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Articles

Foreword

Welcome to the ninth annual *Military Justice Symposium*, the criminal law year in review. This month's issue of *The Army Lawyer* contains Volume I of the *Symposium*. In this issue, the criminal law faculty analyzes cases and developments in the areas of evidence, self incrimination, and unlawful command influence. This issue also contains an article of instructions co-authored by sitting trial judges. Volume II of the *Symposium* will appear in an upcoming issue of *The Army Lawyer* and will contain articles on pretrial procedures, post-trial procedures, search and seizure, sentencing, discovery, crimes and defenses, and jurisdiction.

As in past *Symposia*, the faculty does not intend the articles to be a complete review of every case in a particular subject area. Rather, the faculty members review cases from the Supreme Court, Court of Appeals for the Armed Forces, and significant service courts along with other developments in each member's area of expertise. As always, we try to offer insight into potential trends and analyze the impact of the cases.

Our focus this year remains on assisting the practitioner. To that end, Major Jeff Hagler, along with help from his predecessors, updated and published the *Crimes and Defenses Deskbook*. It is available on a CD-Rom as well as on The Judge Advocate General's Legal Center and School's (TJAGLCS) website.[1] Major Hagler hyperlinked each case in the deskbook to help readers quickly access the opinions. Additionally, each outline published by the department is hyperlinked and on the website.[2] We hope these resources are a helpful research tool for judge advocates, particularly those in deployed environments, operating with limited access to paper materials.

As our objective is for the *Symposium* to assist those practicing military justice in the field, please direct any questions or suggestions to us at TJAGLCS, Criminal Law Department. Lieutenant Colonel James F. Garrett.

1. *See* The Judge Advocate General's Corps, U.S. Army, JAGCNET, *Electronic Publications, available at* https://www.jagcnet.army.mil/laawsxxi/cds.nsf (last visited May 21, 2004).

2. *See id.*

Recent Developments in Unlawful Command Influence

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Introduction

The Court of Appeals for the Armed Forces (CAAF) released several cases involving unlawful command influence (UCI) this year. The types of UCI issues varied case-to-case, and included "something old, something new." The "something new" involved the media-besieged case of *United States v. Simpson.*[1] Here, the CAAF addressed UCI in the context of pretrial publicity and its potential effect on the court-martial proceedings. *Simpson* demonstrates to military justice practitioners, particularly defense counsel, how difficult it is to connect either pretrial statements made by senior military leaders or extensive pretrial publicity with an actual unfairness in the court-martial proceedings.

The old flavor this year is something old indeed—statements by convening authorities. Two Air Force cases provide judge advocates (JA) and convening authorities with timely reminders of the potential harm caused when convening authorities address the emotional issue of crime within the command by expressing their opinions regarding those who commit the crimes.[2] Although the CAAF sends a clear message about the dangers of such statements, the court also provides excellent guidance concerning the permissible role for convening authorities in addressing crime and its effect on good order and discipline.

When Does Apparent UCI Become Actual UCI?

The much publicized court-martial of Staff Sergeant (SSG) Delmar Simpson reached its appellate apex this year. Staff Sergeant Simpson sexually assaulted female trainees at Aberdeen Proving Ground (APG), Maryland, between November 1994 and September 1996.[3] A general court-martial composed of officer and enlisted members convicted SSG Simpson and sentenced him to a dishonorable discharge, twenty-five years confinement, total forfeitures, and reduction to the grade of E-1.[4] As aptly described by the Army Court of Criminal Appeals (ACCA), the pre-court-martial allegations of trainee abuse at Aberdeen created a "media feeding frenzy."[5] Accordingly, Simpson alleged that the pretrial publicity and UCI unfairly tainted his court-martial and thereby deprived him of due process under the Fifth Amendment.[6]

The appellant was a member of the U.S. Army Ordnance Center and School (USAOC&S) when the allegations against him surfaced. Shortly after the criminal investigation began, the command transferred the appellant and other cadre members under investigation to the U.S. Army Garrison Command (USAG). The officer who exercised general court-martial convening authority over the appellant was the USAG Commander, Major General (MG) Longhouser, not MG Shadley, the Commander of the USAOC&S.[7] The Army leadership held press conferences before referral of Simpson's case to a general court-martial. The substance of the relevant Army press conferences generally centered around the Aberdeen investigation and trainee abuse.[8] During the processing of the case, both senior civilian and military leadership stepped into the spotlight with statements about the investigation and allegations.[9] Not mentioned in the CAAF's opinion, but detailed in the ACCA's opinion, is the pretrial congressional interest garnered by the allegations. "A congressional delegation visited APG and talked with a number of trainees. Several members of Congress

1. 58 M.J. 368 (2003).

2. *See* United States v. Davis, 58 M.J. 100 (2003); United States v. Dugan, 58 M.J. 253 (2003).

3. *Simpson*, 58 M.J. at 370. Among the charges and specifications were rape (eighteen specifications), forcible and consensual sodomy (three specifications), indecent assault (twelve specifications), and cruelty and maltreatment of subordinates (two specifications).

4. *Id*.

5. United States v. Simpson, 55 M.J. 674, 682 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003). Documentation of the media attention encompasses five volumes of the appellant's record of trial. *Simpson*, 58 M.J. at 372.

6. *Id.* at 370.

7. *Id*. at 371.

8. *Id*.

9. *Id*.

made public statements demanding various actions on the part of military officials . . . ."[10] Not coincidentally, a senator from Maryland wrote letters to the Secretary of Defense and the Secretary of the Army "demanding the Army take action to 'severely' punish wrongdoers."[11] In response to the media and congressional interest, the Secretary of the Army created a task force to review sexual harassment in the Army.[12] Further, the Chief of Staff sent a letter to all general officers affirming "zero tolerance" on sexual harassment and requiring all Army personnel to be trained on the "zero tolerance" policy.[13]

The CAAF addressed the appellant's due process violation claim in two parts. First, the court reviewed the pre-trial "media frenzy" and its alleged effect on the court-martial.[14] The court found the extensive pretrial media attention given to the trainee abuse in the case did not adversely impact the appellant's court-martial. The court based its conclusion, in part, on the trial judge's actions. The court noted that the military judge issued an order to all "primary and alternate court members at the initial Article 39a session to avoid exposure to print and electronic media stories concerning the investigation of sexual misconduct at Aberdeen."[15] Additionally, the military judge allowed counsel the latitude to conduct a wide-ranging voir dire.[16] Probably to the surprise of many close followers of the case, most members expressed little knowledge of the investigation and the attendant issues.[17] Thus, the appellant's counsel did not challenge any member based on exposure to pretrial publicity.[18]

The CAAF then turned its attention to the second prong of the appellant's due process violation argument: the UCI claim. Throwing the proverbial "mud against the wall" in the hope that some would "stick," Simpson alleged both the appearance of UCI and actual UCI affected his court-martial. Although not distinguishing between the two, he specifically alleged UCI clouded the decision-making of commanders in his chain of command on the disposition of his case, and that UCI invaded the inner sanctum of the panel.[19]

In addressing the appellant's UCI claim, the unanimous CAAF revisited[20] the test outlined in *United States v. Biagase*,[21] which provided military justice practitioners with a template to use when confronted with a potential UCI issue. The *Biagase* court asserted that during the trial, the defense must raise "facts which, if true, constitute unlawful command influence."[22] The defense must then establish a causal connection to the court-martial by showing the alleged UCI will potentially cause unfairness.[23] If the defense counsel identifies UCI and potential impact on the defendant, the burden shifts to the government to rebut the allegation.[24] The government may successfully rebut the allegation in one of three ways. First, the government may "disprove the predicate facts on which the allegation of unlawful command influence is based."[25] Second, the government may choose to "persuade the military judge 'that the facts do not constitute unlawful command influence.'"[26] Finally, the government may show "that the unlawful command influence will not affect the proceedings."[27] The military judge must

10. *Simpson*, 55 M.J. at 682.

11. *Id*.

12. *Simpson*, 58 M.J. at 371.

13. *Id*. at 372.

14. *Simpson*, 55 M.J. at 682.

15. *Id*. at 371.

16. *Id*. at 373.

17. *Id*.

18. *Id*. Additionally, the court noted that the defense did not request a change in venue due to the extensive media interest in the investigation and subsequent court-martial. *Id*. at 376.

19. *Id*. at 373.

20. *Id*. The CAAF recently explained the test in *United States v. Stoneman*, 57 M.J. 35 (2002).

21. 50 M.J. 143 (1999).

22. *Id*. at 150.

23. *Id*.

24. *Id*. at 151.

25. *Id*.

