U.S. 484, 485 (1981). *See also supra* note 60 and accompanying text.

75. *Nadel*, 46 M.J. at 686.

76. Additional facts would be required to develop this analysis fully. For example, after requesting counsel, was Nadel re-advised of his rights before being questioned about the indecent assault offense? *See* Oregon v. Bradshaw, 462 U.S. 1039 (1983) (holding that, if initiation by the accused is found, a separate inquiry must be made as to whether, on the totality of the circumstances, the accused voluntarily waived his rights).

77. *Edwards*, 451 U.S. at 485. If a subject invokes his right to counsel in response to *Miranda* warnings, the questioning must cease.

78. *Davis*, 512 U.S. at 459. *See* MCM, *supra* note 2, MIL. R. EVID. 304(a).

79. 46 M.J. 768 (Army Ct. Crim. App. 1997).

80. *Id.* at 768.

81. *Id.*

82. *Id.* at 769.

83. *Id.*

84. *Id.*

The Army court found that the accused unambiguously invoked his right to counsel and that the *Edwards* rule applied—the investigator could not question the accused further without counsel present.[87] The court, however, held that the investigator's comments were not designed to elicit an incriminating response and did not constitute a police-initiated interrogation in violation of *Edwards.*[88] Rather, the accused's confession was the result of his spontaneous re-initiation of the interrogation. Since the investigator obtained a voluntary waiver of counsel rights prior to the re-interrogation, the confession was admissible.[89]

In determining whether the investigator re-initiated the interrogation, the Army court applied an objective test from the perspective of the investigator.[90] Specifically, were the statements those that an investigator would, "under the circumstances, believe to be reasonably likely to convince the suspect to change his mind about wanting to consult with a lawyer?"[91] Applying the facts to the test, the court held that the comments from the investigator did not equate to an interrogation.[92]

The court's finding in *Young* is disturbing. When inflection and body language are added to the investigator's comments, it is hard to imagine that the accused would not be intimidated. Further, it is unrealistic to think that the investigator did not hope that the accused would talk. *Young* sends a dangerous message to investigators: when a suspect invokes counsel rights, it is OK to display frustration. Government counsel should caution investigators not to follow the example of *Young*.[93]

Demystifying the Corroboration Requirement in Military Practice

In *United States v. Duvall*,[94] the CAAF reversed the United States Air Force Court of Criminal Appeals' interpretation[95] of MRE 304(g),[96] commonly called the corroboration rule.[97] Generally, the corroboration rule requires some corroboration of a confession before the confession can be considered as evidence.[98] The Air Force court's interpretation of this rule permitted the fact finder to convict an accused based solely on his confession.[99] The only precondition required was that the military judge find, as a matter of law, sufficient corroboration to admit the confession into evidence.[100] If this determination was made during a preliminary hearing,[101] the corroborating evidence could exceed the scope of admissible evidence.[102] If the military judge determined that there was sufficient corroboration to admit the confession, the service court concluded that there was no requirement for the prosecution to present any further corroborative evidence to the trier of fact.[103] Therefore, under these circumstances, the only evidence the prosecution needed to present to the fact-finder was the confession. If the confession satisfied all of the elements of the offense alleged, the trier of fact could convict the accused based solely on the confession.

The CAAF recognized that the Air Force court's interpretation of the corroboration rule significantly deviated from precedent.[104] Early in confession jurisprudence, the Supreme Court proclaimed that the "concept of justice" cannot support a conviction based solely on an out of court confession[105] and that admissible corroborative evidence, in addition to the confession, must be presented to the trier of fact.[106] Moreover, military appellate courts have gone to great lengths to analyze the nature of corroborative evidence to ensure that sufficient *admissible* evidence is considered for corroboration.[107]

The facts in *United States v. Duvall* reflect a scenario commonly encountered by military practitioners,[108] a situation

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85. *See* Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis,* the Supreme Court held that an "'interrogation' under *Miranda* refers . . . to express questioning . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . ." *Id.* at 301.

86. *Young*, 46 M.J. at 768.

87. *Id.* at 769. Sergeant Young was in continuous custody from the time he invoked counsel rights until he made his subsequent confession.

88. *Id.* at 770. The court determined that the investigator's comments were a display of frustration and were not designed to elicit an incriminating response.

89. *Id. See* MCM, *supra* note 2, MIL. R. EVID. 305(e)(1), 305(g)(2)(B)(i).

90. *Young*, 46 M.J. at 769 (citing *Innis*, 446 U.S. 291).

91. *Id.*

92. *Id.* at 770.

93. *Id.* at 770 n.2. The court opined that intentional use of comments similar to those used in *Young* as an "'investigative technique' constitutes police misconduct." *Id*. It will be interesting to see if the court's cautionary comments provide adequate deterrence against investigator misconduct in similar circumstances.

94. 47 M.J. 189 (1997).

95. United States v. Duvall, 44 M.J. 501 (A.F. Ct. Crim. App. 1996). Judge Morgan delivered the opinion of the court, in which Senior Judge Schreier concurred. Senior Judge Pearson dissented.

where the only admissible evidence of drug use is the accused's confession. In *Duvall*, Airman First Class (A1C) Gregory Duvall provided to criminal investigators a sworn, written confession that he smoked marijuana at his residence with A1C McKague.[109] Airman First Class McKague also admitted to smoking marijuana with the accused; however, his admission was not to criminal investigators. McKague confessed to a superior, Senior Airman (SrA) Brents.[110] At Duvall's trial, A1C

96. MCM, *supra* note 2, MIL. R. EVID. 304(g). There are two separate aspects of Military Rule of Evidence 304(g): (1) MIL. R. EVID. 304(g)(2), which pertains to the military judge's determination of adequate corroboration and (2) MIL. R. EVID. 304(g)(1), which pertains to the introduction of corroborating evidence before the trier of fact. Specifically, the rule states:

> (g) *Corroboration.* An admission or a 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. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. 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 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. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
> (1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
> (2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced, but the military judge may admit evidence subject to later corroboration.

Id.

97. *Id.* MIL. R. EVID. 304(g) analysis, app. 22, at A22-13.

98. *Id.* MIL. R. EVID. 304(g).

99. *Duvall*, 44 M.J. at 505. The court held that the military judge is solely responsible for determining the admissibility of a confession based on sufficient corroboration, and in making this decision, the military judge can consider inadmissible evidence. Therefore, if all that exists is inadmissible corroborative evidence, but the military judge finds it sufficient enough to corroborate the confession, the only available admissible evidence to present to the trier of fact is the confession itself. Consequently, the effect of the court's holding is the approval of a conviction based solely on a confession.

100. *Id.* at 504.

101. UCMJ art. 39(a) (West 1995). An Article 39(a) session is a court session without the presence of the members for purposes of arraignment, receiving pleas and forum, hearing and ruling on motions, and performing any other procedural functions. The persons typically present are the accused, defense counsel, trial counsel, the court reporter, and the military judge.

102. *Duvall*, 44 M.J. at 505.

103. *Id.*

104. United States v. Duvall, 47 M.J. 189, 192 (1997).

105. *See* Opper v. United States, 348 U.S. 84 (1954) (holding that the corroboration rule applies to admissions in addition to confessions and that the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement"). *See also* Smith v. United States, 348 U.S. 147 (1954) (emphasizing the general rule that "an accused may not be convicted on his own uncorroborated confession").

106. *Opper*, 348 U.S. at 93 (finding that all evidence in addition to the confession or admission must establish guilt beyond a reasonable doubt); *Smith*, 348 U.S. at 153.

107. *See* United States v. Cotrill, 45 M.J. 485 (1997) (finding that the accused's pretrial statements were sufficiently corroborated); United States v. Faciane, 44 M.J. 399 (C.M.A. 1994) (looking to the admissible corroborating evidence to determine if sufficient corroboration exists); United States v. Rounds, 30 M.J. 76 (C.M.A. 1990) (focusing on the admissibility of the corroborating evidence and whether it adequately corroborates the confession).

108. *See generally Rounds*, 30 M.J. 76; United States v. Melvin, 26 M.J. 145 (C.M.A. 1988); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993); United States v. Baker, 33 M.J. 788 (A.F.C.M.R. 1991).

109. *Duvall*, 47 M.J. at 190 (1997). Airman First Class Duvall was charged with wrongful use of marijuana and LSD in addition to wrongful distribution of marijuana. He was acquitted of using LSD and distributing marijuana, but the court-martial convicted him of using marijuana. *Id*. The only evidence presented to the court-martial members regarding the marijuana use was the accused's confession. Duvall was sentenced to a bad-conduct discharge and reduction to the grade of airman basic. *Id*.

110. *Id.*

McKague invoked his privilege against self-incrimination and was deemed unavailable to testify.[111] Consequently, the only evidence available to corroborate the accused's confession was the hearsay testimony of SrA Brents.

In an Article 39(a) session, the military judge heard SrA Brents' testimony about what A1C McKague told him. The defense objected to this testimony. The military judge ruled that although the statement was inadmissible evidence, he could nevertheless consider it on the issue of corroboration.[112] He further ruled that SrA Brents' hearsay testimony provided sufficient corroboration and admitted the confession into evidence.[113]

As a result of the military judge's ruling, the accused's sworn, written confession was the only evidence the prosecution presented. The defense quickly moved for a finding of not guilty,[114] "arguing there was no evidence *before the members* to corroborate the confession."[115] The military judge denied the defense's motion, stating, "[c]orroboration is an issue for the judge."[116] Subsequently, based on the confession alone, the members convicted the accused of drug use. On review, the Air Force Court of Criminal Appeals focused on two issues: (1) whether there was sufficient evidence to corroborate the accused's confession and (2) whether the military judge could admit a confession based upon inadmissible corroborating evidence.[117] The majority of the court answered both of these issues in the affirmative.

The CAAF disagreed and set aside the conviction.[118] The issue before the CAAF was whether the corroboration rule permits an accused to be convicted based solely on a confession.[119] In finding that corroborating evidence must be introduced to the fact-finder, the CAAF relied on *United States v. Faciane*,[120] a case which cuts hard against the service court's position.[121] In *Faciane*, the Court of Military Appeals focused on the admissibility and sufficiency of the corroborating evidence presented during trial.[122] The *Faciane* court first determined that the corroborative evidence was inadmissible hearsay.[123] Excluding the inadmissible corroborative evidence from the sufficiency analysis, the court concluded that the remaining admissible evidence was insufficient to corroborate the confession.[124]

111. United States v. Duvall, 44 M.J. 501, 502 (A.F. Ct. Crim. App. 1996). Although the commanding general and the U.S. Attorney granted A1C McKague immunity from federal prosecution, the local district attorney refused to grant state immunity. Consequently, when A1C McKague took the stand during an Article 39(a) session to testify about his drug use with the accused, A1C McKague invoked his privilege against self-incrimination. As a result, the military judge determined that A1C McKague was unavailable.

112. *Duvall*, 47 M.J. at 190. At first, the military judge did not rule on the admissibility of SrA Brents' testimony. He opined that corroborative evidence did not have to be admissible in order to provide a valid basis for the military judge to determine admissibility of the confession. *Id*. However, when the prosecution requested to also present SrA Brents' testimony to the members, the military judge was forced to rule on the admissibility of the corroborative statement. Although the military judge found the statement to be admissible under Military Rule of Evidence 804(b)(3) (statement against interest), he ultimately determined that the statement was inadmissible under Military Rule of Evidence 403 (more prejudicial than probative). *Id.* As a result, the prosecution could not present the corroborating evidence to the members.

113. *Id.*

114. MCM, *supra* note 2, R.C.M. 917.

115. *Duvall*, 44 M.J. at 506.

116. *Id.*

117. *Id.* at 502.

118. *Duvall*, 47 M.J. at 192.

119. *Id.* at 189.

120. 40 M.J. 399 (C.M.A. 1994).

121. *Duvall*, 47 M.J. at 192.

122. *Faciane*, 40 M.J. at 402-04. In *Faciane*, the accused was charged with committing indecent acts upon his three-year-old daughter. The accused pleaded not guilty and elected to be tried by military judge alone. The prosecution introduced the accused's confession and other testimonial evidence which was intended to corroborate the confession. The military judge admitted the corroborative evidence and found sufficient corroboration of the confession. On appeal, the Court of Military Appeals held that some of the evidence relied on by the military judge to corroborate the confession was inadmissible. *Id*. The court found that the remaining admissible evidence was insufficient to adequately corroborate the confession, and therefore, the confession should not have been admitted as evidence. *Id*. It is important to note from the opinion that the court makes no distinction between the type of corroborative evidence that the military judge can consider for admissibility of the confession and the type of corroborative evidence that can be presented to the trier of fact. It is clear, however, that the corroborative evidence must be independently admissible.

123. *Id.* at 403.

124. *Id.*

In a strong dissent, Judge Sullivan agreed with the service court's analysis. He argued that, under MRE 104(a), the military judge "is not bound by the rules of evidence except those with respect to privilege."[125] According to Judge Sullivan, considering together MRE 304(g) and MRE 104(a), the military judge could consider inadmissible corroborating evidence when making a preliminary ruling regarding the admissibility of a confession.[126] If the confession is corroborated and voluntary, it could be introduced to the fact-finder on the issue of guilt or innocence.[127]

The majority, however, recognized that the service court in *Duvall* ignored the plain language of MRE 304(g)[128] and the myriad judicial precedents that address the corroboration rule.[129] Both sources establish that the corroboration rule has two distinct parts: (1) a determination by the military judge that the confession is admissible based on adequate corroboration and (2) a determination by the trier of fact that the corroborating evidence and the confession establish beyond a reasonable doubt that the accused committed the offense.[130] The Air Force court truncated the corroboration rule analysis by ignoring the second part. The CAAF emphasized that the "role of the members in deciding what weight to give a confession would be undermined if the corroborating evidence were produced only at an out-of-court session under Article 39(a)."[131]

Duvall affirms the traditional protection afforded to an accused under the corroboration rule. The court mandates that the prosecution present admissible corroborating evidence to the trier of fact when introducing the accused's confession. The Air Force court's significant departure from the traditional application of the corroboration rule required the CAAF to resolve the issue to ensure the rule's uniform application. The message is now clear: to convict using an out-of-court statement from the accused, the fact-finder must base its decision on a corroborated confession—that is, a confession plus corroborative evidence. To satisfy this requirement, the government must introduce *admissible* corroborative evidence.