26. United States v. Simpson, 58 M.J. 368, 373 (2003) (citing *Biagase*, 50 M.J. at 151).

weigh the government's rebuttal using the beyond a reasonable doubt standard.[28] At the appellate level, the UCI claim is viewed through a retrospective lens, using essentially the same *Biagase* template.[29]

The CAAF divided Simpson's unlawful influence claim into two parts: publicity and statements made by senior leaders. After applying the *Biagase* template to the pretrial publicity issue, the court concluded that the appellant had not satisfied the initial defense burden of sufficiently raising facts constituting UCI.[30] The appellant had alleged that the extensive media coverage combined with the military leadership's involvement in press conferences was so overwhelming that the appearance of UCI created a "presumptive prejudice."[31] The court quickly rejected the argument, noting that the leadership did not orchestrate press conferences and other media mediums to improperly influence the court-martial.[32] Moreover, the court specifically noted that the senior civilian and military leadership have an obligation to inform the American public of the state of discipline within the military.[33] It is within that context that the CAAF next addressed the second part of the appellant's UCI claim–statements made by senior Department of Defense (DOD) and Department of the Army (DA) leaders.[34]

The court directed trial judges and appellate courts to look at both actual and apparent UCI when confronted with a potential UCI issue.[35] The CAAF called specific attention to the difference between actual UCI and the appearance of UCI, and for the second time in a one-year period, the CAAF appears to require a two-part UCI analysis. Using language from *United States v. Stoneman*,[36] the court stated, "Even if there [is] no actual unlawful command influence, there may be a question whether the influence of command placed *an intolerable strain* on public perception of the military justice system."[37]

In *Simpson*, the appellant argued that statements by senior DOD and DA leaders, and the Army Chief of Staff's emphasis on a "zero tolerance" of sexual harassment created the appearance of UCI.[38] The CAAF bifurcated the contention and applied the *Biagase* analysis to the "zero tolerance" argument. In addressing the statements by senior DOD and DA leaders, however, the court evaluated the government's burden to rebut the UCI allegation using only one of the three options under *Biagase*.[39]

In addressing the appellant's "zero tolerance" contention, the court determined that the appellant failed to raise evidence of UCI sufficiently enough to shift the burden to the government.[40] The court reasoned there was no causal connection between the Army's "zero tolerance" regarding sexual harassment or its attendant training programs and the impact on the court-martial. The CAAF reached this conclusion by reviewing two of the three common Article 37 "protected target groups."[41] First, the appellant could not demonstrate the policy adversely impacted the decision-making of the commanders charged with disposing of the allegations.[42] Second, the court pointed out the

27. *Id*. (citing *Biagase*, 50 M.J. at 151).

28. *Id*.

29. *Id*. at 374 (citing *Biagase*, 50 M.J. at 143 (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994))). At the appellate level, the defense must still establish that the facts constitute UCI, the court-martial was unfair, and most importantly, the UCI was the reason for the unfairness. *Id*.

30. *Id*.

31. *Id*.

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*. In doing so, the court again stressed the mandate it previously provided in *United States v. Stoneman*. 57 M.J. 35 (2002).

36. *Id*.

37. *Simpson*, 58 M.J. at 374 (citing *Stoneman*, 57 M.J. at 43) (emphasis added).

38. *Id*. at 374-75.

39. *Id*.

40. *Id*. at 375.

41. *Id*. Article 37 generally protects the independent discretion of subordinate commanders, panel members, and witnesses in court-martial proceedings from wrongful influence. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE § 6-3 to 6-8 (1999) (containing a thorough overview of Article 37's protection of these three groups).

42. *Id*.

members' answers during voir dire provided the appellant with no factual basis to link the "zero tolerance" policy with a potential cause of unfairness during the court-martial proceedings.[43] The court repeated the answers of one panel member who stated he believed a violation of the policy required "appropriate action" and not any stated disposition.[44] To demonstrate the propriety of its conclusion, the court analyzed the issue as if the defense had successfully shifted the burden to the government. The court then asserted that the government, using the voir dire answers and testimony from the special and general court-martial convening authorities, would have successfully rebutted beyond a reasonable doubt the assertion the "zero tolerance" policy created unfairness during the proceedings.[45]

The court addressed the appellant's "zero tolerance" contention using an actual influence analysis, which relied upon factually based answers from both commanders and panel members. The court only briefly mentioned the potential for the "zero tolerance" policy to create the appearance of UCI, stating that "the manner in which the military judge considered these issues at trial rebuts any reasonable inference that references to 'zero tolerance' created the *appearance* of unlawful command influence."[46]

The CAAF next turned its attention to the appellant's last claim that specific statements made by certain senior leaders improperly influenced the disposition of charges and unfairly tainted the court-martial proceedings. The relevant pretrial statements included conclusions like: "There is no such thing as consensual sex between drill sergeants and trainees"; the UCI claim also extended to phrases such as "no leniency," "severe punishment," and "abuse of power."[47] Instead of following the other UCI claims and sequentially applying the *Biagase* test, the CAAF swept around and attacked the issue from the rear. The CAAF refused to address the first prong of *Biagase* and chose not to determine whether the statements factually amounted to UCI.[48] Instead, the CAAF concluded the government demonstrated that the statements made by senior Army leaders "did not taint Appellant's court-martial with UCI," and thus "met the third prong of *Biagase*."[49] Ultimately, the CAAF did not seize the opportunity to send a stringent message to senior leaders that statements of this nature cast a significant shadow on the integrity of the military justice system at a minimum, and at worst, cause subordinates or panel members to act in conformity with the statements.[50]

In addition to the brief reference to the appearance of UCI arising from the "zero tolerance" policy, the CAAF provided detailed findings for why the proceedings were not tainted with the *appearance* of UCI. The court specifically pointed to pretrial command actions, decisions by the military judge, as well as other extrinsic factors, in reaching the conclusion that the alleged appearance of UCI created by the media "frenzy," the statements made by senior leaders, and the emphasis on the Army's sexual harassment policy did not infect the appellant's court-martial.[51] The court's conclusion in regard to this issue raises two questions. First, was there, in fact, an appearance of UCI in the case? The court did not indicate whether the defense had met its initial requirement under *Biagase* to raise facts which constituted UCI. Consequently, the opinion fails to address whether there was an appearance of UCI. Regardless of the classification of the type of influence, the court provides a helpful template to address the potential for harm at the court-martial proceedings. Second, how are practitioners, military judges in particular, to address the appearance of UCI? The opinion seems to create a standard of review by implication. The language *Simpson* adopted from *Stoneman* indicates the standard of review is "whether the influence of command

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43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*. at 376 (emphasis added).

47. *Id.* The Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, and the Chief of Staff made these statements in various media forums. *Id.*

48. *Id*. at 376.

49. *Id*.

50. *Id*. The court did, however, issue cautionary dicta.

> [W]e note that senior officials and attorneys who advise them concerning the content of public statements should consider not only the perceived needs of the moment, but also the potential impact of specific comments on the fairness of any subsequent proceedings in terms of the prohibition against unlawful command influence.

Id. at 377.

51. *Id*. In support of its finding, the court enumerated the following facts: (1) the transfer of the accused to another unit; (2) the decision to select panel members from other commands; (3) the military judge's order to members not to view, listen to, or read media coverage; (4) the alternative dispositions of like cases arising from the same command; (5) the "extensive ventilation" of UCI at trial; and (6) the fact that the defense did not seek a change of venue. *Id.*

placed an intolerable strain on public perception of the military justice system."[52] The court did not resolve the issue further. After explicitly directing military judges to consider apparent UCI as well as actual UCI, and incorporating the *Stoneman* language, the CAAF chose not to answer the question in this case. In fact, the court side-stepped the issue. The court ignored its own mandate to determine whether there was an intolerable strain on the public perception of the military justice system. As a result, military judges do not have a clear standard to measure whether the strain is "intolerable" or to gauge public perception.

One of the more recent cases involving the public perception of the military justice system is *United States v. Wiesen*.[53] Although *Wiesen* is an implied bias case,[54] the analysis of public perception remains the same as in a UCI setting. The *Wiesen* majority asked a rhetorical question in its analysis of public perception, which led the court to reach a conclusion based on speculation rather than fact.[55] Reviewing for UCI and its potential to cause unfairness is a fact-based analysis;[56] straining to determine public perception is not. Further, there is a debate in the CAAF concerning the status of public perception of the military justice system. One side argues the American public, when provided all the facts, would be insightful enough to form reasoned opinions regarding the fairness of the military justice system.[57] The other side takes a more paternalistic approach in its opinion as to how the American public approaches the military justice system.[58] Regardless of the accuracy of either's view of the American public, the practitioner is still left without clear guidance when facing the question of whether an issue places an intolerable strain on the public's view of the military justice system. There are simply no objective standards to use to reach a sound conclusion.

Practitioners are left with several questions in the UCI arena. First, are military judges and service courts now required to conduct a two-tiered-review in UCI cases? The answer is probably yes. When claims of actual UCI arise, it is well-settled that the issue is to be resolved using the *Biagase* test.[59] But if the government successfully rebuts the allegation, is the military judge required to conduct a second analysis using the *Stoneman* and *Simpson* standard to determine if there is "an intolerable strain on public perception of the military justice system?"[60] The answer appears to be maybe; but what standard should military judges use? How does one define public perception? When faced with only an appearance question, does the military judge have to follow the *Biagase* test sequentially? Will the military judge's decision survive appellate scrutiny if no determination of UCI is made but he or she makes findings that the government demonstrated beyond a reasonable doubt that the proceedings will not be tainted? These questions remain unanswered.

Although *Simpson* raises questions for future cases, the CAAF addressed the well-settled issues of an inflexible attitude and convening authority statements entering the deliberation room in two Air Force cases.

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52. *Id.* at 374 (citing United States v. Stoneman, 57 M.J. 34, 42-43 (2002)).

53. 56 M.J. 172 (2001), *petition for reconsideration denied*, 57 M.J. 48 (2002).

54. Implied bias stems from a Supreme Court holding that the "bias of a juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." United States v. Wood, 299 U.S. 123, 133 (1936). For an overview of the doctrine as it applies in the military, *see* Chief Judge Crawford's dissent in *Wiesen*, 56 M.J. at 177-81.