Mention of Silence at Trial

Another recent case involving the courtroom and the law of self-incrimination is *United States v. Riley.*[132] In reversing the Navy-Marine Corps Court of Criminal Appeals,[133] the CAAF found that it was plain error for the government to introduce testimony that commented on the accused's invocation of his pretrial right to silence.[134] In *Riley*, the accused was convicted of committing indecent acts and forcible sodomy with a ten-year-old female.[135] During the government's investigation, an investigator questioned the accused. Immediately after he was advised of his "military and constitutional rights," the accused elected to remain silent.[136] At trial, the government presented to the members the testimony of the investigator who ques-

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125. *Duvall*, 47 M.J. at 193 (Sullivan, J., dissenting) (quoting MCM, *supra* note 2, MIL. R. EVID. 104(a)).

126. *Id.*

127. *Id*.

128. MCM, *supra* note 2, MIL. R. EVID. 304(g). The rule states that "[a]n admission or a 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." *Id.* The reference to "direct and circumstantial evidence" indicates that the corroborating evidence must be admissible. *See id*. R.C.M. 918(C) (identifying direct and circumstantial evidence as the type of admissible evidence the trier of fact must consider when reaching a finding). Additionally, corroborating evidence must be considered by the trier of fact "in determining the weight, if any, to be given to the admission or confession." *Id*. MIL. R. EVID. 304(g)(1). Since the corroborating evidence must be presented to the trier of fact, it must therefore be admissible evidence. Consequently, based on the plain language of Military Rule of Evidence 304(g), one can conclude that: (1) corroborating evidence must be admissible and (2) corroborating evidence must be presented to the trier of fact.

129. *See generally* Opper v. United States, 348 U.S. 84 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Faciane, 40 M.J. 399 (C.M.A. 1994); United States v. Rounds, 30 M.J. 76 (C.M.A. 1990); United States v. Martindale, 30 M.J. 172 (C.M.A. 1990); United States v. Melvin, 26 M.J. 145 (C.M.A. 1988); United States v. Seigle, 47 C.M.R. 340 (C.M.A. 1973); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993); United States v. Harjak, 33 M.J. 577 (N.M.C.M.R. 1991); United States v. Baker, 33 M.J. 788 (A.F.C.M.R. 1991). *See also* Wade R. Curtis, *Military Rule of Evidence 304(g)—The Corroboration Rule*, ARMY LAW., July 1987, at 35.

130. MCM, *supra* note 2, MIL. R. EVID. 304(g)(1), (2); *Faciane*, 40 M.J. at 402; *Martindale*, 30 M.J. at 175; *Melvin*, 26 M.J. at 146; *Harjak*, 33 M.J. at 583.

131. United States v. Duvall, 47 M.J. 189, 192 (1997).

132. 47 M.J 276 (1997).

133. United States v. Riley, 44 M.J. 671 (N.M. Ct. Crim. App. 1996).

134. *Riley*, 47 M.J. at 280.

135. *Id.* at 277.

136. *Id.* at 278. It is implied that the rights given were the warnings required by Article 31(b) and *Miranda.*

tioned the accused.[137] Three times during the testimony, the investigator commented on the accused's assertion of his right to silence.[138] There was no defense objection or cross-examination of the investigator.

The Navy-Marine Corps Court of Criminal Appeals held that the "three-time reference to [the accused's] assertion of his right to silence was inadmissible."[139] Nevertheless, the service court determined that the error did not constitute plain error because the mistake was not preserved because the defense did not object at trial.[140]

The CAAF reversed the Navy-Marine Corps court's decision, finding that, regardless of the absence of defense objection, there was plain error. The CAAF placed great weight on two factors: (1) the investigator was the government's first witness, and therefore, his testimony "was the filter through which all the evidence was viewed by the members" and (2) the military judge did not provide a limiting instruction.[141] The court gave little, if any, consideration to the defense's failure to object.

Riley presents three notable points: 1) trial counsel should prepare witnesses so that they do not mention invocation of rights; 2) if a witness does mention invocation of rights, the defense should object; and 3) if the first two recommendations fail, the military judge should, sua sponte, give a curative instruction. The result in *Riley* is not disturbing. After all, the law regarding in-court mention of the accused's election to remain silent is firmly settled. You cannot do it.[142] The plain error analysis applicable to appellate review, however, does not apply a bright-line rule. The outcome is fact determinative. In *Riley*, the CAAF decided that the facts dictated a finding of plain error.

Conclusion

In reviewing this year's self-incrimination cases, a trend becomes apparent: the challenged confessions were deemed admissible. Right or wrong, the military courts widened the door of admissibility. From reaffirming the definition of custody to applying the primary purpose test to Article 31(b), the proclivity was to admit confessions. Even when the courts reviewed ambiguous and unambiguous counsel invocation cases, the result was admissibility. Only in the area of corroboration did the CAAF put its foot down and set aside a conviction based on a confession. In some cases, the facts clearly supported admission, but in other cases, the outcome was not as obvious. Regardless of the outcome, this year's self-incrimination cases equip military practitioners with new and creative approaches to employ when addressing self-incrimination issues.

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137. *Id.* It is unclear what probative value the investigator added to the government's case. The substance of his testimony consisted of background information about why the investigation was initiated and the attempted interview of the accused.

138. *Id.* at 278. The investigator testified that after advising the accused of his rights, the accused "elected to remain silent." *Id.* The investigator then testified that the next day, the accused informed him (the investigator) that "based on his attorney's advice, he would elect to remain silent [and] wouldn't participate in any further interrogation." *Id.* Finally, the investigator testified that the only person he interviewed in the case was the accused, and "he elected to remain silent." *Id.*

139. *Id.*

140. *Id.* at 279. "To be plain, 'the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations.'" *Id.* (quoting United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)). The plain error test has three parts: (1) the error must be obvious, (2) the error must be substantial, and (3) the error must actually prejudice the accused (in other words, it must materially prejudice the substantial rights of the accused). *See* UCMJ arts. 66(c), 67(c) (West 1995).

141. *Riley*, 47 M.J. at 280.

142. *See* MCM, *supra* note 2, MIL. R. EVID. 301(f)(3).

Pyrrhic Victories[1] and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility

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Introduction

Sometimes, in winning a battle you may lose the war. This has certainly been the case in the past year in the areas of mental responsibility and discovery. Though there have been few cases in these areas, the themes that arise are ones trial counsel ignore at their peril. The first theme speaks of trial counsel's duty to seek justice, not to oppose automatically defense motions at all costs. The second addresses trial counsel's duty to seek out and to disclose favorable, material evidence to the defense.

Notwithstanding the appellate costs of pyrrhic trial victories in mental responsibility and discovery, trial counsel in the Sixth Amendment arena have enjoyed the ever-broadening hearsay rule exceptions in child sex abuse cases. The Sixth Amendment is an area which encompasses crucial trial rights for a criminal accused. The trifold rights of the Confrontation Clause, the Compulsory Process Clause, and the Counsel Clause define the basic elements of a fair trial.[2] This year, as in years past, the Confrontation Clause in child sex abuse cases transmogrifies what are normally simple hearsay evidentiary issues into weighty Constitutional arguments. The courts also have looked at issues involving the Compulsory Process Clause and, in so doing, have reminded defense counsel that the right to present a defense is not absolute. In the effective assistance of counsel area, the Court of Appeals for the Armed Forces (CAAF) has returned to *closely* scrutinizing defense counsel's performance in the post-trial arena and has created new standards in the process.

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."[3]

The Confrontation Clause, Hearsay, and Child Sex Abuse

When the trial counsel attempts to introduce an out-of-court statement of a witness under a hearsay exception, and the witness does not testify at trial, the Confrontation Clause is implicated. Beginning with *Ohio v. Roberts*[4] and its progeny,[5] the Supreme Court has fashioned a methodology for analyzing the constitutionality of such out-of-court statements. When the Confrontation Clause is not at issue, military courts deviate from this methodology and consider additional factors, such as corroborating evidence. This article reviews the military jurisprudence in this area and several new cases in the Sixth Amendment areas of residual hearsay and child sex abuse.

Unfortunately, counsel find themselves involved in child abuse cases with increasing frequency. These cases present not only painfully human issues in the pretrial and trial stages, but also constitutional issues when the child witness either is not available to testify at trial or is reluctant to face the accused in the courtroom. It is important for military practitioners to understand that there are two analyses. One analysis applies when the Confrontation Clause is implicated, and a different evidentiary analysis applies when the Confrontation Clause is *not* implicated.

Child victim cases often involve extensive hearsay testimony because the child and the perpetrator are often the only witnesses to the crime. At trial, the child frequently claims not to remember, recants, or is simply too young to provide an articulate statement under oath. In such situations, the prosecution may seek to admit videotaped interviews of the child or statements the child made to a babysitter, caregiver, or other person.

1. From the victory of Pyrrhus, King of Epirus (319-272 B.C.), over the Romans at Asculum in 279 B.C. "A victory won at a staggering cost." WEBSTER'S II, NEW RIVERSIDE UNIVERSITY DICTIONARY (1994).

2. The Supreme Court wrote in *Strickland v. Washington*, "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment including the Counsel Clause . . . ." 466 U.S. 668, 684 (1984).

3. U.S. CONST. amend. VI.

4. 448 U.S. 56 (1980).

5. *See* White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986).

Such out-of-court statements that do not fall within a firmly rooted hearsay exception are presumptively unreliable.[6]

Confrontation Clause issues arise when the child witness *does not testify at trial*, and thus, the defense has no opportunity to cross-examine the witness. Simply put, the "main and essential purpose of confrontation is to secure the opponent the opportunity of cross-examination."[7] Notwithstanding an absent child witness, however, the Confrontation Clause is satisfied when the out-of-court statement falls within a firmly rooted hearsay exception.[8] The Supreme Court has recognized that excited utterances (Military Rule of Evidence 803(2)[9]) and statements made for the purpose of medical diagnosis and treatment (Military Rule of Evidence 803(4)[10]) are firmly rooted.[11] These two oft-used exceptions have been substantially broadened in child sex abuse cases.[12]

If the statement is not a firmly rooted hearsay exception, the Supreme Court methodology dictates that the prosecution must produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.[13] Even if the prosecution demonstrates that the declarant is unavailable, the statement is inadmissible for Confrontation Clause purposes unless there are adequate indicia of reliability evidenced by a showing of particularized guarantees of trustworthiness.[14] The particularized guarantees of trustworthiness must be shown from the totality of the "circumstances surrounding the making of the out-of-court statement and not from subsequent corroboration of the criminal act."[15]

Residual Hearsay and Statements to the Police

Another hearsay exception frequently used in child sex abuse cases is the residual hearsay exception.[16] This exception is *not* firmly rooted.[17] This exception was created to provide flexibility in new and unanticipated situations. Because it is not firmly rooted, however, it is presumptively unreliable,[18] and the

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6. *Wright*, 497 U.S. at 818.

7. Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting WIGMORE, EVIDENCE § 1395 (3d Ed. 1940)).

8. *White*, 502 U.S. at 356-57 (stating, "[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the integrity of the factfinding process."). *See id*. at 355-56 (observing that statements "made in contexts that provide substantial guarantees of their trustworthiness" are firmly rooted, because their "reliability cannot be recaptured even by later in-court testimony"). Though the Supreme Court has not spoken explicitly on *each* hearsay exception, it has specifically listed a few as firmly rooted hearsay exceptions. *See id*. at 356-57 (listing as firmly rooted spontaneous declarations and statements made in the course of securing medical treatment); *Bourjaily*, 483 U.S. at 182 (listing as firmly rooted statements of a co-conspirator made in the course and in furtherance of the conspiracy). Professors Saltzburg, Schinasi, and Schlueter posit that Military Rules of Evidence 803(1) through 803(23) are all firmly rooted hearsay exceptions. STEPHEN A. SALTZBURG ET. AL., MILITARY RULES OF EVIDENCE MANUAL 972 (4th ed. 1997).

9. MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 803(2) (1995) [hereinafter MCM].

10. *See id*. MIL. R. EVID. 803(4).

11. *White*, 502 U.S. at 356-57.

12. In regard to excited utterances in child abuse cases, courts have noted that time delay alone is not as dispositive in determining whether the statement is an excited utterance. Military courts and federal courts are willing to consider a longer delay in child sex abuse cases. *See* United States v. Arnold, 25 M.J. 129 (C.M.A. 1987); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (holding that the lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of 803(2)). *But see* United States v. Grant, 42 M.J. 340 (1995).

The medical diagnosis and treatment exception has been broadened for children as well. *See* United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (observing that the identity of the defendant as the sexual abuser was necessary to therapeutic treatment of the victim, because effective treatment may require that the victim avoid contact with the abuser and because the psychological effects of sexual molestation by a father or other relative may require different treatment than those resulting from abuse by a stranger, so that the victim's statements to a psychologist concerning the identity of the abuser were admissible under exception to the hearsay rule). *See* State v. Robinson, 735 P.2d 801, 809 (Az. 1987) (asserting that identity and "fault usually are not relevant to diagnosis or treatment . . . . This general rule, however, is inapplicable in many child sexual abuse cases because the abuser's identity is critical to effective diagnosis and treatment").

13. Ohio v. Roberts, 448 U.S. 56 (1980).

14. Idaho v. Wright, 497 U.S. at 805 (1990).

15. *Id.* at 821 (identifying five non-exclusive factors to consider when determining whether the circumstances surrounding the making of the statement are reliable: spontaneity, consistent repetition, mental status of the declarant, terminology atypical of a child that age, and motive to lie).

16. *See* MCM, *supra* note 9, MIL. R. EVID. 803(24), 804(b)(5). These exceptions are known as the "catch-all" exceptions. Note that Federal Rules of Evidence 803(24) and 804(b)(5) have been combined and transferred to a new Rule 807, effective 1 December 1997. *See* FED. R. EVID. 807. Military Rule of Evidence 1102 directs that "[a]mendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendment unless action to the contrary is taken by the President." MCM, *supra* note 9, MIL. R. EVID. 1102.