55. *Id*. at 176. Traditionally the standard for determining public perception is the one which tests for implied bias. Implied bias exists when "most people in the same position would be prejudiced." *Id.* at 174 (citing United States v. Armstrong, 54 M.J. 51, 53-54 (2000)).

56. *See generally Stoneman*, 57 M.J. at 34 (providing cases that were remanded to gather facts to include *United States v. Dugan*, 58 M.J. 253 (2003) and *United States v. Baldwin*, 54 M.J. 308 (2001)). *Stoneman*, 57 M.J. at 40. The military judge in *Stoneman* admirably attempted to divine what the public might have perceived.

> [I]f it [implied bias] was reviewed through the eyes of the public the responses that the court members gave, if members of the public were sitting in the back of the courtroom and heard their responses given on *voir dire* by the members of 1st Brigade who have been selected to serve in this court-martial, I think they would see the finest traditions of the United States Army as court members, and would certainly not be swayed by anything Colonel Brook [brigade commander] might say . . . .

Id. Although the CAAF majority may have agreed with the military judge's attempt, it disagreed in the final analysis. *Id.* at 42-43.

57. *Wiesen*, 56 M.J. at 180 (Crawford, J., dissenting).

58. *Id.* at 176 ("The American public should and does have great confidence in the integrity of the men and women who serve in uniform, including their integrity in the jury room.").

59. *See supra* text accompanying notes 20-29.

60. *See Stoneman*, 57 M.J. at 42-43.

Convening Authority with an Attitude, Again

Airman Basic Davis entered into a pretrial agreement with the convening authority to plead guilty to absence without leave and the use of both cocaine and marijuana.[61] An officer panel sentenced a provident Davis to a bad conduct discharge and three months confinement.[62] After the trial, Davis' trial defense counsel learned of certain comments attributed to the convening authority, Major General (Maj Gen) [F] and objected to him taking action on Davis' sentence.[63] The defense counsel objected specifically to Maj Gen [F]'s public comments that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to me about your situation or your families[']" or words to that effect.[64] Major General [F] approved the adjudged sentence in the case despite the defense objection.[65]

Convening authorities have a statutory duty to consider clemency appeals from an accused.[66] A convening authority may not ignore or delegate this duty. The issue before the CAAF in *Davis* was whether the convening authority disqualified himself given the conflict between his public expressions concerning drug users and his post-trial duties.[67] The court first looked to *United States v. Howard*[68] in which a convening authority transmitted his views toward drug users in a letter published within a unit newsletter. In the letter, the convening authority indirectly but pointedly informed the accused that he would get no clemency but he would get a trip to Leavenworth to serve his full sentence.[69] The court in *Howard* held the convening authority did not fulfill his statutory post-trial duties and had disqualified himself with "an inelastic attitude toward clemency requests."[70] In the present case, the CAAF unanimously held that the convening authority "did not possess the required impartiality with regard to his post-trial responsibilities."[71] In doing so, the CAAF used an interesting tactic. The court took apart the convening authority's statement, "[d]on't come crying to me" word by word, to determine his intent.[72] The convening authority, the court determined, built a "barrier" against the accused and demonstrated an inelastic attitude toward certain offenses.[73] The CAAF set aside the action and returned the case for a new action by a different convening authority.[74]

There are two primary lessons to be extracted from *Davis* for JAs advising convening authorities. The first is to be ever vigilant for convening authority comments which reflect inelastic attitudes or a predisposition towards any action. Judge advocates should remind convening authorities they must remain detached and perform their post-trial statutory duties without the hint of partiality. In the CAAF's view, the convening authority's post-trial role is as important as the pre-trial role. The CAAF's pointed use of language from a thirty-year-old case makes this clear; convening authority statements will be subjected to heightened scrutiny.

A second lesson from *Davis* provides JAs insight into what the court views as the boundaries for convening authorities who wish to make statements regarding crime. The court uses fairly emphatic language to inform convening authorities that they do not have to shy away from public statements about criminal behavior and its adverse effects. In fact, "it is not disqualifying for a convening authority to express *disdain* for illegal drugs and their adverse effect upon good order and discipline in the command."[75] Further, "[a]dopting a strong anti-crime position, manifesting an awareness of criminal issues within a command, and taking active steps to deter crime

61. United States v. Davis, 58 M.J. 100 (2003).

62. *Id.* at 101.

63. *Id*

64. *Id*.

65. *Id*. The staff judge advocate did not address the objection in the addendum to the post-trial recommendation. *Id*. at 102.

66. UCMJ art. 60b(1) (2002).

67. *Davis*, 58 M.J. at 103.

68. 48 C.M.R. 939 (C.M.A. 1974).

69. *Id*. at 943 ("No, you are going to the Disciplinary Barracks at Fort Leavenworth for the full term of your sentence and your punitive discharge will stand. Drug dealers, is that clear?").

70. *Id.* at 944.

71. *Davis*, 58 M.J. at 104.

72. *Id.* at 101.

73. *Id*. at 104.

74. *Id*.

are consonant with the oath to support the Constitution."[76] Judge advocates writing policy letters and advising commanders may want to take note of the CAAF's language and incorporate the message. Convening authorities, however, must always take caution not to cross the line and make pronouncements about those who commit crimes or about what should happen to the "criminals."

The "Possibility" of the Convening Authority in the Deliberation Room, Not a Good Thing

Airman (Amn.) Dugan faced sentencing by a general court-martial composed of officer members after his conviction for, among other offenses, using ecstasy.[77] The panel sentenced Amn. Dugan to a bad conduct discharge, confinement for nine months, total forfeitures, and reduction to the lowest enlisted grade.[78] Sometime after the court-martial, the junior member of the panel gave the trial defense counsel a letter to include in Dugan's clemency matters. The letter addressed several concerns, the most important of which was the mention, during the panel's sentence deliberation, of an earlier Commander's Call hosted by the general court-martial convening authority.[79] The panel member recalled other panel members making statements such as, the "sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message . . . . [We] need to make sure it didn't look like we took the charges too lightly . . . . [O]ur names would be identified as panel members."[80]

The trial defense counsel requested a post-trial Article 39a session. The military judge denied the request, ruling "any references to [the Commander's Call] during the deliberative process did not appear to chill the deliberative process."[81] The Air Force Court of Criminal Appeals affirmed the case finding the contents of the letter as a whole, "reflect the reality of the military justice system."[82]

The CAAF again reviewed the UCI issue with heightened scrutiny and unanimously set aside the sentence, returning the case for a *Dubay* hearing on the claim of UCI.[83] The court determined the letter presented by the defense after the court-martial sufficiently met the first prong of *Biagase* since the contents sufficiently raised the possibility of UCI in the deliberation room.[84] From the CAAF's perspective, the possibility of such an occurrence was too great to permit it to remain unaddressed.[85] The court found the convening authority's influence may have permeated into the deliberations and "chilled" the independence of one of Article 37's protected targets—panel members.[86]

A note worth addressing is the applicability of Military Rule of Evidence (MRE) 606(b), which applies to inquiries into panel deliberations.[87] The CAAF cautioned the military judge who may hold the *Dubay* hearing that MRE 606 prohibits member-questioning regarding the impact of statements made during deliberation.[88] Thus, the *Dugan* panel members may be questioned concerning what was said during deliberations but not how the statements impacted "on any member's mind, emotions, or mental processes."[89] This limitation almost certainly guarantees that any military judge facing this situation will

75. *Id*. at 103 (emphasis added).

76. *Id*. (emphasis added) ("A commanding officer or convening authority fulfilling his or her responsibility to maintain good order and discipline in a military organization need not appear indifferent to crime.").

77. United States v. Dugan, 58 M.J. 253, 254 (2003).

78. *Id*. at 254.

79. *Id*. at 255. The Commander's Call occurred several weeks before Amn. Dugan's court-martial. Four members attended the meeting. Among the topics discussed by the general court-martial convening authority was the prevalence of drugs on the Gulf Coast of Florida. He also mentioned that drug use was incompatible with military service. *Id*.

80. *Id*.

81. *Id*. at 256.

82. *Id*. at 256 (citing United States v. Dugan, No. 34477 (A.F. Ct. Crim. App. Mar. 20, 2002) (unpublished)).

83. *Id*. at 260.

84. *Id*. at 259.

85. *Id*.

86. *Id*.

87. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2002).

88. *Dugan*, 58 M.J. at 260.

receive limited evidence on the issue of whether UCI tainted the sentencing proceedings.

The better solution is to advise military judges facing even a hint of UCI within the deliberation room to proactively inquire into the facts, receive evidence, and apply the *Biagase* test to determine whether UCI has tainted the court-martial. Further, in light of MRE 606(b), a military judge should include on the record a comparison of the demeanors of the panel members during voir dire with the demeanors during the post-trial hearing. Caution dictates that military judges should reopen proceedings and take testimony while the evidence is still fresh. Only then are both parties protected from cumbersome proceedings months, if not years, down the road.

Next, the CAAF stepped out of the conventional court-martial proceedings and into the administrative discharge arena and thus, practitioners must ask the following question.

Does UCI Extend to a Post-Trial Request for Discharge?