17. *Wright*, 497 U.S. at 818.

proponent must "demonstrate a trustworthiness consistent with that required under other specifically stated exceptions."[19] Prosecutors often resort to this exception because it may be the only avenue of admission in a child sex abuse case.

The CAAF has been cautious about admitting statements made to law enforcement officers.[20] In *United States v. Cabral*,[21] however, the court upheld the admission of a videotaped statement made to a law enforcement agent. *Cabral* involved the introduction of a videotaped interview of a four-year-old girl to an Office of Special Investigations (OSI) agent; the videotape was made nine days after the abuse occurred. The young girl was unable to testify at trial, and the military judge deemed her unavailable.[22] The judge also found that the videotaped interview bore the requisite particularized guarantees of trustworthiness.

The CAAF agreed that the young girl was unavailable and also upheld the use of the videotaped statement. In evaluating the trustworthiness of the statement, the court noted that there were several factors that lent "abundant" indicia of reliability to the videotaped statement: it was spontaneously made (non-leading questions were used), there was consistent repetition (the child's story did not change throughout the interview), the four-year-old victim used child-like terminology in explaining events, and there was a lack of motive to fabricate.[23] In addition, the court looked to the videotape itself for further indicia of reliability and found that the videotape "provided the members with the opportunity to view the child's demeanor, her confusion on occasion, and her communication skills."[24]

Practice Tips for Counsel—Videotapes

When attempting to introduce videotaped statements, counsel for both sides should be mindful of Judge Effron's instructive concurrence in *Cabral.* He was concerned about the "particular susceptibility of young children to suggestion and manipulation in the interview process, an issue which has been noted by a number of commentators."[25] Specifically, law enforcement personnel may often employ interview techniques which undermine the reliability of the entire process to such an extent that the child's memory of the event may be distorted or tainted.[26]

In *Cabral*, the OSI agent failed to videotape a twenty-minute "rapport session" that took place immediately before the taped interview. This "rapport session" was especially troublesome because "it is essential that any contact with a child, including a 'rapport' session, not taint a subsequent interview."[27] In this case, the defense did not raise the issue of the "rapport session." Had it done so, it may have been able to infuse "serious questions about the guarantees of trustworthiness of this interview."[28]

18. *See id*. at 817. The military's "catch-all" exceptions are essentially identical to the Idaho statute and are thus *not* firmly rooted exceptions for Confrontation Clause purposes. *See* MCM, *supra* note 9, R.C.M. 803(24) (availability of declarant immaterial), 804(b)(5) (declarant unavailable).

19. State v. Sorenson, 421 N.W.2d 77, 83 (Wis. 1988).

20. *See*, *e.g*., United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (observing that police officers have a unique outlook because they are seeking to build a case to prove guilt).

21. 47 M.J. 268 (1997).

22. *Id*. at 270. *See* MCM, *supra* note 9, Mil. R. Evid. 804(a). *See also* United States v. Ureta, 44 M.J. 290 (1996). In *Ureta*, the child recanted and was unavailable to testify at trial. The CAAF upheld the admissibility of a videotaped interview of the child witness under the residual hearsay exception. *Id*. at 296. An OSI agent conducted the interview two days after the last act of abuse. *See generally* Lieutenant Colonel Donna M. Wright, *"An Old Fashioned Crazy Quilt": New Developments in the Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment*, Army Law., Apr. 1997, at 75-76.

23. *Cabral*, 47 M.J. at 273 (observing that the child spoke of the appellant "spanking" his "ding-dong").

24. *Id.*

25. *Id.* (Effron, J., concurring).

26. *See* United States v. Cabral, 43 M.J. 808, 811 (A.F. Ct. Crim. App. 1996). In such a case, a "taint hearing" may be appropriate. The Air Force Court of Criminal Appeals stated in its decision that in "a closer case, an investigator's failure to tape an initial 'rapport' session could be the scale-tipper." *Id*. at 811. *See also* United States v. Kibler, 43 M.J. 725 (Army Ct. Crim. App. 1995) (holding that, unless a "taint hearing" is raised before trial, the issue is waived on appeal); United States v. Geiss, 30 M.J. 678 (A.F.C.M.R. 1990); Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117 (1996) ("[T]he defendant has the initial burden of triggering the pretrial hearing by making a showing of 'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques."); Stephen J. Ceci et al., *Repeatedly Thinking About a Non-Event: Source Misattributions Among Preschoolers*, 3 Consciousness & Cognition 388 (1994). *But see*, *e.g.*, John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L.J. 1 (1996).

27. *Cabral*, 47 M.J. at 275.

28. *Id.*

Both defense counsel and trial counsel have a lot to gain by applying Judge Effron's analysis. It can be advantageous to videotape child witness interviews. Ideally, such interviews should take place immediately after the report of abuse. Videotapes that do not contain the complete interchange between the interviewer and the victim should be viewed suspiciously, especially if a law enforcement official is involved in the interview. Defense counsel should seek a taint hearing if it appears that law enforcement or other investigators have distorted the child's recollection of events. Additionally, the greater the delay between the initial report of abuse and the videotaped interview, the greater the likelihood that the videotape will be found untrustworthy.

Confrontation Clause Satisfied When Witness Testifies

The sole "Confrontation Clause inquiry is whether the trial provided an opportunity for effective cross-examination."[29] In most situations, even when the witness cannot remember the details of the event during testimony, the Confrontation Clause is satisfied. A "witness's inability to recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or [to] recollect the circumstances under which [the] statement was given, does not have Sixth Amendment consequences."[30] The test is whether there is an "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[31]

The Confrontation Clause methodology of *Idaho v. Wright*[32] does not apply when the witness is available and testifies at trial.[33] Where the witness testifies at trial and the defense has an opportunity for cross-examination, the government need only meet the evidentiary requirements.[34] Similarly, if the defense expressly waives the right to confront the hearsay declarant, the CAAF has held that *Wright* does not apply.[35]

Why is there a hearsay issue at all if the declarant actually testifies at trial? Why is the witness' in-court testimony not enough for the prosecution? Even if the child is a well-spoken, unflappable witness, the prosecutor often finds it desirable to use the firmly rooted hearsay exceptions to buttress the child's in-court testimony with excited utterances and statements made to health care providers or social workers. Hearsay statements may, however, become the primary engine by which the prosecution proves its case when the witness takes the stand and recants, cannot remember or articulately relate what occurred, or is reluctant to speak.

When the declarant actually testifies, the military judge may look beyond the circumstances surrounding the making of the statement and, in her discretion, may consider corroborating evidence when determining the trustworthiness of the statement. Corroborating evidence can include physical evidence of the abuse, consistency between or among other witness' state-

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29. Dolny v. Erickson, 32 F.3d 381, 385 (8th Cir. 1994).

30. United States v. Owen, 484 U.S. 554, 558 (1988).

31. *Id.* Confrontation Clause concerns may still arise, for instance, if the child is so young or disabled that he or she is unable to testify. The fact that a declarant is physically present in the witness chair "should not, in and of itself, satisfy the demands of the Confrontation Clause." United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991).

32. 497 U.S. 805 (1990).

33. Judge Sullivan disagrees and believes that *Idaho v. Wright* applies. *See* United States v. Kelley, 45 M.J. 275 (1996); United States v. Martindale, 40 M.J. 348 (C.M.A. 1994); United States v. McGrath, 39 M.J. 158 (C.M.A. 1994). Judge Sullivan also believes that independent corroborative circumstances should not be considered in admitting evidence under the residual hearsay rule. The U.S. Court of Appeals for the Tenth Circuit agrees with this approach. *See* United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (holding that "other evidence that corroborates the truth of a hearsay statement is not a circumstantial guarantee of the declarant's trustworthiness"). The court also noted that:

> [E]ach of the cases cited by the [Supreme] Court [in *Idaho v. Wright*] addressed the admissibility of such statements under exceptions to the hearsay rule—not the Confrontation Clause. Indeed, two of the cases involved the reliability requirement of the residual hearsay exception . . . . In essence, the Court saw no meaningful distinction between Rule 803(24)'s requirement that a statement have "circumstantial guarantees of trustworthiness" and the Confrontation Clause requirement that it "bear adequate indicia of reliability." Thus, even though Wright is technically a Confrontation Clause case, its discussion of the reliability of hearsay statements by child victims of sexual abuse is equally pertinent to both Confrontation Clause and Rule 803(24) cases.

Id. at 1452 n.5. The CAAF, however, follows an analysis similar to the Eighth Circuit. *See* Johnson v. Lockhart, 71 F.3d 319 (8th Cir. 1995); *Dolny*, 32 F.3d 381; United States v. Grooms, 36 F.3d 425 (8th Cir. 1992); *Spotted War Bonnet*, 933 F.2d 1471.

34. *See Kelley*, 45 M.J. at 275.

35. *See Martindale*, 40 M.J. at 349; *McGrath*, 39 M.J. at 163 (holding that the appellant waived his right to cross-examination and thus could not argue a violation of his confrontation rights). Because no constitutional issue is involved, the judge's purely evidentiary decision is reviewed for an abuse of discretion, as opposed to a harmless beyond a reasonable doubt standard when constitutional error is found. *See* United States v. Casteel, 45 M.J. 379, 382 (1996). Contrast this with a Confrontation Clause issue. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

ments, the accused's confession, and behavioral changes in the child.[36]

The military judge must still find that the stringent requirements of the residual hearsay rule are met when analyzing the evidence. Provided that the notice requirement is met, the proponent must first show that the out-of-court statement has circumstantial guarantees of trustworthiness *equivalent* to the other enumerated hearsay exceptions. Then, the rule sets out three additional requirements for admissibility: (1) materiality, (2) necessity, and (3) that the statement is in the interests of justice.[37] As the U.S. Court of Appeals for the Tenth Circuit stated:

> Courts must use caution when admitting evidence under [the residual hearsay exception], for an expansive interpretation . . . would threaten to swallow the entirety of the hearsay rule . . . . [The catch-all exceptions] should be used only "in extraordinary circumstances" where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative, and necessary in the interest of justice.[38]

Residual Hearsay and Statements to Police . . . Again

In *United States v. Casteel*,[39] the six-and-one-half-year-old victim testified via closed circuit television from a remote location. Her testimony on direct examination consisted of "I don't know" and very few other details. Defense counsel chose not to cross-examine the victim. Using an abuse of discretion standard of review, the CAAF found that the trial judge did not err in admitting a statement which the child made to a sheriff's detective shortly after the allegations against Casteel arose. The court noted that "statements given ex parte to law enforcement officials must always be viewed with suspicion," but the court was satisfied that the judge "adequately assessed that factor."[40]

The military judge cited factors which indicated that the statement was reliable, but he did not refer to corroborating evidence, though he could have. He considered first that the victim's statement against the appellant was like a declaration against interest, because she "perceived that her situation would be made worse by telling the police what appellant did."[41] Additionally, the child appeared to speak from memory, she contradicted her interrogator on several occasions, and the questioning was not suggestive.[42]

Corroborating Evidence—Noncontemporaneous Defense Evidence

In a recent case, the defense argued against the admission of a residual hearsay statement by alleging that the trial judge's failure to refer to evidence outside of the circumstances surrounding the making of the statement was error. This argument essentially turned the government's argument for consideration of corroborating evidence on its head.

In *United States v. Kelley*,[43] the appellant argued that it was judicial error *not* to consider outside evidence which showed that the statement was *unreliable.* At trial, the defense pointed to evidence that the victim's "parents 'left pornography laying [sic] about the house' and that she and her siblings 'had inadvertently seen their parents having intercourse.'"[44] The CAAF rejected this argument and held that the military judge has discretion "to consider other evidence but is not required to do so."[45]

In *United States v. Johnson*,[46] the Army Court of Criminal Appeals followed the CAAF's logic in *Kelley* and held that, when the witness testifies at trial and is subject to cross-examination, the military judge may consider not only corroborating

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36. *See*, *e.g.*, *Martindale*, 40 M.J. at 349; *McGrath*, 39 M.J. at 166.

37. *See* MCM, *supra* note 9, Mil. R. Evid. 803(24), 804(b)(5).

38. United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995), *quoting* United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993).

39. 45 M.J. 379 (1996).

40. *Id.* at 383 (citing United States v. Pollard, 38 M.J. 41, 49 (C.M.A. 1993); United States v. Barror, 23 M.J. 370, 372 (C.M.A. 1987)).

41. *Id.* at 382. The victim was the daughter of Casteel's girlfriend.

42. *Id.*

43. 45 M.J. 275, 281 (1996).

44. *Id.*

45. *Id.*

46. 45 M.J. 666 (Army Ct. Crim. App. 1997).

evidence but also "any relevant non-contemporaneous evidence, including impeaching evidence."[47] The military judge erred when he *incorrectly* found that it was "not permissible to look at subsequent events in evaluating the trustworthiness of those circumstances at the time the statement was taken."[48] The Army court found, however, that this error was not prejudicial.

In *Johnson*, the thirteen-year-old daughter of the accused testified at trial and recanted her original statement that her father sexually abused her. The trial counsel sought admission of the daughter's sworn statement to a CID agent and only relied on the circumstances surrounding the making of the statement to argue trustworthiness. Defense counsel presented, but the military judge did not consider, "non-contemporaneous events to demonstrate that [the girl's] original statement lacked trustworthiness."[49] Specifically, the defense offered evidence that the daughter: was sexually precocious and thus her extensive sexual knowledge was independent of her father; inaccurately described her father's penis;[50] was diagnosed with a sexually transmitted disease (chlamydia), which her father was not shown to have; recanted her complaint to a military officer the same night she made her sworn statement to CID; filed a false sexual abuse allegation against one of the child protective service specialists who was working on her case; and testified that her sexual abuse allegation was a lie.[51] Additionally, "her sister S made and recanted a similar complaint approximately six years before," and "her initial attempts to recant her statement to [the CID agent] were rebuffed because of [the agent's] personal sexual abuse experience."[52]

The Army Court of Criminal Appeals affirmed the trial judge's decision after it painstakingly balanced the noncontemporaneous evidence—which it found material to the trustworthiness of the statement—against the corroborating evidence upon which the government did not rely at trial.[53] The court concluded that "the overwhelming weight of the evidence supported the statement's reliability."[54]

Residual Hearsay—Practice Tips for Defense Counsel

Defense counsel should vigilantly contest the admission of residual hearsay statements at trial. This is especially true for statements made to law enforcement officials, as in *Johnson*, *Casteel*, and *Cabral*. Even if the witness testifies, defense counsel should remind the judge that the *hearsay* rules require the out-of-court statement to be equally as reliable as a firmly rooted hearsay exception. The entirety of the hearsay rule will be swallowed if this equivalency concept is not strictly followed.

Next, defense counsel should not let the court forget that residual hearsay statements must meet three additional requirements in the evidentiary rule: (1) it must evidence a material fact; (2) it must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and (3) it must be in the interests of justice to admit it.[55] Defense counsel should also argue that, if the victim actually testifies at trial (especially if the testimony is straightforward), the witness' in-court statement is the most probative evidence of abuse and that the out-of-court statement must be precluded because it is not necessary.[56]

Defense counsel should also argue that *in all cases*, whether the witness testifies or not, the court should consider "non-contemporaneous" evidence which shows that the statement is untrustworthy. Residual hearsay statements are presumptively unreliable. The defense should not be precluded from presenting evidence which details the untrustworthiness of the statement. Despite these arguments, however, it appears that the military judge can, in her discretion, choose not to consider such evidence. On the other hand, should she opt to consider *corroborating* evidence, it seems clear that she *must* consider the defense's noncontemporaneous evidence as well.

Alternative Forms of Testimony

47. *Id.*

48. *Id.* at 667.

49. *Id.* at 667.

50. "[I]n her statement, [A] describes SSG Johnson's penis as having 'some dark patchy area.'" Defense Appellate Brief, Supplement to Petition for Grant of Review at 12, United States v. Johnson, 45 M.J. 666 (Army Ct. Crim. App. 1997) (citing Prosecution Exhibit 4). A government "search" revealed that SSG Johnson's penis was not "discolored" and that his scrotum was of similar "uniform appearance." *Id.*

51. *Johnson*, 45 M.J. at 668.

52. *Id.*

53. *Id.* at 669.

54. *Id.*

55. *See* MCM, *supra* note 9, MIL. R. EVID. 803(24), 804(b)(5).

56. *See* United States v. Knox, 46 M.J. 688, 695 (N.M. Ct. Crim. App. 1997); United States v. Kelley, 45 M.J. 275, 282-83 (1996) (Everett, S.J., concurring in part and dissenting in part).

An accused's right to confront witnesses, physically, is also a core protection of the Confrontation Clause; however, it is not an absolute right.[57] When the alleged victim is available to testify but is reluctant to face the accused, the court may employ alternative forms of testimony, such as one-way or two-way closed circuit television. The Supreme Court held in *Maryland v. Craig*[58] that the critical inquiry is "whether use of the procedure is necessary to further an important state interest."[59] Face-to-face confrontation is required with an available witness unless the prosecutor can make a "case-specific showing of necessity."[60] This necessity is shown when the alternative procedure is required to protect the particular child; the child will be traumatized by the accused; and the emotional distress the child will suffer will be more than de minimis.[61] The accused's Sixth Amendment confrontation rights are addressed if the prosecutor successfully makes a case-specific showing of necessity.

In response to *Craig*, Congress enacted 18 U.S.C. § 3509, which provides that the attorney for the government or the child's representative may apply for an order that the child's testimony be taken in a room outside of the courtroom and be televised by *two-way* closed circuit television.[62] The court *may* order the testimony of the child to be taken by closed circuit television if the court makes a necessity finding on the record.[63] The CAAF has not determined whether 18 U.S.C. § 3509 applies in courts-martial, but it has relied upon the federal statute's permissive term "may" to uphold the use of one-way closed circuit television in *United States v. Longstreath*.[64]

Proposed changes to the military rules will codify existing case law and bring the military practice in line, to some extent, with the federal statute. Proposed Military Rule of Evidence (MRE) 611(d) details the requirements under which the military judge can allow a child to testify from an area outside of the courtroom.[65] Proposed Rule for Courts-Martial (R.C.M.) 914A follows the federal statute in part and states that *two-way* closed circuit television *normally* will be used.[66] The witness, counsel for each side, equipment operators, and other persons deemed necessary (such as a child attendant) will be at the remote location.[67] Finally, proposed R.C.M. 804(c) gives the accused the option to absent himself voluntarily from the courtroom in order to preclude the use of the procedures described in proposed R.C.M. 914A.[68] Involuntary removal of the accused from the courtroom under these circumstances is unconstitutional.[69]

Limits on Cross-Examination

57. *See* Maryland v. Craig, 497 U.S. 836, 849 (1990) (stating that "our precedents establish that 'the Confrontation Clause reflects a preference for face-to-face confrontation at trial' . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case'") (quoting Ohio v. Roberts, 448 U.S. 56 (1980); Mattox v. United States, 156 U.S. 237, 244 (1895)). Justice Scalia dissented in *Craig* and wrote:

> The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.

Craig, 497 U.S. at 860-61 (Scalia, J., dissenting). Justice Scalia believes that the explicit text in the Sixth Amendment is clear and that the right to physically confront is absolute. He also wrote that the "Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here . . . ." *Id.* at 863.

58. *Craig*, 497 U.S. at 857.

59. *Id.* at 856.

60. *Id.*

61. *See id.*

62. 18 U.S.C. § 3509 (1994).

63. *Id.* §§ 3509(B), (C).

64. 45 M.J. 366 (1996).

65. Joint Service Committee on Military Justice (JSC), Notice of Proposed Amendments to the Manual for Courts-Martial, Proposed MIL. R. EVID. 611(d) (1997).

66. *Id.* "[S]uch testimony should normally be taken via a two-way closed circuit television system." *Id.* Proposed R.C.M. 914A.

67. *Id.* Proposed R.C.M. 914A(1)-(6).

68. *Id.* Proposed R.C.M. 804(c). This rule is proposed because the CAAF has rejected the *involuntary expulsion* of the accused from the courtroom. *See* United States v. Daulton, 45 M.J. 212 (1996); United States v. Rembert, 43 M.J. 837 (Army Ct. Crim. App. 1996). *See also* Wright, *supra* note 22, at 78.

69. *Daulton*, 45 M.J. at 212. However, the right to be present at trial is not violated where the accused engages in disruptive behavior. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51-54 (1987) (plurality opinion).

Implicit in the Confrontation Clause is, arguably, the most important trial right of an accused—the right of cross-examination. In fact, the main purpose of confrontation is to allow the accused the right of cross-examination. As the Supreme Court wrote in *Davis v. Alaska*:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., [to] discredit, the witness.[70]

Constitutional issues arise when the trial judge does not permit the defense counsel to cross-examine the witness on a relevant issue, such as the witness' biases, prejudices, or ulterior motives.

Limitations on Cross-Examination—Rule 412

Evidence must be relevant to be admissible; however, even if evidence meets "the threshold for relevance, it may be excluded unless its importance outweighs the policies which support exclusion."[71] Military Rule of Evidence 412 generally excludes evidence of a victim's prior sexual behavior to show consent in sex offense cases.[72] This rule protects the privacy of the victim, though not absolutely. When the exclusion of the evidence would violate the accused's constitutional rights, subdivision (b)(1)(C) allows the trial judge to admit the evidence.[73]

In *United States v. Lauture*,[74] the Army Court of Criminal Appeals held that the accused's right to introduce relevant evidence did not overcome the Rule 412 prohibition.[75] The defense argued that the judge's restriction of cross-examination of the rape victim violated the accused's Sixth Amendment right to confrontation. At trial, the defense sought to cross-examine the rape victim about a single prior act of adultery committed two years earlier. The act of adultery was offered to show a motive to lie. The victim, a devout Mormon, went through an extensive "cleansing" process after the adulterous act. The defense argued that this process would make it difficult for her to admit her second transgression. The defense also argued that the prior adultery supported a mistake of fact defense because the accused knew about the adultery at the time of the offense and, therefore, did not believe "no" *really* meant "no."

The Army Court of Criminal Appeals held that it was not error for the military judge to prohibit the defense from cross-examining the rape victim about her previous act of adultery.[76] The court declined to adopt the defense's argument that the evidence was relevant to support a mistake of fact defense as to consent because, absent unusual circumstances, such evidence does not render the mistake reasonable.[77] The court also found that, though the defense's assertion concerning the victim's motive to fabricate "met the minimum standard of relevance under [MRE] 401," it was "speculative and remote."[78] The defense theory at trial was that the accused was reasonably mistaken concerning the victim's consent, not that the victim *actu-*

70. Davis v. Alaska, 415 U.S. 308, 316 (1974). *See also* Pointer v. Texas, 380 U.S. 400, 404 (1965).

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. Even more recently we have repeated that a denial of cross-examination without waiver would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

Id.

71. United States v. Lauture, 46 M.J. 794, 798 (Army Ct. Crim. App. 1997), *citing* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

72. MCM, *supra* note 9, Mil. R. Evid. 412.

73. *Id.* Mil. R. Evid. 412(b)(1)(C).

74. 46 M.J. 794 (Army Ct. Crim. App. 1997).

75. *Id.* at 800.

76. *Id.* at 796. Before raising the issue, the defense did not give timely notice, but the judge did not exclude the evidence on this basis.

> Defense counsel raised this issue when SPC F was called to testify as the first prosecution witness on the merits, by asking that SPC F be advised of her rights against self-incrimination under Article 31, UCMJ. Defense counsel indicated he intended to cross-examine SPC F about the prior act of adultery.

Id. n.1.

77. *Id.* at 799 (citing United States v. Greaves, 40 M.J. 432 (C.M.A. 1994)). *But see* United States v. Jensen, 25 M.J. 284 (C.M.A. 1987) (holding that evidence of prior consensual sex between the victim and co-defendant was admissible).

ally consented. Therefore, the defense's "marginal showing of relevance was insufficient to overcome the policies protecting privacy and preventing prejudice inherent in [MRE] 412."[79]

The defense, as the moving party in an MRE 412 motion, bears the burden of establishing that sexual evidence is relevant to an issue in the case. The defense may do this through the context in which the questions are asked or by making it known through an offer of proof.[80]

Limitations on Cross-Examination—Nexus Requirement

In *United States v. Shaffer*,[81] the accused was charged with indecent exposure. Of the five government eyewitnesses who testified, three came from the same family—a mother and her two daughters. The other two witnesses were also a mother and daughter and were friends with the first group. The judge would not allow the defense to cross-examine the daughter from the first family about her father's recent conviction for child sexual abuse. The military judge sua sponte called an Article 39(a) session and asked the defense to articulate a relevance theory. Defense counsel did not offer any theory of relevance and "did not object or otherwise protest."[82]

The CAAF found that the defense counsel did not establish the relevance of the evidence within the meaning of MRE 401.[83] The court held that it would not "hold the military judge to a standard of prescience."[84] "Without a timely proffer, appellant cannot now fairly complain that the judge improperly precluded the questioning."[85]

Practice Tips for Counsel

Both *Lauture* and *Shaffer* stand for the proposition that merely invoking the denial of the right to confrontation does not peremptorily shift scrutiny away from the defense and onto the government. The defense still bears the burden of establishing relevance. Defense counsel cannot assume that the military judge will admit evidence simply because the defense desires its introduction.

Before trial, defense counsel must anticipate objections and formulate a theory of relevance. This means succinctly articulating a defense theory of the case and *linking* the evidence to the theory.[86] It may also mean that the defense must make an offer of proof to ensure that the issues are preserved for appeal. Such an offer may involve the testimony of witnesses out of the hearing of the members. Defense counsel must be persistent, even in the face of seemingly hostile judicial reception, in making offers of proof. Construction of the trial record is critical for appeal. Failure to make such an offer will result in waiver of the issue at the appellate level, unless the appellate court finds that the trial judge's exclusion materially prejudiced substantial rights of the accused.

Compulsory Process

The Compulsory Process Clause of the Sixth Amendment is the alter ego of the Confrontation Clause. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[87] The Compulsory Process Clause is, in essence, the right to present a defense. In addition to this constitutional right, a military accused can also invoke Article 46 of the Uniform Code of Military Justice and R.C.M. 703(a), which state that the prosecution *and defense* shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.[88] Under R.C.M. 703(b)(1), the defense is entitled to the production of any witness whose testimony is relevant and necessary.[89]

78. *Lauture*, 46 M.J. at 800.

79. *Id.*

80. MCM, *supra* note 9, Mil. R. Evid. 103 (a)(2).

81. 46 M.J. 94 (1997), *cert. denied*, 118 S. Ct. 181 (1997).

82. *Id.* at 99.

83. *See* MCM, *supra* note 9, Mil. R. Evid. 401.

84. *Shaffer*, 46 M.J. at 100.

85. *Id.* (Sullivan, J., dissenting). Judge Sullivan strongly dissented in this case and believed that the defense strategy at trial was clear—the defense wanted to show that the victim's family was motivated to testify falsely because of an intense hatred and jealousy of the accused's "All-American" family. He wrote that the defense theory was "clearly articulated in the defense voir dire questions of the members, in defense counsel's opening statement, and in defense counsel's argument to the military judge (it tends to show motivation of bias toward Chief Shaffer)." *Id.* at 102.

86. *See generally* Saltzburg, *supra* note 8, at 606.

87. Washington v. Texas, 388 U.S. 14, 19 (1967).

The CAAF has not established a bright-line rule for when to require the production of a defense witness, but the court has provided, over time, the following specific factors to be considered:

> the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories, or previous testimony.[90]

Production of Expert Witnesses

The right to Compulsory Process and the equal opportunity to obtain witnesses includes the right to the production of experts. The defense must show the convening authority or the court why the expert is "relevant and necessary."[91] The defense requests an expert from the convening authority, and the defense can renew its request in a motion for production of a witness before trial. The military judge may preliminarily deny the motion before trial, but remain open to reconsideration of the request during trial. When the judge makes such an open-ended ruling, defense counsel must be vigilant in renewing the motion at trial or may find themselves losing the issue on appeal.