A majority of the CAAF believes that UCI may potentially extend to the administrative elimination arena. In a summary disposition, the CAAF set aside an ACCA decision and ordered a *Dubay* hearing to determine "whether [the] appellant was prejudiced by unlawful command influence when the group commander told appellant's company commander to 'not go soft on me now' regarding her recommendation on a soldier's Chapter 10 request, which led the company commander to abstain from a favorable recommendation."[90]

After his conviction for an indecent assault and an indecent act, Private (PVT) Lujan submitted a request for discharge in lieu of trial by court-martial.[91] The company commander did not submit a recommendation. The group commander, along with the staff judge advocate, recommended that the request be denied. The general court-martial convening authority denied PVT Lujan's request.[92] Later, PVT Lujan's trial defense counsel submitted an affidavit detailing a conversation with Lujan's company commander. The company commander described a conversation she had with the group commander regarding the post-trial discharge request in which the group commander told her, "don't go soft on me now."[93] The company commander affirmed the discussion in her affidavit to the ACCA.[94] The CAAF concluded that the appellant sufficiently raised evidence of UCI "because it may have deprived him of a favorable recommendation from his company commander."[95] Therefore, in order to prevail at the subsequent *Dubay* hearing, the government must rebut the appellant's contention beyond a reasonable doubt.

In her dissent, Chief Judge Crawford, brought the majority around to the salient issue in the case. As she pointed out, "there must be more than unlawful command influence in the air."[96] The "more" is the second defense prong required by *Biagase*, which the majority failed to address before setting the ACCA's decision aside.[97] However, Chief Judge Crawford worked through the second prong and, using several facts, concluded that the defense failed to meet the initial showing that the statement "don't go soft on me now," caused the appellant harm.[98] Among the facts she used, three stand out. First, the new company commander never had a favorable recommendation concerning the Chapter 10 request; thus, the group commander did not attempt to change her recommendation. Second, the company commander approached the group commander not vice versa. Finally, and most importantly, neither the company commander nor the group commander had the final say on the Chapter 10 request. The general court-martial convening authority made that determination, and the defense produced no evidence to show the conversation between the subordinate commanders had an impact on the general court-martial convening authority.[99]

The *Lujan* case is important to JAs for several reasons. First, *Lujan* shows the CAAF's sensitivity to the words "unlawful command influence." Moreover, it demonstrates how inclined the CAAF is towards remanding a case for a fact-gathering

89. *Id*.

90. United States v. Lujan, 59 M.J. 23 (2003) (summary disposition). A "Chapter 10" refers to *Army Regulation* (*AR*) *635-200*, chapter 10 which allows an accused pending charges to request discharge in lieu of trial by court-martial. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION ch. 10 (19 Dec. 2003).

91. *Lujan*, 59 M.J. at 23.

92. *Id*.

93. *Id*. The company commander did not assume command until after the offenses committed by the appellant. *Id.* at 26.

94. *Id.* at 23.

95. *Id.* at 24.

96. *Id*.

97. United States v. Biagase, 50 M.J. 143, 150 (1999). The defense must show that the UCI alleged has the potential to cause unfairness. *Id*.; *see, e.g*., United States v. Stombaugh, 40 M.J. 208 (1994) (providing the appellate review of UCI).

98. *Lujan*, 59 M.J. at 26.

hearing.[100] Some issues and situations, such as the one in *Lujan*, may not come to light until the appellate phase. For issues that arise before convening authority action, as each case this year illustrates, prudence dictates a full and complete disclosure of the facts on the record. Otherwise, the convening authority, or any other offender of Article 37, may have to later state, "Quote me as saying I was mis-quoted."[101]

99. *Id.* Chief Judge Crawford noted that the convening authority would most likely have been disinclined to approve the discharge request regardless of the company commander's recommendation. He had already approved the appellant's offer to plead guilty and knew of the adverse effect the assault on a female soldier had on good order and discipline within the command. *Id.*

100. The CAAF's action in *Lujan* raises an interesting and unanswered question left for another day. What is the CAAF's role in reviewing an administrative separation action? *See* Goldsmith v. Clinton, 526 U.S. 529 (1999).

101. Watchfuleye.com, *Quotes from Groucho Marx, available at* http://watchfuleye.com/groucho.html (last visited May 25, 2004).

New Developments in Evidence 2003

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Introduction

During the 2003 court term, military appellate courts approached the Military Rules of Evidence (MRE) with a combination of firmness and flexibility. The service appellate courts and the Court of Appeals for the Armed Forces (CAAF), relying on precedent and strict textual interpretation, applied a firm approach to rules involving uncharged misconduct, privileges, character evidence, expert testimony, the scope of appellate review of a military judge's characterization of evidence, and the procedural notice requirements of certain evidentiary rules. Yet, the courts demonstrated a willingness to stretch traditional concepts of time as applied to hearsay exceptions and uses of uncharged misconduct evidence. In virtually every case, whether applying firmness or flexibility to evidentiary issues, the courts granted substantial deference to the military judge's findings of fact and conclusions of law.

This article is organized according to the framework of the MRE in the *Manual for Courts-Martial* (*MCM*). Accordingly, the following evidentiary issues and rules of evidence are addressed: uncharged misconduct and MRE 404(b);[1] the spousal privilege and MRE 504;[2] human lie detector testimony and MRE 608;[3] opinion testimony by lay and expert witnesses and MREs 701,[4] 702,[5] and 704;[6] prior consistent statements under MRE 801(d)(1)(B);[7] the nexus between hearsay under MRE 802[8] and impeachment by contradiction; excited utterances under MRE 803(2);[9] then existing mental, emotional, or physical condition and MRE 803(3);[10] statements for the purpose of medical treatment or diagnosis and MRE 803(4);[11] the substantive and procedural aspects of MRE 807,[12] the residual hearsay rule; and authentication requirements under MRE 901.[13]

Uncharged Misconduct

Military Rule of Evidence 404 generally prohibits the use of character evidence for propensity purposes.[14] Subsection (b) of the rule, however, contains an exception that permits evidence of other crimes, wrongs, or acts for non-character purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[15] The use of other crimes evidence is heavily litigated both in the federal and military justice systems,[16] primarily because of the danger that jurors or panel members will misuse the evidence and decide against the accused because of his bad character.[17]

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2002) [hereinafter MCM].

2. *Id.* MIL. R. EVID. 504(b).

3. *Id.* MIL. R. EVID. 608(b).

4. *Id.* MIL. R. EVID. 701.

5. *Id.* MIL. R. EVID. 702.

6. *Id.* MIL. R. EVID. 704.

7. *Id.* MIL. R. EVID. 801(d)(1)(B).

8. *Id.* MIL. R. EVID. 802.

9. *Id.* MIL. R. EVID. 803(2).

10. *Id.* MIL. R. EVID. 803(3).

11. *Id.* MIL. R. EVID. 803(4).

12. *Id.* MIL. R. EVID. 807.

13. *Id.* MIL. R. EVID. 901.

14. *Id.* MIL. R. EVID. 404(a). The rule reads as follows: "(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . . ." *Id.*

15. *Id.* MIL. R. EVID. 404(b).

In order to protect the accused from the improper use of character evidence, the Court of Military Appeals (COMA) established a three-part test for admissibility in *United States v. Reynolds*:[18] (1) the evidence must reasonably support a finding that the appellant committed the prior acts of uncharged misconduct; (2) a fact of consequence in the proceeding must be made more or less probable by the existence of the evidence; and (3) the evidence must withstand an MRE 403 balancing test for prejudice.[19] The *Reynolds* factors provide a useful template for counsel and military judges to use when evaluating uncharged misconduct evidence, and the CAAF has continued to rely on these factors in recent years.[20]

In *United States v. Diaz*,[21] the appellant was convicted of the unpremeditated murder of his infant daughter, Nicole, and assault upon a child under sixteen of age against his other infant daughter, Jasmine, for incidents that occurred during an eighteen-month period between January 1993 and July 1995.[22] The Army Court of Criminal Appeals (ACCA) affirmed the conviction.[23] The CAAF, however, reversed, holding that the military judge improperly admitted evidence of uncharged misconduct pertaining to injuries suffered by Nicole,[24] failed to grant a mistrial after government experts improperly opined that Nicole's death was a homicide and the appellant was the perpetrator,[25] and erred in denying a motion for a mistrial with respect to the assault charges against Jasmine because of the combined prejudicial effect of improper expert testimony and uncharged misconduct evidence.[26]

During her short life, Nicole Diaz suffered several appalling injuries. When she was four-months old, the appellant took her to the Reynolds Army Community Hospital at Fort Sill with facial burns from a steam vaporizer the family had been using to treat her cold symptoms. The appellant had been alone with Nicole and initially claimed that he had held her face over the vaporizer to help her breathe.[27] Because she had second-degree burns, Nicole had to be evacuated to Children's Hospital in Oklahoma City. Doctors at the hospital noted other injuries, including chest and facial bruising, leg and rib fractures, all of which were unexplained yet consistent with child abuse. These injuries triggered a report of abuse and neglect to the Oklahoma social services department, which took Nicole into protective custody and placed her into foster care.[28]

Nicole remained in protective custody for about eight months. During that time, she thrived, and her health was excellent. In November 1993, when she was approximately one-year old, the state returned her to her parents. She died under suspicious circumstances in February 1994. The appellant claimed that he removed her from her crib during the night because she was coughing, gave her some cough medicine, and laid her on his lap while he was watching television. When he took her back to her crib a few minutes later, he noticed that she was limp and not breathing. He attempted unsuccessfully to resuscitate her, and then, after waking his wife, the two of them took Nicole to Reynolds Army Community Hospital at Fort Sill. Medical personnel made futile attempts to resuscitate her. The appellant claimed that Nicole had shown no signs of distress before she went limp.[29]

An autopsy revealed no obvious cause of death. There were two small, subcutaneous bruises to her scalp and a dark area on

16. 1 STEPHEN A. SALZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 404.02[3][b], at 4-88 (5th ed. 2003).