In *United States v. Ruth*,[92] the military judge denied the defense's request for a named expert to impeach handwriting analysis, but he "specifically stated that he would be open to reconsideration of the request during trial, if circumstances supported so doing after the [g]overnment's expert had testified."[93] The CAAF found that the defense counsel's failure to renew the motion was relevant in its determination that the military judge had properly denied production of the witness.[94]

Defense Counsel Must Follow the Rules

Even if the defense shows that the witness is relevant, the right to Compulsory Process is not unfettered. An accused does not have a right to "offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly."[95] If used irresponsibly, the military judge may preclude the witness' testimony.[96]

Rule for Courts-Martial 703(c)(2)(A) dictates that, if the defense requires the government to obtain its witnesses for trial, the defense must submit a written witness list to the trial counsel. This list must include "a synopsis of the expected testimony sufficient to show its relevance and necessity."[97] Rule for Courts-Martial 703(d) provides for employment of defense expert witnesses if the defense submits a request to the convening authority detailing why the witness is necessary and the estimated cost of the expert.[98] If the convening authority denies the request, the defense may renew the request before a military judge, who will determine whether the witness is "relevant and

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88. UCMJ art. 46 (West 1995). Article 46 states:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and [to]testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run any part of the United States, or the Territories, Commonwealths, and possessions.

Id. *See* MCM, *supra* note 9, R.C.M. 703(a). Rule 703(a) states that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." *Id*.

89. MCM, *supra* note 9, R.C.M. 703(b)(1) discussion.

90. United States v. Ruth, 46 M.J. 1, 4 (1997).

91. MCM, *supra* note 9, R.C.M. 703(d) discussion.

92. 46 M.J. 1 (1997).

93. *Id.* at 3.

94. *Id*. at 5. The court also relied in part on defense counsel's failure to heed the military judge's suggestion to attempt to employ alternatives to the production of their named expert, Professor Denbeaux, "such as use of his article as a learned treatise (Mil. R. Evid. 803(18)) and use of the article for cross-examination (Mil. R. Evid. 705) . . . ." *Id.*

95. Taylor v. Illinois, 484 U.S. 400, 410 (1988).

96. *See id. See also* Michigan v. Lucas, 500 U.S. 145 (1991); United States v. Nobles, 422 U.S. 225 (1975).

97. MCM, *supra* note 9, R.C.M. 703(c)(2)(B)(i).

necessary, and, if so, whether the [g]overnment has provided or will provide an adequate substitute."[99]

In *United States v. Ndanyi*,[100] the defense requested the production of a named civilian DNA expert at trial, but failed to provide before trial a synopsis of testimony or explain why the testimony was relevant and necessary. The military judge made a factual finding that the defense had engaged in deliberate delay and denied the defense request for the expert.[101] The CAAF held that the military judge did not err when he found that the defense request for funding of an expert was "not properly filed with the convening authority (no synopsis of testimony) nor with the court (not expeditiously filed with the judge)."[102] The court found that there was no constitutional error in the case because material and vital evidence was not denied the defense since the government's DNA evidence pertained to a peripheral matter in the case.[103]

Distinguish a Request for Expert Assistance

Ndanyi also addressed the related but distinct issue of a defense request for expert *assistance* in preparation for trial. The request for expert assistance to prepare for trial is an issue of fundamental fairness and due process; however, it does not entitle the accused to name an expert of his choice.[104] In *Ndanyi*, the defense requested a named civilian expert to assist in the preparation of its case. The court used a three-step test in determining whether the witness was necessary. "First, why is the expert assistance needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and [to] present the evidence that the expert assistant would be able to develop."[105] The court essentially found that the first two requirements were met in *Ndanyi*, but found that the third requirement was not met—there was no showing of unavailability or inadequacy of assistance from other sources.[106] The government had previously offered to provide a DNA expert from CID, but the defense rejected the offer because the g*overnment* had a civilian expert. The court held that this argument did not justify a civilian expert for the defense. In the usual case, the services available in the military are adequate.[107] Absent a showing that the expert offered by the government will be "unqualified, incompetent, partial, or unavailable," the defense request should be denied.[108]

Preclusion of Expert Testimony

The judge's preclusion of defense testimony can also raise Confrontation Clause concerns. In *United States v. Costello*,[109] the military judge precluded the testimony of a defense expert who would have challenged the suggestive interview techniques in a child sex abuse case. Doctor Ralph Underwager was not allowed to testify in the defense case about children's susceptibility to suggestion, the various forms of suggestion that could be employed, and the particular interview techniques in the case. The judge found that the probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the members. The Army Court of Criminal Appeals held that the exclusion was reversible error[110] and that:

> [T]here was no basis in fact for the judge's finding. Such expert evidence is widely recognized as relevant, reliable evidence that is "helpful" to juries in evaluating the coercive-

98. *Id.* R.C.M. 703(d).

99. *Id.*

100. 45 M.J. 315 (1996). Another issue in this case involved a defense request for the same named civilian expert to assist in preparation for trial. It appears that there was "some confusion as to whether the request submitted to the convening authority involved a request for expert assistance prior to trial or a witness at trial . . . ." *Id.* at 317. Because of the apparent confusion, the military judge addressed both issues on the record.

101. *Id.* at 321.

102. *Id.*

103. *Id.* at 321-22.

104. *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

105. *Ndanyi*, 45 M.J. at 319, *quoting* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (citing United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), a*ff'd*, 33 M.J. 209 (CMA 1991)).

106. *Ndanyi*, 45 M.J. at 319.

107. *See id.* at 320 (citing United States v. Garries, 22 M.J. 288 (CMA 1988)).

108. *Id.*

109. No. 9500014 (Army Ct. Crim. App. Apr. 21 1997).

110. *Id.* at slip op. 4.

> ness of factors to which children had been subjected. Such information is generally beyond the knowledge of nonprofessionals. This is similar in scientific validity to "syndrome" testimony associated with rape and sex abuse trauma, which enjoys wide judicial acceptance.[111]

The government argued that Doctor Underwager harbored personal biases against child victims.[112] The court, however, held that any attack on Doctor Underwager's personal views was a matter to be addressed on cross-examination.[113]

Assistance of Counsel

Though the idea is anathema to some, lawyers are the brains and backbone of our criminal adversarial system. Criminal defense attorneys must not only be physically present alongside the accused, but also play "the role necessary to ensure the trial is a fair one."[114] A lawyer's failure to render adequate legal assistance can deprive the accused of the effective assistance of counsel to which he is entitled.

To obtain a reversal of a conviction or a sentence on a claim of ineffective assistance of counsel, the accused must meet the two-part test established by the U.S. Supreme Court in *Strickland v. Washington*.[115]

> 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 reliable. Unless a defendant makes both showings, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.[116]

The *Strickland* standard establishes a high hurdle for an accused. To meet the first prong, deficiency, an appellant must demonstrate how counsel's performance fell below an objective standard of reasonableness *under prevailing professional norms*.[117] Defense attorneys are given wide latitude in making tactical decisions, because trial practice, in large part, is an art. The accused must overcome the *presumption* that the action might be considered cogent trial strategy. The "deficiency" prong prohibits 20/20 hindsight, but evaluates "counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*."[118]

The reasonableness of the attorney's actions often *cannot* be assessed without knowing what information the accused provided to his defense counsel. For example, an attorney may decide to forego a line of investigation because of facts the accused provided to him. In such a situation, inquiry into the communications between the accused and counsel are critical to a proper determination of reasonableness.[119]

Even if an error is determined to be professionally unreasonable, however, setting aside the conviction or sentence is not warranted unless the accused affirmatively proves prejudice (the second prong of *Strickland*).[120] Proving prejudice is more than focusing on outcome determination.[121] The test for prejudice is identical to the test for a *Brady*[122] discovery violation; "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[123]

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111. *Id.* (citing United States v. Banks, 36 M.J. 150 (C.M.A. 1992)).

112. *Id.*

113. *Id.*

114. Strickland v. Washington, 466 U.S. 668, 685 (1984).

115. *Id.*

116. *Id.* at 687.

117. *See id.* at 688.

118. *Id.* at 690 (emphasis added).

119. *See id.* at 691.

120. *See id.* at 693.

121. *See* Lockhart v. Fretwell, 506 U.S. 364 (1993).

122. Brady v. Maryland, 373 U.S. 83 (1963).

Death is Different—At Least in the Military

Earlier this year, in a surprising turn of events, the CAAF reversed its previous decisions in the death penalty case of *United States v. Curtis*[124] and set aside the sentence based on ineffective assistance of counsel.[125] The court summarily concluded, with strong dissents from Judges Sullivan and Crawford, that counsel's performance during the "sentencing hearing was deficient and that there is a reasonable probability that there would have been a different *result if all available mitigating evidence had been exploited by the defense.*"[126] The court's opinion is so brief[127] that it provides no other insight into its decision-making process.

Coincidentally, *Strickland* was a death penalty case.[128] The standard in a death penalty case, therefore, is no different than in any other case. The CAAF, however, in its brief per curiam opinion in *Curtis*, sets a competency standard that is far beyond what the Supreme Court described in *Strickland*. The CAAF essentially held that failure to *exploit all available mitigating evidence* is professionally unreasonable. Specifically, the CAAF was referring to counsel's failure to exploit the issue of voluntary intoxication.[129]

Trial attorneys *must* have broad latitude in making tactical decisions at trial. One of those important tactical decisions involves weighing and assessing all available evidence and defense theories and carefully selecting the manner and the method in which they will be presented. For the court to find fault with counsel for failure to exploit *all* available mitigating evidence, especially when it is apparent from the record that defense counsel was well aware of the evidence,[130] essentially strips the attorney of his discretion to engage in classically tactical legal decision-making. Were the CAAF to apply the *Curtis* standard to *all* courts-martial, the flood of reversals would be diluvian.

This being said, the CAAF certainly has not created a new standard for all courts-martial, but *has* created a higher standard for defense counsel in death penalty sentencing cases. Chief Judge Cox believes that counsel in death penalty cases need special training beyond that involved for ordinary trials—they must receive the unique training and develop the skills necessary "to know how to defend a death-penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed."[131] *Curtis* should be a lesson for government counsel even more than defense counsel—considerably more resources must be expended not only in training counsel, but also in funding defense experts, such as mitigation specialists, background investigators, psychiatrists, and psychologists.

The CAAF will likely get another chance to more fully explain its position on ineffective assistance of counsel and capital litigation when it reviews *United States v. Simoy*.[132]

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123. *Strickland*, 466 U.S. at 694 (citing United States v. Agurs, 427 U.S. 97, 104, 112-13 (1976)). This test was further described in *United States v. Bagley*, 473 U.S. 667 (1985). The Court also refers to the test for materiality of testimony made unavailable to the defense by government deportation of a witness, citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982).

124. 46 M.J. 129 (1997). This reversal occurred because of the new composition of the court (the addition of Judge Effron) and because Chief Judge Cox changed his original position.

125. *Id.* at 130. The decisions leading up to the CAAF's setting aside of the sentence are found at 44 M.J. 106 (1996); 33 M.J. 101 (C.M.A. 1991); 32 M.J. 252 (C.M.A. 1991); 38 M.J. 530 (N.M.C.M.R. 1993); and 28 M.J. 1074 (N.M.C.M.R. 1989). The court's earlier opinion on the issue of voluntary intoxication, authored by Judge Crawford, stated that "there [was] sufficient information in the record and allied papers on which to form an opinion as to trial defense counsel's effectiveness in dealing with the issue of intoxication." United States v. Curtis, 44 M.J. 106, 122 (1996). The court held that "counsel made a strategic decision not to present intoxication as a key factor in the killings but, rather, to refer to it in argument." *Id.* Additionally, the defense team may have been aware that juries often react with hostility to such a defense. *Id.* at 123.

126. *Curtis*, 46 M.J. at 130 (emphasis added).

127. The opinion is one page in length.

128. *See* Strickland v. Washington, 466 U.S. 668 (1984).

129. *See* United States v. Curtis, No. 94-7001/MC, slip op. at 3 (C.A.A.F. Sept. 11, 1997). This is gleaned from the dissenting opinions of Judges Sullivan and Crawford, as well as from Chief Judge Cox's concurring opinion to deny the government's request for reconsideration of the sentence reversal. *See Curtis*, 46 M.J. at 130-32. In Chief Judge Cox's view, trial defense counsel in a death penalty case need special training and skills to know how to defend a capital case. He wrote, "A quick look at this case reveals that the defense team, although experienced in courts-martial, lacked any experience in the trial of a death penalty case." *Curtis*, No. 94-7001/MC, slip op. at 3.

130. *See Curtis*, 46 M.J. at 130. Judge Sullivan and Judge Crawford both indicate that the evidence the court refers to is evidence of the appellant's voluntary intoxication. Judge Sullivan avers in his dissent that defense counsel "expressly referred to appellant's intoxication in his findings argument" and that he opted to stress the appellant's "positive character traits and the aberrational nature of his conduct on the night in question . . . ." *Id.* at 130. Judge Sullivan wrote that counsel's decision to "obliquely reference appellant's voluntary intoxication also cannot now be legally questioned." *Id.*

131. *Curtis*, No. 94-7001/MC, slip op. at 3.

132. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

Contrary to the holding in *Curtis*, the Air Force Court of Criminal Appeals concluded that "[a] defense counsel may tactically choose not to put on any mitigation evidence whatsoever in a capital case and still meet the standard of competence set out in *Strickland*."[133] In *Simoy*, the defense counsel called no witnesses and put on no evidence in mitigation during the sentencing phase of the trial. The CAAF may well reverse this case based on its decision in *Curtis*, hopefully with a more detailed explanation.[134]

Ineffective Assistance During Post-Trial

Post-trial ineffective assistance of counsel is a fecund area for appellate defense counsel, not only in cases where defense counsel fail to submit matters,[135] but also in cases involving substitute counsel and cases where clemency matters are actually submitted. Though the CAAF professes a Sixth Amendment *Strickland* standard in evaluating counsel's post-trial performance, recent cases have broadened defense counsel's duties, found counsel deficient, and second-guessed tactical decisions.

Meaningful Discussions

In *United States v. Hicks*,[136] the contents of defense counsel's clemency package were in issue. The defense counsel primarily sought to minimize confinement and wished to portray "a viable picture" of the appellant.[137] Two letters authored by the accused's supervisors contained some unfavorable information about Hicks but requested that he be released early from his four-month sentence to confinement. One letter also ambiguously requested "revocation" of appellant's punitive discharge.[138] The staff judge advocate erroneously reported in the addendum to the post-trial recommendation that the supervisor requested a "suspension of the bad conduct discharge."[139]

Hicks claimed in his post-trial affidavit that "he did not remember seeing these unfavorable letters."[140] The trial defense counsel responded in his affidavit that he discussed the letters with Hicks and that Hicks agreed to their submission. Apparently, Hick's defense counsel concluded that discussing the *substance* of the letters with his client was professionally reasonable. The Air Force Court of Criminal Appeals agreed and held that "[t]he fact that a tactic fails to achieve its intended objective does not reflect on the competence of the attorney who attempts it."[141]

The CAAF held otherwise and found that counsel's failure to "*adequately* explain the letters to his client" and his failure to notify the convening authority that one of the letters recommended that Hicks receive an administrative discharge instead of a bad conduct discharge was "deficient" performance within the meaning of *Strickland*.[142] It further observed that:

> Defense counsel should have served as more than a robot or a clearing house, and should have discussed with appellant the two letters, as well as their pros and cons . . . . Additionally, CPT C should have urged the convening authority, *who was a fighter pilot, to consider that clemency would assist the servicemembers on the maintenance line by giving them additional help*.[143]

Despite its conclusion that counsel was deficient, the court ultimately held that counsel's performance did not prejudice the outcome of the case.[144]

133. *Id.* at 603.

134. Numerous other issues exist in the case for the CAAF to scrutinize. *See generally id*.

135. In *United States v. Sylvester*, 47 M.J. 390 (1998), the civilian defense counsel met with the convening authority post-trial to discuss his client's clemency matters. He then failed to submit R.C.M. 1105 or 1106 matters. *See* MCM, *supra* note 9, R.C.M. 1105, 1106. The CAAF held that this omission was not deficient under the circumstances of the case. *Sylvester*, 47 M.J. at 393. While it may have been the preferred "matter of practice for counsel to have supplemented or memorialized this personal presentation to the convening authority with a written submission under R.C.M. 1105 or 1106, there [was] no statutory or regulatory requirement for counsel to do so." *Id.*

136. 47 M.J. 90 (1997).

137. *Id.* at 93.

138. *Id.* at 91-92.

139. *Id.* at 92.

140. *Id.*

141. *Id*.

142. *Id.* at 93 (holding that the tactical decision to submit the letters was not "deficient") (emphasis added).

143. *Id.* (emphasis added).

The CAAF abruptly concluded that counsel did not engage in *sufficiently meaningful* discussions with his client. Other than observing that counsel needed to discuss the "pros and cons," the court gave little supplementary guidance. The CAAF also faulted counsel's decision not to make a more direct appeal to the convening authority and, in so doing, ignored the first prong of *Strickland* and the accompanying strong presumption of competence afforded counsel in tactical decision-making. The CAAF metes out these judgments of professional incompetence in a peremptory fashion.

Contacts with the Accused

A similar scenario arose in *United States v. Hood*. [145] The accused was convicted of two specifications of false swearing and larceny. Since trial defense counsel was leaving the military, a substitute defense counsel was appointed to represent the accused post-trial. The substitute counsel properly established an attorney-client relationship with the accused on the day of trial. Substitute counsel then received service of the post-trial recommendation and submitted a timely and thorough clemency package, which underscored the poor health of the accused's mother and the accused's problem-filled background. [146]

On appeal, Hood claimed in his sworn affidavit that his substitute defense counsel never contacted him and never discussed the contents of the clemency package with him.[147] Hood specifically complained that his counsel submitted a letter from his mother, which criticized some of the military members involved in the trial.[148] He also complained that his counsel submitted a "rough draft" of his unsworn statement, which contained typographical errors.

The Army Court of Criminal Appeals found that Hood had not overcome the presumption of competent counsel (the first prong of *Strickland*), observing that substitute counsel submitted a "detailed, well-articulated, and persuasive summary of clemency matters most favorable to the appellant. He enclosed several letters, to include the rough draft of a detailed personal statement by the appellant, and a handwritten letter from the appellant's mother."[149] Because the appellant provided nothing for the court to review, "his claim [was] decided against him without inquiry of the trial defense counsel."[150]

In the absence of an affidavit from substitute counsel to the contrary, the CAAF chose to accept as true the appellant's version concerning his lack of contacts with his counsel.[151] Thus, the CAAF disagreed with the Army court and held that this "failure to consult with appellant and submission of clemency materials to which appellant objected was deficient performance within the meaning of *Strickland v. Washington*."[152] The court held, however, that there was no prejudice because the appellant did not identify any additional matters he would have otherwise submitted and did not show a "reasonable probability" of more favorable action by the convening authority if the letter had not been submitted.

Practice Tips for Counsel

Before the release of *Hicks* and *Hood*, most defense counsel understood that failure to submit clemency matters, absent a signed, written waiver from the accused, constituted solid grounds for a new review and action based on post-trial ineffective assistance of counsel. Defense counsel were cognizant of few legal minefields, however, when they submitted well-articulated clemency matters, as in *Hicks* and *Hood.*

Defense counsel in both *Hicks* and *Hood* were found "deficient" in communications with their clients,[153] despite the fact that counsel in both cases presented well-focused clemency packages with unitary themes. The counsel in *Hicks* focused on a reduction in confinement, and the counsel in *Hood* focused on the accused's troubled family background. In each case, coun-

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144. *Id.*

145. 47 M.J. 95 (1997).

146. *Id*. at 96-98.

147. *Id*. at 97.

148. *Id.* at 96-97. Substitute counsel submitted three letters from Hood's mother; however, Hood only complained that *one* of the letters from his mother was harmful to his case. The named letter thanked the trial defense counsel, her son's two escorts, and two other NCOs. "She then complained of the 'rudeness and lack of respect' shown by two captains, a first sergeant, a sergeant, and a 'chief.' Appellant's mother complained that they snickered, laughed, and made snide remarks in her presence during the trial and photographed her son while he was handcuffed." *Id.* at 96.

149. United States v. Hood, No. 95000624, slip op. at 2 (Army Ct. Crim. App. Dec. 22, 1995).

150. *Id.*

151. *Hood*, 47 M.J. at 97. The CAAF made no effort to obtain an affidavit from defense counsel, though it knew that the lower court did not order an affidavit. The CAAF's cavalier finding of "deficiency" in such a scenario ignores the professional and ethical repercussions for counsel in the field.

152. *Id.*

sel made professionally reasonable tactical decisions to submit items that were not entirely favorable, but which supported their respective themes.

Strickland dictates that counsel's performance be viewed, not in hindsight, but at the *time* of counsel's conduct.[154] The defense counsel in these cases were not aware of any procedural rule, policy, or case law which dictated the standard of "meaningful discussions," which the CAAF set forth for the first time in its decision.[155] In essence, contrary to *Strickland*, the CAAF has created a higher standard for military defense counsel in post-trial matters. The CAAF has also eased the way for accuseds to allege a new error—failure to conduct meaningful discussions. To combat this, the Army court should order an affidavit from defense counsel before finding that counsel was deficient.

How much contact with an accused is "meaningful" contact? What duties do defense trial practitioners now have toward their clients when submitting post-trial matters? Until recently, the accused made five decisions concerning his court-martial: what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal.[156] Now, it appears that the specific contents of post-trial clemency matters can be added to this list of decisions for the accused. Counsel should advise that "the final decision as to what, if anything, to submit rests with the accused."[157]

Since the client has the final word on what to submit, the defense counsel's best approach is to develop a clemency plan with the client. Counsel should confer with the accused as the packet develops and document the process. Counsel should show, mail, or fax the accused a copy of every document to be submitted to the convening authority. If "eyes on" is not feasible, counsel should ensure that she thoroughly explains the "pros and cons" of the information and should make a memorandum for record of the events. Counsel should document all post-trial communications in the case file. Should an allegation arise that counsel did not make required communication, counsel will then be able to provide a detailed response.

Ineffective Assistance of Counsel and the Staff Judge Advocate's Post-Trial Recommendation

Another area fraught with peril for both defense counsel and staff judge advocates (SJAs) is post-trial recommendations. In *United States v. Wiley*,[158] the CAAF declined to determine whether defense counsel was deficient for failing to note an error in the SJA's addendum, but held that there was no prejudice.[159] Although a defense counsel's failure to respond to errors in a PTR can constitute deficiency in some cases, the *Wiley* court decided not to make a deficiency determination and moved directly to the prejudice prong of *Strickland*. The CAAF determined that Wiley suffered no prejudice because he received a two-year sentence reduction under his pretrial agreement, and the same convening authority who approved the pretrial agreement also acted on the sentence.

Judge Effron dissented, concluding that both prongs of *Strickland* were met. His dissent focused on the fact that both the appellant and the convening authority relied on their respective lawyers to provide them with competent, accurate legal counsel. Neither received such counsel. The existence of a pretrial agreement in the case, and the fact that the accused "beat the deal," had no bearing on the issue. "A pretrial agreement does not nullify clemency proceedings."[160] In this case, the errors substantially exaggerated the evidence actually pre-

153. The court summarily determined that the substitute defense counsel in *Hood* did not contact his client. Had the court found that contact actually occurred, however, the outcome may have been the same, considering the *Hicks* opinion.

154. Strickland v. Washington, 466 U.S. 668, 690 (1984).

155. *See* United States v. Lewis, 42 M.J. 1, 4. (1995). The CAAF cited *Lewis* in both opinions; however, *Lewis* dealt with counsel's unilateral *refusal* to submit the accused's handwritten clemency letter. *See id*. The CAAF also cited *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994), in both cases. *MacCulloch* dealt with a civilian defense counsel who submitted a letter that the accused apparently provided to his counsel. The letter, ironically authored by defense counsel to the accused's mother on a prior occasion, undercut the accused's plea for clemency because it clearly implicated the accused in more crimes than he was charged. *Id*.

156. *MacCulloch*, 40 M.J. at 239 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2(a) (3d ed. 1993)).

157. *Lewis*, 42 M.J. at 4.

158. 47 M.J. 158 (1997). The accused was charged with rape, sodomy, indecent acts, and indecent liberties with his seven-year-old stepdaughter. He pleaded guilty, with a pretrial agreement, to indecent acts and indecent liberties, but not guilty to rape and sodomy. The rape and sodomy charges were withdrawn after the military judge accepted the plea. The post-trial recommendation erroneously summarized the evidence supporting the original charges of rape and sodomy.

159. *Id.* at 160. In United States v. Strickland, the Supreme Court said:

> [A] court need not determine her counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure the ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. 668, 697 (1984).

sented at trial. The SJA's "summary was inaccurate and unfocused" and the withdrawn charges were "untried and untested."[161] In essence, Judge Effron noted, the convening authority was misled.

Counsel should *never* presume that the PTR and addendum contain accurate information and afford them only a cursory reading. Counsel should directly address and clarify errors and misleading information about the accused. In addition, defense counsel should avoid the temptation to "overlook" error in the hopes that the appellate courts will correct it and attribute the deficiency to the government. For officers of the court, this maneuver is unacceptable and ultimately may harm the appellant. Errors that mislead the convening authority can potentially result in a new review and action and could also result in a finding that trial defense counsel was ineffective.

Substitute Defense Counsel and 1106 Matters

An accused has a right to submit clemency matters under R.C.M. 1105;[162] however, this right is separate from the accused's right to submit matters in response to the SJA's PTR.[163] Though distinct, these rights are usually "exercised simultaneously under the time-limit provisions of these rules."[164] When the trial defense counsel has been relieved or is not reasonably available, R.C.M. 1106(f)(2) provides that "substitute counsel to represent the accused shall be detailed by an appropriate authority."[165] When R.C.M. 1105 and 1106 matters are not submitted simultaneously, problems may arise, particularly when the trial defense counsel leaves the service and the PTR has not yet been served. The CAAF has closely scrutinized the substitute counsel arena because accuseds in some recent cases have been left with virtually *no* counsel to represent them post-trial. [166]

When substitute counsel is not appointed or does not establish an attorney-client relationship with the accused, the accused need not meet *Strickland's* cumbrous test. In *United States v. Howard*, [167] defense counsel left active duty before Howard's post-trial matters were submitted. Substitute counsel was appointed for representation, but the substitute counsel never contacted Howard or entered into an attorney-client relationship, as R.C.M. 1106(f)(2) requires.[168] Substitute counsel accepted service of the record of trial and indicated that he would submit clemency matters. Counsel then submitted a form (which contained two check marks) and a short handwritten note Howard had provided to his original defense counsel.[169] Six months later, substitute counsel received the post-trial recommendation and did not comment.

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160. *Wiley*, 47 M.J. at 161.

161. *Id.*

162. MCM, *supra* note 9, R.C.M. 1105. These matters can consist of allegations of legal error, portions of evidence offered at trial, matters in mitigation, and clemency recommendations by any person. *Id*.

163. *See id*. R.C.M. 1106(f)(4). Rule 1106(f)(4) states: "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter." *Id*. The SJA's PTR must be served on defense counsel, who has the opportunity to respond. *See also* United States v. Hickock, 45 M.J. 142, 145 (1996) (citing United States v. Goode, 1 M.J. 3 (C.M.A. 1975)).

164. *Hickock*, 45 M.J. at 145 (referring to R.C.M. 1106(f)(5) and R.C.M. 1105(c)(1)). *See* MCM, *supra* note 9, R.C.M. 1105(c)(1), 1106(f)(5).