17. *See id.*

18. *See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

19. *See id.*

20. *See* Major Charles H. Rose III, *New Developments: Crop Circles in the Field of Evidence*, ARMY LAW., Apr./May 2003, at 55 (discussing the CAAF's consistent reliance on the *Reynolds* test).

21. 59 M.J. 79 (2003), *aff'd*, 56 M.J. 795 (Army Ct. Crim. App. 2002).

22. *See id.* at 80-81.

23. *Diaz*, 56 M.J. at 795.

24. *Diaz*, 59 M.J. at 95-96.

25. *Id.* at 92-93.

26. *Id.* at 97.

27. *Id.* at 81-82. Over the next few days, the appellant gave several different versions of how Nicole received her injuries. He claimed that the steamer had fallen and splashed hot water on her face, that he had held her face over the vaporizer for three to four seconds, and, alternatively, that he had held her face over the vaporizer for eight to ten seconds. *Id.* He also changed his story about holding her over the vaporizer three times. *See id.*

28. *Id.*

29. *Id.* at 83.

her left cheek under her left eye. There was not, however, any evidence of internal injury or hemorrhages, nor did the toxicology screen show sufficient amounts of any medications or drugs that would have contributed to her death.[30] Because of Nicole's past history of unexplained or inadequately explained injuries, the medical examiner noted the death as suspicious. He opined that the autopsy findings were consistent with death by suffocation. He could not rule out Sudden Infant Death Syndrome (SIDS), but he declined to use that diagnosis because of Nicole's injuries. Ultimately, he listed the cause of death as unknown and the manner of death as undetermined.[31]

Two subsequent events led to the appellant's eventual prosecution. The first was a burn injury the appellant inflicted on his infant child, Jasmine, in Hawaii in 1995.[32] The second was the 1996 finding of a mandatory child-death-review board in Oklahoma that Nicole's death was a homicide and the appellant was the perpetrator.[33]

At trial, Nicole's unexplained injuries formed a major part of the government's case. The appellant made a general denial to the charge of murdering Nicole, asserting that he had no idea what had caused her death. There was no direct forensic evidence, and there were no eyewitnesses; Mrs. Diaz had been asleep when Nicole died. The government's strategy—successful at trial and at the ACCA—was to use the appellant's pattern of abuse against his daughters to establish both the cause of Nicole's death and the identity of the appellant as the perpetrator. The uncharged misconduct pertaining to Nicole's facial burns, broken limbs, and fractured ribs was critical in establishing the pattern of abuse the government needed to sustain its theory of the case.[34]

The CAAF strictly applied the three-part *Reynolds* test in holding that the military judge abused his discretion in admitting uncharged misconduct evidence of the fractures, bruises, and facial burns that Nicole suffered. The first *Reynolds* factor is that the evidence must reasonably support a finding that the appellant committed the prior acts of uncharged misconduct. In *Diaz*, the CAAF found that the government did not meet the "low" standard for linking the appellant to Nicole's injuries.[35] While recognizing that the pattern-of-abuse strategy may sometimes be the only evidence to prove a case of infanticide or child abuse, the CAAF stated, "Each alleged incident of uncharged misconduct must pass through the *Reynolds* filter."[36]

There was little evidence to establish either when or how Nicole suffered the fractures and bruising. Moreover, there was no evidence establishing who inflicted the injuries; in fact, trial testimony revealed that several people, including the appellant's spouse and several babysitters, had access to Nicole during the time frame the injuries would have occurred. The government conceded that the link between the appellant and the injuries was tenuous, stating in a response to a defense motion, "Evidence of the broken bones and bruises is not being offered to show that the accused actually caused these injuries, but to explain the reasoning behind [Death Review Board member] Dr. Stuemky's opinion that Nicole was an abused child."[37] In short, the unexplained injuries that helped trigger suspicion as to the cause of Nicole's death remained unexplained in the government's case and could not be "lump[ed] together as a series of incidents . . . [to] establish Appellant committed each act of abuse."[38]

But what of the evidence of Nicole's facial burns from the vaporizer? The appellant had admitted involvement in the burn but claimed it was an accident.[39] It would seem that the govern-

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30. *Id.* The toxicology screen did show small amounts of an over-the-counter drug medication and also the presence of drugs used in the resuscitation attempts. These amounts, however, were insignificant and, according to the medical examiner, were negative in having any relation to the cause of death. *See id.*

31. *Id.*

32. *See id.* at 82-83. Jasmine was born approximately eleven months after Nicole died. *See id.* The Army had, in the meantime, transferred the appellant to Hawaii. *Id.* at 83. When Jasmine was approximately seven-months old, her mother took her to the hospital to have a burn treated on her leg. The appellant claimed he had been trying to burn a centipede that was in his daughter's crib when he accidentally dropped his lighter on her leg. The burn, however, exhibited classic branding characteristics, indicating that an accident was unlikely. *See id.* at 83-84. The Hawaii Child Protective Services took Jasmine away from her parents' custody. *Id.* at 84.

33. *Id.* According to the CAAF, Oklahoma's Death Review Board conducts a multi-disciplinary review of all deaths of children under the age of eighteen. The Board collects all agency and medical records and reports in making its determination. *Id.* The Death Review Board contacted the military to ensure that military investigators knew about Nicole's death and her previous injuries. *Id.*

34. *Id.* at 93-96.

35. *See id.* at 94.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 95. In fact, the appellant presented evidence by stipulation from the CEO of the vaporizer manufacturer concerning complaints from consumers who had accidentally burned themselves in the vaporizer steam. The CEO also said that he had accidentally burned himself several times. *Id.*

ment was on firm ground in introducing evidence of the facial burn and the appellant's claim of accident, rebutting it with evidence of the branding burn to Jasmine's thigh and the appellant's claim of accident for *that* incident, and then using the facial burn incident to help establish that the appellant was the source of Nicole's other injuries. This would surely help establish the pattern of abuse that the CAAF implicitly recognized as being valid in infanticide or child abuse cases.[40]

In the most confusing section of the opinion,[41] the CAAF found that the facial burn evidence did not meet the second *Reynolds* prong because the evidence did not make a fact of consequence in the trial more or less probable. The appellant's chosen theory of defense was the key to this part of the opinion. The appellant never claimed that Nicole suffered an accidental death at his hands; rather, he made a general denial as to any involvement at all in her death. Accordingly, there was no claim of accident to rebut. The CAAF claimed that the government had, in essence, "created an act" by the appellant (the accidental burn) and then rebutted it with uncharged misconduct (the fractures and bruises). As the CAAF stated, "the prosecution cannot introduce uncharged misconduct to rebut a defense that was never raised or presented by the defense."[42] Thus, the CAAF permitted the appellant's defense theory to control the relevance of the uncharged misconduct evidence the government would be permitted to introduce at trial.

Finally, the CAAF applied the third prong of the *Reynolds* test in concluding that the uncharged misconduct evidence was overly prejudicial. In this section of the opinion, the CAAF measured the overall impact of the uncharged misconduct evidence when aggregated with improper expert testimony that had been introduced at trial.[43] A social worker testified about confronting the appellant with her belief that he had killed Nicole, and a doctor from the Death Review Board testified that in his opinion, the death was a homicide and the appellant was the perpetrator. According to the CAAF, the improper expert testimony on the charged misconduct was inextricably intertwined with testimony on the incidents of uncharged misconduct, making it impossible for the members to differentiate between proper and improper uses of the evidence. The CAAF found that the "panel's hearing [the expert's] testimony so fueled the prejudicial impact of the uncharged misconduct that it rendered it inadmissible for the purpose of showing a pattern of abuse."[44]

The CAAF's opinion in *Diaz* emphasizes the importance of the *Reynolds* factors in using uncharged misconduct evidence. Government counsel must ensure that each act of uncharged misconduct, standing alone, meets each of the three *Reynolds* factors. Government counsel must resist the temptation to take evidentiary shortcuts when introducing uncharged misconduct evidence. *Diaz* makes clear that it is unacceptable to throw an "unformed mass" of uncharged acts into the courtroom in the hope that some will stick to the accused. Counsel and military judges should take careful note of the substance of the accused's plea at trial. In child abuse cases, at least, a general denial of wrongdoing may preclude the government from certain logically reasonable uses of uncharged misconduct evidence. Finally, *Diaz* confers a great benefit to the defense in evaluating the prejudicial effects of uncharged misconduct evidence—while the government must ensure that each act stands alone, *Diaz* permits the defense to aggregate all evidence introduced at trial in determining the prejudicial impact of the government's uncharged misconduct evidence.

In *United States v. McDonald*,[45] the Navy-Marine Court of Criminal Appeals (NMCCA) addressed the temporal limits of uncharged misconduct evidence in a case involving misconduct the appellant had committed as a juvenile some twenty years before trial. Although by no means a bright-line rule, "temporal remoteness depreciates or reduces the probative value of [uncharged acts] evidence."[46] A lengthy time lapse can render evidence "legally irrelevant,"[47] particularly if the uncharged misconduct occurred when the accused was a juvenile.[48]

The appellant in *McDonald* was charged with two specifications of taking indecent liberties with his twelve-year-old

40. *See id.* at 94.