165. MCM, *supra* note 9, R.C.M. 1106(f)(2).

166. *See Hickock*, 45 M.J. at 143-44. In *Hickock*, the CAAF agreed that a new review and action were required. The appellant's trial defense counsel left active duty, and no substitute counsel was appointed. "[T]here was no indication anywhere in the record that substitute defense counsel was appointed to pursue the accused's post-trial interests . . . and no indication, either, that the SJA's recommendation was served on any counsel representing the accused, as was required by R.C.M. 1106(f)(1) and (2)." *Id* at 143. The court observed that:

> Unfortunately, because of apparent omissions of several persons—the detailed defense counsel, to ensure continuity of representation; the supervisory defense counsel, to provide substitute counsel; and the SJA, to serve his recommendation on defense counsel—the accused was entirely unrepresented post-trial except for the clemency petition his counsel had filed in August.

Id. at 144.

Contrast *Hickock* with *Hood*, where the CAAF found that substitute counsel established an attorney-client relationship on the record. United States v. Hood, 47 M.J. 95, 96 (1997). *See* United States v. Miller, 45 M.J. 149 (1996). In *Miller*, substitute counsel was appointed, but he never formally entered into an attorney-client relationship with the appellant. The court held that the error can be tested for prejudice. *Id*. at 150. No error occurred, since the original trial defense counsel submitted "a rather substantial clemency package to the convening authority . . . ." *Id.*

167. 47 M.J. 104 (1997).

168. *See* MCM, *supra* note 9, R.C.M. 1106(f).

169. *Howard*, 47 M.J. at 105.

The CAAF held that Howard essentially had no post-trial attorney and that he did not have to meet *Strickland's* two-prong test. The court found that, since counsel made no contact and submitted nothing on behalf of his client, there was a "colorable showing of possible prejudice" that warranted a new review and action. "The appropriate test for prejudice . . . is set forth in Article 59(a), UCMJ as follows: a finding or sentence of a court-martial may not be held incorrect on the grounds of an error of law unless the error materially prejudices the substantial rights of the accused."[170]

Practice Tips for Counsel

Considering the facts in the case, the court's holding in *Howard* was none too surprising. In general, this area is fraught with potential legal errors. Substitute counsel are often unfamiliar with individual cases and have not met their clients when they are appointed. In addition, the clients are often in jail or on excess leave. Senior defense counsel not only must ensure that substitute counsel are appointed, but also must confirm that defense counsel are forging attorney-client relationships. A lawyer's failure to form an attorney-client relationship with his client violates R.C.M. 1106(f)(2) and breaches his legal and ethical duty to his client.[171]

Staff judge advocates, chiefs of justice, and trial counsel must also be aware that when an accused alleges ineffective assistance of counsel in a post-trial submission, it is incumbent on the government to "inform defense counsel and [to] resolve the matter."[172] In *United States v. Rickey*,[173] the accused complained, in a letter attached to the clemency petition, that his two detailed defense counsel were unprepared to assume the case and lacked the time and energy it required. The SJA, in his addendum, noted the accused's comments but "penned 'I disagree' and submitted the record to the convening authority for action that day."[174] The Army court held that the hurried flourish of the SJA was insufficient. The SJA's personal disagreement with the accused's assertions did not resolve the dilemma.

The SJA bears the responsibility to ensure that the accused is afforded conflict-free counsel. This means that the SJA must ensure that defense counsel discuss and resolve issues with their clients before continuing in their representation. After investigation of the matter, if the SJA determines that a conflict exists, she should advise the senior defense counsel, who must in turn ensure that substitute defense counsel is appointed to represent the accused post-trial.

Discovery

An accused in the military enjoys broad discovery rights under Article 46, R.C.M. 701, and military and Supreme Court case law.[175] These broad discovery rights exist because they prevent "trial by ambush" and further military efficiency and because an inherent imbalance exists between the prosecution and the defense in their abilities to obtain evidence. The trial counsel, as an agent of the commander, has ready access to materials and relevant facts; the defense often does not. Defense counsel's reliance on the prosecution for such evidence places the accused in a vulnerable position and concomitantly imposes a special obligation on trial counsel to transcend the adversarial role and to ensure that justice is served.

Last year, in *United States v. Sebring*,[176] the Navy-Marine Corps Court of Criminal Appeals acknowledged this inherent imbalance and recognized the Navy drug-testing laboratory as an arm of the prosecution.[177] The court held that the trial counsel's lack of actual knowledge of evidence favorable to the defense did not excuse him from his obligation[178] under *Brady v. Maryland*.[179] The court observed that, though the defense made a specific request for all quality control reports and records prior to trial, the trial counsel was unaware of the report

170. *Id.* at 106.

171. *See Miller*, 45 M.J. at 151.

172. United States v. Rickey, No. 9501597 (Army Ct. Crim. App. Sept. 8, 1997).

173. *Id.*

174. *Id.* at slip op. 2.

175. *See* UCMJ art. 46 (West 1995); MCM, *supra* note 9, R.C.M. 701.

176. 44 M.J. 805 (N.M. Ct. Crim. App. 1996).

177. *Id.* at 808.

178. *Id*.

179. 373 U.S. 83, 85 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution"). Essentially, *Brady* requires the prosecution to disclose only evidence that is both favorable to the accused and "material either to guilt or to punishment;" the decision is based on a requirement of due process. *Id.* at 87. *See* United States v. Bagley, 473 U.S. 667 (1985) (holding that the *Brady* rule covers impeachment evidence as well as exculpatory evidence and formulating a new test for materiality); United States v. Agurs, 427 U.S. 97, 102 (1972) (extending the *Brady* rule to cover instances where the defense had made no request for evidence).

and, thus, did not disclose it. The court held that the trial counsel had an obligation to search for favorable evidence known to others who act on the government's behalf. The court imposed this duty of due diligence on the trial counsel because the laboratory was clearly "acting on the government's behalf" in conducting tests "to determine the presence of controlled substances."[180] The court held that this affirmative duty exists,[181] notwithstanding the language in R.C.M. 701(a)(6),[182] which appears to limit the duty of disclosure to evidence actually "known" to the trial counsel.

Trial counsel also have an affirmative obligation to provide exculpatory information in related cases. Such discovery can be problematic for trial counsel, as failure to turn over exculpatory information from a related case could result in reversal on appeal. *United States v. Romano*[183] involved three companion cases arising out of the same incident. An officer (First Lieutenant Romano) and an enlisted member (Airman Mucci) were alleged to have engaged in an improper relationship. They were also charged with conspiring with the third accused (Sergeant Mitchell) to cover up the incident. At Sergeant Mitchell's Article 32 investigation, two individuals (Major Northup and Master Sergeant Uloth) testified that Airman Mucci admitted to them that she lied when she professed to have dated the accused. Airman Mucci testified at the accused's trial that she dated the accused.[184]

The government representative in Sergeant Mitchell's Article 32 investigation was also the assistant trial counsel in *Romano*.[185] Notwithstanding a defense discovery request for exculpatory evidence and "[a]ny handwritten, typed, or recorded statements by . . . any potential witnesses" and "[a]ny known evidence tending to diminish [the] credibility of witnesses," the trial counsel did not provide the defense with the statements from either witness at Sergeant Mitchell's Article 32 hearing.[186]

The CAAF reversed the case and held that the undisclosed testimony of one of the witnesses at Sergeant Mitchell's Article 32 hearing was critical to the defense.[187] "The central issue in the case was the credibility of the witnesses."[188] The witness did not know either the accused or Mucci and apparently had no reason to lie during testimony. The CAAF held that because the defense was denied such a critical witness, the verdict was not "worthy of confidence," and there was a "reasonable probability of a different verdict had this evidence been made available."[189]

The Army Court of Criminal Appeals recently held that a trial counsel's duty to disclose evidence does not extend to evidence in "other government files unrelated to the investigation of that particular accused's misconduct."[190] In *United States v. Williams*,[191] Private First Class (PFC) F was driving the accused somewhere, and they got into a verbal altercation with the people in another car. The cars stopped, and the passenger from the other car, Mr. B, got into a fistfight with the accused. Mr. B and the accused fell to the ground and struggled. As they faced each other, with Mr. B on top, Mr. B felt several blows on his back. When he got up, he realized that he had been stabbed eight times. The accused was charged with aggravated assault. Mr. B testified at trial that he thought the accused stabbed him; however, on three occasions before trial, he told police and medical personnel that he thought the female (PFC F) stabbed him.

One month after the stabbing, trial counsel had not been able to discover the identity of the other person (PFC F) who was in the car with the accused. At the same time, in an unrelated tire-

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180. *Sebring*, 44 M.J. at 805, 808.

181. *Id*.

182. *See* MCM, *supra* note 9, R.C.M. 701(a)(6). This is the military's version of the *Brady* rule. This rule imposes a duty on the trial counsel to disclose favorable information known to the trial counsel "as soon as practicable," irrespective of a defense request. *Id*. The favorable evidence must "reasonably tend to negate the guilt of the accused . . . [r]educe the degree of guilt . . . or [r]educe the punishment." *Id*.

183. 46 M.J. 269 (1997).

184. *Id*. at 272.

185. United States v. Romano, 43 M.J. 523, 526 (A.F. Ct. Crim. App. 1995).

186. *Id*. at 526. "The assistant trial counsel made extensive responses to these discovery requests, but he did not supplement his disclosures to include the Northup and Uloth testimony. Appellant did not learn about this testimony until after trial." *Id*.

187. *Romano*, 46 M.J. at 273.

188. *Id.*

189. *Id.*

190. United States v. Williams, 47 M.J. 621 (Army Ct. Crim. App. 1997).

191. *Id*.

slashing investigation, Specialist C reported to the military police that he thought PFC F slashed his tires because she "always carries a knife."[192] Private First Class F denied involvement, but the police seized a knife in a consent search of her room. Two weeks later, trial counsel opined that there was insufficient evidence to title PFC F for damage to SPC C's property. One month later, at the conclusion of the accused's Article 32 hearing, the government still had not identified PFC F as the other person in the car with the accused. The defense did not call PFC F as a witness at the Article 32 investigation.

The defense submitted a discovery request just before the Article 32 investigating officer completed his report. The government listed PFC F as a witness, but the trial counsel did not remember the tire slashing investigation and did not list it in the discovery response.[193] The defense's theory at trial was that PFC F stabbed Mr. B.

The Army court held that the trial counsel had no duty to locate and to search an unrelated military police file "in which PFC F was listed as a witness, and not a suspect."[194] The duty to disclose favorable defense evidence "only includes information which the trial counsel has personal knowledge of or is known to criminal investigators or others [who] are working on *the case* being investigated and prosecuted."[195] The court noted, however, assuming the trial counsel did have such a duty, the evidence in this case was not "material."[196]

The accused has due process rights, but these rights do not impose an unrealistic duty on trial counsel to do the defense's job. Trial counsel are not omniscient and are not responsible for finding and turning over every shred of possibly favorable defense evidence. The government's only obligation is to disclose evidence that is material to either guilt or punishment. Defense counsel cannot rely on trial counsel to ferret out exculpatory information. When signals are triggered, the defense counsel must follow through. Following through means making specific discovery requests for any other information that may logically follow.

Mental Responsibility

Sanity boards took center stage in the area of mental responsibility this year. *United States v. James*[197] is a reminder to trial counsel that it may be wise to join the defense in a request for a sanity board; otherwise, the government might face reversible error. In *James*, the defense requested a sanity board based on the accused's peculiar behavior with her defense counsel.[198] Trial counsel, instead of joining in the motion, arranged for the accused to undergo a mental status evaluation. The counselor who performed the evaluation was not a physician, psychiatrist, or psychologist. The evaluation took thirty minutes and consisted of a one-page "check the block" form.

A good faith request for a sanity board, which is not frivolous, should be granted.[199] The Army appellate court held that the defense request met this requirement.[200] Using the analytical framework set forth in *United States v. Collins*,[201] the court then determined that the mental status evaluation was not in any way the equivalent of a sanity board under R.C.M. 706.[202] The court observed that the person who conducted the mental status evaluation did not even meet the requisite professional qualifications. Rule 706(c)(1) requires that all members of a sanity board be either physicians or clinical psychologists.[203] Additionally, the Army court identified four other conditions (listed in *Collins*) that also were not met: (1) the government did not provide the examiner with a copy of the defense motion, and the

192. *Id.* at 624.

193. *Id*.

194. *Id.* at 626.

195. *Id.* (emphasis in original).

196. *Id*. Evidence is material if there is a "reasonable probability" that the result would have been different. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether, in its absence he received a fair trial, understood as resulting in a verdict worthy of confidence." United States v. Romano, 46 M.J. 269, 272 (1997), *quoting* Kyles v. Whitley, 514 U.S. 419, 434-38 (1995).

197. 47 M.J. 641 (Army Ct. Crim. App. 1997).

198. *Id*. at 642. The defense counsel felt that the accused was incoherent in responding to questions and that she was unable to make the necessary decisions regarding the defense of her case.

199. *See* United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985).

200. *James*, 47 M.J. at 643.

201. 41 M.J. 610, 612 (Army Ct. Crim. App. 1994).

202. *James*, 47 M.J. at 643. *See* MCM, *supra* note 9, R.C.M. 706.

203. MCM, *supra* note 9, R.C.M. 706(c)(1).

examiner, therefore, was not apprised of the reasons for doubting the mental capacity of the accused; (2) the examiner made no attempt to perform any "in-depth forensic evaluations of the sort contemplated by R.C.M. 706;"[204] (3) the examiner had no familiarity with forensic evaluation or participation in previous sanity boards; and (4) there was no "specific psychiatric testimony concerning the appellant's capacity to understand the nature of criminal proceedings and to cooperate in her defense at a court-martial."[205] The court returned the case for a sanity board and a *DuBay*[206] hearing to resolve the issue of the appellant's mental capacity to stand trial.