41. In the alternative, the section might be so clear that even a child could understand it. As the inimitable Groucho Marx once said, "A child of five could understand this. Fetch me a child of five." *See* Wikiquote, *Groucho Marx, at* http://wikiquote.org/wiki/Groucho_Marx (last visited May 4, 2004).

42. *Diaz*, 59 M.J. at 95.

43. For a more thorough discussion of the expert testimony, *see infra* notes 134-51 and accompanying text.

44. *Diaz*, 59 M.J. at 95-96.

45. 57 M.J. 747 (N-M. Ct. Crim. App. 2003), *review granted*, 2003 CAAF LEXIS 802 (Aug. 4, 2003).

46. 2 EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT ¶ 8:08, at 8-26 (1999).

47. *See id.* ¶ 8:08, at 8-27.

48. *See id.* Imwinkelreid gives an example of a defendant committing uncharged misconduct as a sixteen-year-old teenager and notes that "intervening years may have brought reformation, maturity, and responsibility." *Id.* He notes that the significance of the time lapse relates to and is dependent on the purpose for which the uncharged misconduct is offered; if the uncharged misconduct is offered to prove modus operandi and the uncharged act is nearly identical to the charged act, "the courts tolerate substantial time lapses." *Id.*

adopted daughter, communicating indecent language to her, and soliciting her to commit carnal knowledge with him. The appellant's wife had been involved in a serious automobile accident that made it impossible for the couple to engage in sexual intercourse for several months. During that time period, the appellant gave condoms to his adopted daughter, went into the bathroom and photographed her while she was bathing, and attempted on another occasion to photograph her in the bathroom. He left a book in her bathroom entitled "Daddy and Me," which glorified father-daughter sexual relations. Finally, he wrote a note informing her that he wanted to provide her first sexual experience. Nonetheless, he never actually touched his daughter in a sexual manner. He was charged for each of these offenses except for the act of giving his adopted daughter the "Daddy and Me" book.[49]

At trial, the government introduced two items of uncharged misconduct. The first of them, the "Daddy and Me" book, was introduced to show the appellant's intent and plan to have sexual intercourse with his adopted daughter.[50] The second involved the appellant's sexual abuse of his stepsister some twenty years earlier, when the appellant was thirteen-years old and his stepsister was eight. The evidence was that the appellant had exposed himself to his stepsister, showed her a pornographic magazine in which a fairy was masturbating a man, and expressed to her his fantasy that she would perform a similar act on him. In addition, the appellant made his stepsister masturbate him on several occasions, removed her clothing below the waist, and touched her private parts. The trial counsel offered this evidence to show the appellant's intent and plan to condition his adopted daughter to have sexual intercourse with him.[51]

Both the military judge and the NMCCA applied the *Reynolds* test to determine that the evidence was admissible. In an Article 39(a) session, the trial counsel made an evidentiary proffer concerning the twenty-year-old misconduct. The NMCCA found that the military judge had ample information from the proffer to determine that the evidence would reasonably support a finding that the appellant had committed the uncharged misconduct with his stepsister twenty years earlier.[52] As for the second prong of the *Reynolds* test, both the military judge and the NMCCA apparently accepted the trial counsel's explanation that the uncharged misconduct was highly probative of the appellant's intent and plan to condition his stepdaughter to have sexual intercourse with him. The military judge found (and the NMCCA neither disturbed nor questioned the finding) that there were several similarities between the appellant's uncharged acts with his stepsister and the charged acts with his adopted daughter. This evidence satisfied the second *Reynolds* prong by making a fact of consequence in the proceeding more probable.[53]

The MRE 403 balancing test—the third prong of the *Reynolds* test—formed the largest part of the NMCCA's analysis in *McDonald*. The defense counsel argued that admission of the twenty-year-old misconduct would prejudice the members against the appellant on sentencing by causing them to consider the appellant's activities as a teenager.[54] The military judge, however, found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, and the NMCCA agreed.[55]

The NMCCA cited an earlier CAAF case, *United States v. Tanksley*,[56] for the proposition that MRE 404(b) does not have a temporal yardstick.[57] The NMCCA noted several differences between the facts in *Tanksley* and those in *McDonald*,[58] but found persuasive the CAAF's reasoning that "'[t]he nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense.'"[59]

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49. *McDonald*, 57 M.J. at 748-49.

50. *Id.* at 754-55. Although the appellant objected at trial and on appeal to the introduction of the "Daddy and Me" book, the NMCCA applied the abuse of discretion standard of review and upheld the military judge's decision to admit the evidence. The military judge's findings of fact met the three-pronged *Reynolds* test, and the NMCCA found that the evidence was probative as to the appellant's intent and plan to condition his adopted daughter to have sexual intercourse with him. *Id.*

51. *Id.*

52. *Id.* It should be noted that the defense counsel concurred in the use of an evidentiary proffer, rather than a witness or some other form of proof, at the Article 39(a) session. *See id.*; UCMJ. art. 39(a) (2002).

53. *See McDonald*, 57 M.J. at 755.

54. *Id.*

55. *Id.*

56. 54 M.J. 169 (2000). In *Tanksley*, the appellant was charged with taking indecent liberties in the shower with the six-year-old daughter of his second marriage. He was also charged with making false official statements pertaining to sexual abuse of the daughters of his first marriage nearly thirty years earlier. At trial, one of his adult daughters testified that the appellant had begun bathing her when she was three or four-years old, had digitally penetrated her, and eventually began raping her. This testimony was admitted for two purposes: (1) in proof of the false official statements charge for his denial that these events ever occurred; and (2) as MRE 404(b) evidence to show his intent to gain arousal or gratification by showering with his six-year-old daughter. *See id.* at 174.

57. *McDonald*, 57 M.J. at 756.

The NMCCA took a further step in its opinion, conducting a harmless-error analysis. Although neither party briefed the issue, the NMCCA proceeded *sua sponte* to determine that any potential error was not of a constitutional magnitude. Because of the overwhelming nature of the government's case, including the appellant's written statement, his oral admission to his wife, the testimony of his adopted daughter, and corroborating testimony from the victim's brother and a doctor, the NMCCA found that the twenty-year-old evidence likely had little impact on the panel's findings.[60] This, of course, begs the question—if the evidence was overwhelming, why did the government introduce additional uncharged misconduct evidence at trial?

McDonald provides a strong incentive for trial counsel to widen the net in their pretrial investigations of the accused. Distant acts of juvenile misconduct may potentially be admissible at trial and are worth exploring, particularly in sexual misconduct cases when they may bolster the government's theory concerning the accused's intent or plan to commit the offense. Defense counsel should be aware of the ramifications of *McDonald* and seek full disclosure from their clients concerning past acts of misconduct and be prepared to contest government assertions as to the admissibility of the evidence.[61] Finally, the NMCCA opinion demonstrates that if a military judge makes strong findings of fact based on the *Reynolds* factors, an appellate court is unlikely to disturb or overturn the findings.

Note: As this article was in the final stages of preparation for publication, the CAAF reversed the NMCCA's holding in *McDonald*.[62] The CAAF held that the evidence was not logically relevant under the second *Reynolds* prong. It did not demonstrate a common plan because, in the CAAF's view, the acts between the appellant and his stepsister were so different from the offenses charged against his daughter. The CAAF also held that the evidence did not establish intent. There was no evidence at trial comparing the appellant's state of mind as a thirteen-year-old juvenile as compared to his state of mind as a thirty-three-year-old married adult.[63] The CAAF did not, however, specifically address the NMCCA's analysis of the temporal limits of MRE 404(b), holding instead that the military judge abused his discretion in finding a common plan and intent.

Marital Communications Privilege

In *United States v. McCollum*,[64] the CAAF continued its recent trend of strictly construing the marital communications privilege against the government in favor of protecting marital communications, even when the communications involve the sexual abuse of a child.[65] The marital communications privilege, codified at MRE 504,[66] is based on the common-law marital confidences privilege, which allows witnesses "to refuse to reveal their own confidential marital communications and to prevent their spouse from doing so."[67] The privilege does not apply if the communication was not intended to be confidential or when one spouse is charged with committing a crime against "the person or property of the other spouse or a child of either."[68] In *McCollum*, the CAAF clarified that the govern-

58. The acts in *Tanksley* were charged misconduct that were required to prove a false official statements charge, whereas the misconduct in *McDonald* was uncharged and arguably not required to prove the government's case. The acts in *Tanksley* all involved the abuse of parental authority, whereas the uncharged misconduct in *McDonald* involved two minors separated by only five years in age. *See id.* at 755. In addition, the acts in *Tanksley* all occurred as part of a clearly identifiable pattern of grooming and conditioning a child by sexually abusing the child during bathing, whereas the pattern similarities between the charged and uncharged misconduct in *McDonald* are not necessarily readily apparent. Most importantly, the appellant in *Tanksley* was a parent and an adult when all acts of misconduct occurred, whereas the appellant in *McDonald* was only thirteen-years old when the uncharged misconduct occurred. *Compare Tanksley*, 54 M.J. at 169, *with McDonald*, 57 M.J. at 747.

59. *McDonald*, 57 M.J. at 756 (quoting *Tanksley*, 54 M.J. at 175).

60. *Id.*

61. Defense counsel should also consider making specific requests of the government for discovery of such matters under the Rules for Courts-Martial (RCM). MCM, *supra* note 1, R.C.M. 703(e)(3).

62. United States v. McDonald, 59 M.J. 426 (2004).

63. *Id.*

64. 58 M.J. 323 (2003).

65. *See* Rose, *supra* note 20, at 59 (discussing the CAAF's recent treatment of the marital communications privilege).

66. MCM, *supra* note 1, MIL. R. EVID. 504(b)(1). The rule defines the husband-wife privilege as follows:

> (b) *Confidential communication made during marriage*. (1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

Id.

67. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 396 (3d ed. 2003).

ment bears the burden of overcoming the presumption of confidentiality in marital communications. The CAAF also addressed the definitional limits of "child of either," determining that the so-called "de facto child" exception to the privilege does not apply at courts-martial.[69]

The appellant in *McCollum* was convicted of raping his wife's mildly retarded, fourteen-year-old sister, who had come to stay with the couple for a month during the summer. The appellant's wife entered the living room between 0200 and 0300 to discover the appellant and her sister lying on the floor. The sister's nightgown was up above her waist, and the appellant was rubbing her stomach. The appellant's wife did not, however, immediately confront him; although the incident disturbed her, she waited until later in the morning to discuss it.

In response to pointed questioning from his wife, the appellant admitted that he had sexual intercourse with her fourteen-year-old sister. During a later conversation, the appellant's wife expressed her fear that her sister might be pregnant. In response, the appellant told her that he did not ejaculate. Nevertheless, the appellant's wife took her sister to a clinic for a pregnancy test. Not long afterwards, the appellant deployed to Saudi Arabia for several months, where he experienced a religious awakening of sorts. When he returned, he told his wife that he needed to take responsibility for things he had done in the past, and that he might want to tell their families about the incident with his wife's sister. His wife told him that she did not want him to tell her family.[70]

At trial, the defense counsel moved to suppress all of the appellant's statements to his wife on the grounds that the marital privilege protected them. In opposition, the government argued that the "child of either" exception to the privilege applied because the wife stood *in loco parentis* to her sister during the visit. The judge declined to construe the exception so broadly and ruled that the privilege clearly covered the appellant's first statement to his wife, in which he admitted the act of sexual intercourse, and should be suppressed. Conversely, the judge did admit the appellant's statement claiming he did not ejaculate, determining that the defense had failed to establish the confidential nature of the communication. The judge also admitted the appellant's post-deployment statements in which he talked about telling family members about the incident, ruling that the statements were never intended to be confidential.[71]

The CAAF reviewed the military judge's decision to admit the appellant's statements to his wife under the abuse of discretion standard. The CAAF began its opinion by noting the long history of the marital communications privilege, both at common law and by statute. Citing *United States v. McElhaney*,[72] the CAAF observed the marital communication privilege has three prerequisites: (1) there must be a communication; (2) the communication must have been intended to be confidential; and (3) the communication must have been made between married persons not separated at the time of the communication.[73] The appellant met two of these prerequisites by establishing that certain communications took place between himself and his spouse during their marriage.[74] The issue was whether the communications were intended to be confidential.

The CAAF's analysis of whether the appellant intended his communications to his spouse to be confidential provides a useful template for counsel and military judges alike. The CAAF referred to the two-part test it promulgated in *United States v. Peterson*[75] for measuring confidentiality. First, there must be physical privacy between the individuals—in other words, the communication is not made in a public forum. Second, there must be an intent to maintain secrecy.[76] Because most marital communications occur orally and in private, it can be difficult for an individual to prove his intent to keep a communication confidential; thus, long-standing precedent has established that marital communications are presumptively privileged.[77] The party asserting the marital communications privilege has only to establish that the communication occurred in private between married spouses who were not separated. Then, the burden of production shifts to the opposing party to overcome the presumption of confidentiality.[78] The CAAF listed several

68. MCM, *supra* note 1, MIL. R. EVID. 504(c)(2)(A).

69. A "de facto child" is "a child who is under the care of custody of one of the spouses, regardless of the existence of a formal legal parent-child relationship." *McCollum*, 58 M.J. at 340.

70. *Id.* at 334-35.

71. *Id.*

72. 54 M.J. 120 (2000).

73. *McCollum*, 58 M.J. at 336.

74. *See id.* at 338-39.

75. 48 M.J. 81 (1998).

76. *McCollum*, 58 M.J. at 336.

77. *Id.* at 337 (citing Pereira v. United States, 347 U.S. 1, 6 (1954); Blau v. United States, 340 U.S. 332, 333 (1951); United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984); *In re* Grand Jury Investigation, 603 F.2d 786, 788 (9th Cir. 1979); Caplan v. Fellheimer, 162 F.R.D. 490, 491 (E.D. Penn. 1995)).

factors that would be relevant in overcoming a presumption of confidentiality: (1) the nature of the circumstances under which the communication was made (for example, a statement made in the presence of third parties would lose its presumptive confidentiality); (2) the substance of the communication (for example, a discussion of a timeline or plan for disclosure may reveal an intent to disclose information); and (3) whether the statement is actually shared with a third party.[79]

The appellant in *McCollum* met his initial burden by establishing that the communications were made in private during his marriage. The CAAF held that the military judge erred by shifting the burden of production from the government to the appellant. Instead of the government having to prove that the appellant did not intend the statements to be confidential, the military judge's ruling forced the appellant to prove that he *did* intend for them to be confidential.[80]

Looking at the facts and circumstances surrounding the statements, the CAAF determined that the government did not overcome the presumption of confidentiality for either of them. The statement about not ejaculating, said the CAAF, "is not the kind of statement a person generally intends to share openly."[81] The statement was of the type that, if disclosed, carried the risk of criminal sanctions. Furthermore, there was no evidence supporting the military judge's determination that the appellant intended for the statement to be shared with medical authorities—the appellant's wife was unsure whether she even told the appellant she intended to take her sister to the clinic for a pregnancy test. Finally, the fact that neither spouse shared the statement until the investigation indicated an intent for it to be kept confidential.

The post-deployment statement, in which the appellant talked about disclosing the incident to family members, was different. The Air Force Court of Criminal Appeals (AFCCA) held that the appellant had waived his privilege by giving his wife consent to disclose the statement under MRE 510(a). Military Rule of Evidence 510(a) states that a person waives his privilege if he "voluntarily . . . consents to disclosure of any significant part of the matter or communication."[82] However, the CAAF found no evidence that the appellant elected to share a substantial portion of these communications outside the marriage. At best, the comments "reflect a marital discussion about telling the families about [a]ppellant's conduct . . . *not necessarily a decision to do so*."[83] Having determined that the waiver doctrine of MRE 510(a) did not apply, the CAAF next addressed whether the government overcame the presumption of confidentiality. While the statements could have been interpreted as expressing an intent to disclose the information to their families, the CAAF viewed it more likely that it was merely aspirational.[84] The CAAF found it significant that the statement did not contain a timeline for disclosure. The statement contained information traditionally maintained as confidential—disclosure could have resulted in criminal or civil liability or could have traumatized family members. Finally, the appellant's spouse counseled him not to disclose the conduct, and neither party actually disclosed the information to family members. On balance, the CAAF found that the government failed to carry its burden.[85]

The final section of the CAAF's opinion staked out the definitional limits of the "child of either" exception at courts-martial. The government argued that "child of either" should be broadly read to include the so-called "de facto child," or a child who is under the custodial care of one of the spouses, independent of a formal parent-child arrangement. The CAAF first looked at the plain language of MRE 504(c)(2)(A) and determined that a biological or legal relationship is necessary in order to trigger the "child of either" exception to the marital communications privilege.[86] Although the CAAF recognized that "child of either" could be broadly construed to include custodial arrangements, it declined to construe the phrase so broadly at courts-martial. The CAAF applied the rule of interpretation contained in MRE 101(b), which instructs military courts to look to federal laws and the common law for evidentiary guidance when practicable and not inconsistent with the UCMJ or the *MCM*.[87] Only one federal circuit and five state jurisdictions have recognized a "de facto child" exception for offenses against children who are neither the biological nor adopted children of one of the spouses.[88]

Despite the CAAF's holding that the military judge improperly admitted statements covered by the marital communica-

78. *Id.*

79. *Id.* at 337-38.

80. *Id.* at 338.

81. *Id.*

82. MCM, *supra* note 1, MIL. R. EVID. 510(a).

83. *McCollum*, 58 M.J. at 339 (emphasis added).

84. *Id.* at 339.

85. *Id.*

86. *See id.* at 340.

tions privilege, the appellant in *McCollum* did not receive any relief. The CAAF found that the erroneous introduction of privileged material was a non-constitutional error, and applied a harmless error analysis to the evidence. Weighing the strength of the government's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence, the CAAF determined that the admission of the evidence was harmless error.[89]

Nevertheless, *McCollum* is an excellent case for practitioners. Trial counsel and military judges must be aware of the shifting burden of production for the marital communications privilege. Once an accused establishes that a communication was made in private during a marriage, the burden shifts to the government to overcome the presumption of confidentiality. *McCollum* provides a useful list of factors for determining whether the presumption of confidentiality has been overcome. Defense counsel must assert the privilege early and often and use the common-sense arguments from *McCollum* in attacking government efforts to overcome the presumption of confidentiality.

Human Lie Detector Testimony

In *United States v. Kasper*,[90] the CAAF held that the authority to introduce opinion evidence regarding a person's character for truthfulness under MRE 608(a)[91] does not extend to "human lie detector" testimony by an Office of Special Investigations (OSI) agent.[92] The case provides a good primer for counsel on the limitations and pitfalls of character evidence and serves as an admonition for military judges to take an active role in issuing *sua sponte* limiting instructions in certain instances even when counsel fail to timely object or to request instructions.