It is hard to imagine a case in which defense counsel might ever willingly agree to such a mental status evaluation instead of a sanity board without litigating the issue on the record. The military judge must grant a good faith, non-frivolous request for a sanity board, and no defense counsel should settle for less. The comments of the accused in a mental status evaluation are not privileged, as they are in a sanity board inquiry. Defense counsel take a great risk in placing the accused in such a precarious position.[207] Any imprudent or ambiguous comment the accused makes could come back to haunt the defense at trial.[208]

It is less complicated and less costly for a sanity board to determine the competency of an accused to stand trial *before* trial, rather than *after* trial. Trial counsel should consult with their chiefs of justice and determine whether the circumstances warrant joining the defense counsel in the motion. Cleverness and cutting corners will, in the long run, not be rewarded in the area of sanity boards.

When an Article 32 investigating officer recommends that the accused undergo a psychiatric examination, the government and the defense counsel should pay close attention. In *United States v. Breese*,[209] a case tried in 1991, the investigating officer noted in the report that the accused "appear[ed] to have a problem with his ability to control his actions."[210] Neither the defense counsel nor the trial counsel pursued the issue. The seemingly benign comment precipitated the "tortured appellate history of the case."[211] As a result of the comment, the Court of Military Appeals found that, "[a]bsent any indication in the record that any such examination was conducted or any further action was taken on this recommendation, we believe further inquiry concerning this allegation must be undertaken before we can continue our review of this case."[212] A much belated sanity board was conducted, resulting in the board opinion that the appellant had alcohol problems. The CAAF noted that this was "a fact painfully obvious from a reading of the record of trial."[213]

Though the CAAF ultimately held that it was "persuaded beyond a reasonable doubt that [the] evidence would not have persuaded the trier of fact to reach a different result as to appellant's guilt,"[214] the government can hardly be said to have won the case. Rule 706 allows not only defense counsel, but also trial counsel, commanders, and investigating officers who believe that the accused lacks mental capacity or mental responsibility, to raise the issue so that a sanity board may be ordered.[215] Trial counsel should clarify ambiguous issues concerning capacity or mental responsibility on the record with the military judge and defense counsel. Defense counsel need not be the party to raise the issue, but he is often in the best position to know whether an accused's behavior warrants further examination. Exposing and resolving a capacity issue on the record *before trial*, even when initiated by trial counsel, is generally the best avenue of approach.

204. *James*, 47 M.J. at 643.

205. *Id.*

206. United States v. Dubay, 37 C.M.R. 411 (1967).

207. *See* MCM, *supra* note 9, MIL. R. EVID. 302. The general rule is that anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him. *See id.* The accused may claim this privilege notwithstanding the fact that he may have been warned of the rights provided by MRE 305. *See* MCM, *supra* note 9, MIL. R. EVID. 305. The accused can waive this privilege when he first introduces into evidence such statements or derivative evidence.

208. *See* United States v. Toledo, 25 M.J. 270 (C.M.A. 1987) (indicating that the defense may request a physician, psychotherapist, or psychologist be made part of the "defense team" under MRE 502, to be covered by the attorney-client privilege). Comments not covered under the attorney-client privilege can come back to haunt the accused.

209. 47 M.J. 5 (1997).

210. *Id.* at 6.

211. *Id.* The rest of the "tortured appellate history" can be found at 41 M.J. 108 (C.M.A. 1994) and 41 M.J. 213 (A.C.M.R. 1994).

212. United States v. Breese, 41 M.J. 108, 109 (C.M.A. 1994) (petition for grant of review-summary disposition).

213. *Breese*, 47 M.J. at 6.

214. *Id.*

215. *See* MCM, *supra* note 9, R.C.M. 706.

In *United States v. English*,[216] the government once again contested the need for a sanity board at trial, "won" at the trial level, but lost on appeal. In fact, the CAAF went so far as to call into question the very concept of an "adequate substitute" for a sanity board.

The accused was in the Marine Corps and apparently wanted out. He sought mental health treatment for feelings of depression and suicidal thoughts. Between his second and third visits to the mental health facility, he made a suicidal gesture.[217] The government thought of a quick way to get the accused out and charged him with malingering by feigning a mental illness, based on the diagnoses of his treating psychiatrist and psychologist. The government's theory of the case rested on the testimony of the Navy psychiatrist and psychologist who initially treated the accused for his feelings of depression.

Defense counsel requested a sanity board, and the government "argued that the equivalent of an R.C.M. 706 board already had been conducted by the combined efforts of two Navy doctors."[218] The military judge agreed with the trial counsel. Based on the judge's ruling, the defense counsel moved to preclude either witness from testifying, on the grounds that an accused's statements made during an R.C.M. 706 board were privileged and could not be disclosed over his objection.[219] The military judge denied the defense motion.

The CAAF held that the military judge erred in deeming the accused's previous mental health evaluations a sanity board substitute.[220] They distinguished *English* from *United States v. Jancarek*,[221] in which the Army Court of Military Review stated that, "in a proper case, there can be a substitute for a sanity board . . . ."[222] The doctors evaluating Private First Class English focused solely on treatment, not on "the judicial standards of mental capacity or responsibility."[223] The *Jancarek* court recognized the need to limit access to privileged information revealed during an R.C.M. 706 board. The CAAF noted in *English* that "the communications between appellant and the mental health professionals provided the foundation for the criminal charge against him."[224] A mental health examination can be compelled under a sanity board because the question is not whether the accused committed the crime, but whether the accused "possessed the requisite mental capacity to be criminally responsible therefore, *if other proof establishes that he did do them*."[225]

The CAAF ultimately left until another day the question of whether there can ever be an adequate substitute for a sanity board, considering the unambiguous language in R.C.M. 706. When trial counsel decide to argue that a mental health evaluation is an adequate substitute for a sanity board, defense counsel should cite *English* and posit that the trial counsel must show that the mental examination meets the purpose of both R.C.M. 706 *and* MRE 302. Defense counsel should also vigorously argue that no mental examination could ever substitute for a formal sanity board because R.C.M. 706 contains unambiguous requirements. Before litigating the motion at all, however, trial counsel would do well to consider the consequences of King Pyrrhus' victory.[226]

In addition to addressing sanity board issues, the CAAF also elucidated the standard of proof for the affirmative defense of lack of mental responsibility in *United States v. DuBose*.[227] Article 50a[228] and R.C.M. 916(k)[229] impose on the accused the burden of proving lack of mental responsibility at the time of the crime by clear and convincing evidence. In *DuBose*, the Air Force Court of Criminal Appeals attempted to place an even greater burden on the accused, however, when it erroneously

216. 47 M.J. 215 (1997).

217. *Id.* at 216. The accused took an overdose of non-prescription pain medication.

218. *Id.*

219. *Id.* at 217.

220. *Id*. at 218.

221. 22 M.J. 600 (A.C.M.R. 1986).

222. *Id*. at 603, *quoted in English*, 47 M.J. at 218.

223. *English*, 47 M.J. at 218.

224. *Id.*

225. *Id.* at 219, *citing* United States v. Babbidge, 40 C.M.R. 39 (1969) (quoting United States v. Albright, 388 F.2d 719, 725 (4th Cir. 1968)) (emphasis added).

226. *See supra* note 1.

227. 47 M.J. 386 (1998).

228. UCMJ art. 50a (West 1995).

229. MCM, *supra* note 9, R.C.M. 916(k).

held that the defense must present both subjective and *objective* evidence to meet this burden.[230]

In *DuBose*, the accused was charged with making a bomb, and he presented the affirmative defense of lack of mental responsibility.[231] In support of his case, the defense presented the testimony of three experts, as well as corroborating evidence from his squad leader concerning his irregular behavior on the day of the offense. Despite this evidence, DuBose was convicted. The Air Force Court of Criminal Appeals affirmed and held that, "in order for the defense to pertain, there must be *clear and convincing objective* evidence, not merely *subjective medical opinion*, that the appellant at the time of the offense either did not know what he was doing or did not know what he was doing was wrong."[232] The court concluded that, because DuBose had not met the objective prong, it was unnecessary to consider the subjective "severe mental disease" prong of the test.

The CAAF reversed this creative, yet unsupported, two-prong test because it improperly distinguished between types of evidence. The CAAF observed that "there is nothing in the UCMJ . . . that requires a different *mode* of proof for lack of mental responsibility than any other determinative fact."[233] "All relevant evidence, whether 'objective' or 'subjective,' must be considered by the lower court in its review of sufficiency. There is no premium placed on lay opinion as opposed to expert opinion, nor on 'objective' as opposed to 'subjective' evidence."[234]

Conclusion

The cases in the past year involving discovery and mental responsibility remind trial counsel to avoid pyrrhic victories. Trial counsel can do this by stepping back and thinking objectively about their cases. They must pursue tactical victories at trial, bearing in mind the strategic implications of these tactical decisions at the appellate level.

The decisions of the military appellate courts over the past year reflect permutations from previous case law in the area of post-trial ineffective assistance of counsel. Defense counsel must be aware of the implications of their actions. They must be cognizant of the permutations in recent decisions and reshoot their trial and post-trial azimuths. A thorough knowledge of the case law and zealous representation of the client should ensure that defense counsel will attain the best result.

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230. *DuBose*, 47 M.J. at 388.

231. *Id*. at 387.

232. *Id.* at 388 (emphasis added).

233. *Id*. (emphasis in original).

234. *Id.* at 388-89.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera by e-mail at riverjj@hqda.army.mil. Major Rivera.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,..........................trometn@hqda.army.mil
Director

COL Keith Hamack,.......................hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,...............................foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,...............................riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,...........................parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostesl@hqda.army.mil
IMA Assistant

Mrs. Margaret Grogan,...................grogame@hqda.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton Dr. Mark Foley	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17May	Kansas City, MO 89th RSC Embassy Suites Hotel KCI Airport 7640 NW Tiffany Springs Pkwy Kansas City, MO 64153-2304 (800) 362-2779	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext. 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

May 1998

4-22 May	41st Military Judges Course (5F-F33).
11-15 May	51st Fiscal Law Course (5F-F12).

June 1998

1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).
1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
8-12 June	28th Staff Judge Advocate Course (5F-F52).
15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July	9th Legal Administrators Course (7A-550A1).
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
7-9 July	29th Methods of Instruction Course (5F-F70).
13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
3-14 August	141st Contract Attorneys Course (5F-F10).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

May

1 May
ICLE
Successful Trial Practice for Younger Lawyers (6 CLE hours)
Sheraton Colony Square Hotel
Atlanta, GA

8 May
ICLE
Criminal Law (6 CLE hours)
Clayton State University
Atlanta, GA

14 May
ICLE
Administrative Procedure
Marriott North Central Hotel
Atlanta, GA

21 May
ICLE
Curing Discovery Abuse
Marriott North Central Hotel
Atlanta, GA

1 June
ICLE
Administrative Procedure
Marriott North Central Hotel
Atlanta, GA

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street

Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Law Research (http://www.lawresearch.com/index.htm).

This web page has an impressive array of legal resource links, indexes, search engines, and directories. It is a great starting point for your legal research of state, federal, and international law. You can also sign up for a free subscription to the "just the law links" newsletter, as well as find forms, search an attorney directory, and numerous specialty areas such as medical law, bankruptcy, family law, tax law, and immigration law. Great for the legal assistance attorney.

b. Legal Information Institute (http://www.law.cornell.edu/).

The LII server offers a collection of recent and historic Supreme Court decisions, the U.S. Code, U.S. Constitution, Federal Rules of Evidence and Civil Procedure, recent opinions of the New York Court of Appeals, the American Legal Ethics Library, and other important legal materials—federal, state, foreign, and international. Cases can be searched by party name, keyword, or phrase. Many options for display of the search results can be set with the Native Harvest search option. Additionally, FindLaw collects the texts of opinions of all circuits.

c. Legal Ethics.com (http://www.legalethics.com/home.html).

Legal Ethics.com is a web site designed to pull together links to all the legal ethics resources available on the world wide web. It links to online ethics rules and opinions from the various states. It also lists state-by-state bar and disciplinary resources and, at a minimum, provides addresses and phone numbers for those organizations. Besides merely listing Internet sites that concern legal ethics, Legalethics.com provides the full text of several articles which focus on attorney use of the Internet and the ethical issues it raises. Thus, Legalethics.com is a terrific place to gain background information about legal ethics and the Internet.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A333321 Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).

AD A326002 Wills Guide, JA-262-97 (150 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).

*AD A332897 Tax Information Series, JA 269-97 (116 pgs).

AD A329216 Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

AD A328397 Defensive Federal Litigation, JA-200-97 (658 pgs).

AD A327379 Military Personnel Law, JA 215-97 (174 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

*AD A338817 Government Information Practices, JA-235-98 (326 pgs).

AD A325989 Federal Tort Claims Act, JA 241-97 (136 pgs).

AD A332865 AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692 The Law of Federal Employment, JA-210-97 (290 pgs).

AD A336235 The Law of Federal Labor-Management Relations, JA-211-98 (320 pgs).

Developments, Doctrine, and Literature

AD A332958 Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A302312 Senior Officer Legal Orientation, JA-320-95 (297 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel

Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed

publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2)The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.
(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made

available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
46GC.EXE	January 1998	46th Graduate Course Criminal Law Deskbook.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.
98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
ALAW.ZIP	June 1990	*The Army Lawyer/ Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.

EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
145BC.EXE	January 1998	145th Basic Course Criminal Law Deskbook.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.
JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	March 1998	Government Information Practices, March 1998.
JA241.EXE	January 1998	Federal Tort Claims Act, May 1997.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).

JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280P1.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, LOMI, March 1998.
JA280P2.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Claims, March 1998.
JA280P3.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, March 1998.
JA280P4.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, March 1998.
JA280P5.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Reference, March 1998.
JA285V1.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Core Subjects), March 1998.
JA285V2.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Elective Subjects), March 1998.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.

TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APRIL.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail stroncj@hqda.army.mil.

7. Articles

The following information may be useful to judge advocates:

Robert P. Burns, *The Purpose of Legal Ethics and the Primacy of Practice*, 39 WM. & MARY L. REV. 327.

Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283.

Walter F. Ulmer, Jr., *Military Leadership into the 21st Century: Another "Bridge Too Far?"*, 28 PARAMETERS 4 (Spring 1998).

8. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

9. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.