In *Kasper*, an Air Force general court-martial convicted the appellant of wrongfully using ecstasy during a visit to Florida.[93] The government had two primary witnesses. First, the appellant's ex-boyfriend, also an Air Force airman, testified that he and the appellant had used ecstasy while they were visiting friends in Florida. Second, an OSI agent testified that the appellant had confessed to ecstasy use during an interrogation. The OSI agent testified that the appellant began crying during the interrogation, and in response to the question, "did you use ecstasy in Florida," the appellant held up one finger and began crying some more; the agent interpreted this to mean that the appellant had confessed to using ecstasy once during a visit to Florida.[94] The appellant, in contrast, testified at trial that when she held up the finger, it meant that she had visited Florida once, not that she had used ecstasy in Florida.[95] Thus, the case hinged on the interpretation of ambiguous non-verbal conduct.

With this evidence, the Air Force took the appellant to trial. During opening statements, defense counsel placed the confession's validity before the members, telling them that the appellant repeatedly denied using ecstasy, and that the OSI agents merely believed they had obtained a confession from her. Defense counsel promised the members that they would not see

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87. *See id.* at 341. The rule of interpretation the CAAF cited is contained in MRE 101(b):

> (b) *Secondary Sources*. If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:
> (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
> (2) Second, when not inconsistent with subsection (b)(1), the rules of evidence at common law.

MCM, *supra* note 1, MIL. R. EVID. 101(b).

88. *McCollum*, 58 M.J. at 341.

89. *See id*. at 342-43.

90. 58 M.J. 314 (2003).

91. MCM, *supra* note 1, MIL. R. EVID. 608(a). Military Rule of Evidence 608(a) states the following:

> (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

92. *Kasper*, 58 M.J. at 314.

93. *Id.*

94. *See id.* at 316.

95. *See id.* at 318. The appellant also testified that she had been at a party and had been given an ecstasy pill, which she palmed and flushed down a toilet. She accepted the pill, she claimed, because she did not want the other partygoers to think she was an undercover agent. *See id.*

believable evidence that the appellant had used ecstasy. During the government's case-in-chief, the OSI agent testified that the appellant initially denied using ecstasy. The agent also said that she did not believe the appellant's denial: "We decided she wasn't telling the truth. She wasn't being honest with us . . . ."[96] The defense did not object. Eventually, the agent testified that the appellant began crying and held up a finger in confession. Without objection from the defense, the trial counsel asked whether there was "anything about what she said or the way she behaved that made you believe at that time that she was falsely confessing to you?"[97]

Matters worsened for the defense on cross-examination. The OSI agent testified that she was trained to assess through body language and other indicators whether an individual was being truthful or not. The agent also testified that she had believed the appellant's boyfriend when he testified that the appellant had used drugs because he displayed indicators of truthfulness. On re-direct, without defense objection, the trial counsel asked why the OSI agent believed the boyfriend. The agent replied that the boyfriend "gave all verbal and physical indicators of truthfulness."[98] When the trial counsel began to ask about the *appellant's* verbal indicators of deception, defense counsel finally objected. The military judge sustained the objection, but permitted the OSI agent to testify that when a suspect shows signs of being untruthful in his or her denial of wrongdoing, the agents continue the interrogation.[99]

This line of questioning impacted the members. One of them submitted a written question to the OSI agent asking what indicators the appellant had displayed that made the agent believe she was deceptive when denying ecstasy use. The defense counsel objected to the question and the judge sustained it, advising the members that the question could not be asked because it would, in effect, turn the OSI agent into a human lie detector. The military judge gave no instructions concerning the testimony that the OSI agent had already given on the issue of the appellant's credibility. [100]

Applying the waiver doctrine, the AFCCA affirmed the conviction in an unpublished opinion, holding that because the defense counsel not only failed to object to the testimony on direct, but opened the door to additional damaging testimony on cross-examination, the issue had been waived.[101] The CAAF reversed, holding that the military judge abused his discretion by permitting the OSI agent to give human lie detector testimony and by failing to give prompt corrective instructions to the members.

The CAAF's opinion first reviewed the limits of opinion testimony on a person's character for truthfulness. Military Rule of Evidence 608 permits evidence of a person's general character for truthfulness, but the rule does not permit human lie detector testimony, which the CAAF defined as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case."[102] The CAAF listed several reasons for restricting such testimony: (1) determining whether a person is truthful exceeds the scope of a witness's expertise; (2) it violates the limits on character evidence in MRE 608(a) because it offers an opinion on the declarant's truthfulness on a particular occasion rather than the declarant's reputation for truthfulness in the community; and (3) it places an improper stamp of truthfulness on the witness's own testimony in a manner that usurps the panel's exclusive function to weigh and determine credibility.[103]

The CAAF then turned its attention to the OSI agent's testimony in *Kasper.* It rejected the AFCCA's waiver analysis and noted that the government—not the defense—initiated the human lie detector testimony as part of its case-in-chief.[104] Even before the defense counsel's ill-fated cross-examination, the trial counsel had elicited two opinions from the OSI agent on the appellant's credibility.[105] The central issue in the case was the appellant's credibility, and the members had to decide whether she was lying when she denied ecstasy use or was lying when she allegedly confessed to it. Permitting the OSI agent to testify that it was a physiological fact that the appellant was lying materially prejudiced the appellant's ability to present a defense.[106] The panel member's written question regarding the

96. *Id.* at 316.

97. *Id.*

98. *Id.* at 317.

99. *See id.*

100. *Id.*

101. *See* United States v. Kasper, 2001 CCA LEXIS 351, *6 (A.F. Ct. Crim. App. Dec. 28, 2001).

102. *Kasper*, 58 M.J. at 315; *see* MCM, *supra* note 1, MIL. R. EVID. 608.

103. *See Kasper*, 58 M.J. at 315.

104. *Id.* at 319.

105. *Id.*

indicators of deception demonstrated the impact this testimony had on the panel. The defense's failure to offer a timely objection or to request a limiting instruction did not change the military judge's *sua sponte* duty to stop the testimony, and issue effective limiting instructions.[107]

Kasper provides a message and a warning for trial counsel, military judges, and defense counsel. Trial counsel should avoid any efforts or subterfuges to introduce human lie detector testimony at trial. Evidence from a trained police investigator can be powerful and unduly prejudicial to the defense. *Kasper* also imposes an additional burden on military judges, who now must consider paternalistic intervention on evidentiary matters even when a defense counsel seemingly opens the door to improper testimony or fails to object to it. For defense counsel, *Kasper* presents a textbook example of a defense counsel failing to protect a client by lodging objections or recognizing the ramifications of certain cross-examination questions. By the time the defense counsel in *Kasper* began protecting the client, the damage had already been done.

United States v. Caley,[108] an unreported NMCCA case, is an interesting holding on credibility evidence. In a judge-alone general court-martial, the appellant was convicted of raping a female sailor. At trial, the government presented testimony from a Navy Criminal Investigation Services (NCIS) agent on the victim's demeanor during her police interview. Trial counsel asked the NCIS agent to describe the victim's demeanor during his interview of her. The NCIS agent replied that the victim appeared to be forthcoming and honest. This drew an objection for improper bolstering, which the judge sustained. The trial counsel, however, continued to ask questions about the victim's demeanor, and the judge permitted the NCIS agent to testify that the victim's demeanor had been "open, forthcoming, much more cooperative, et cetera."[109] After a few more questions and answers, the military judge sustained a second bolstering objection and directed the trial counsel to move on.[110]

The NMCCA affirmed the introduction of this evidence. The court held that the NCIS agent used the word "forthcoming" only as a description of the victim's demeanor and not as a description of her honesty or credibility.[111] In a footnote, the NMCCA noted that in its search of case law, it had been able to find only one other appellate decision on point, from Arizona, addressing demeanor testimony, and the Arizona court had affirmed the introduction of the evidence.[112] The NMCCA also observed that there was no danger of members being improperly influenced by the evidence because this was a judge-alone case.[113]

Caley demonstrates that not all so-called credibility evidence is off-limits. So long as the opinions and conclusions on truthfulness and credibility are left to the finder of fact, counsel may be able to call witnesses to describe an individual's demeanor. This evidence is potentially valuable at trial because it can permit a trier of fact to draw appropriate conclusions on credibility based on the demeanor observations of trained witnesses. For example, the fact finder might be interested to know that a complaining witness never looked the police officer in the eye, talked quickly, was evasive in response to questioning, and the like. *Caley* leaves open the issue of whether this type of evidence would be limited to a judge-alone trial or would be permissible in a members trial. Counsel who desire to introduce demeanor evidence in a members trial would be well advised to file a motion in limine and have the military judge address the admissibility of the evidence under MRE 104 at a pre-trial 39(a) session.

Opinion Testimony

Lay Opinion Testimony

In *United States v. Schnable*,[114] the NMCCA addressed the issue of lay opinion testimony under MRE 701.[115] The appellant in *Schnable* was convicted of committing indecent acts with and communicating a threat to his mildly retarded, thirteen-year-daughter. The appellant committed several indecent acts with his daughter. On one occasion, he cornered her in the garage, forced her to wrap her legs around him, fondled her, and French-kissed her. Another time, he took her into the master bedroom, unzipped his pants, masturbated, touched her genitals, and made her fondle his penis. On a third occasion, he took her for a drive in his truck, parked by the side of a road, fondled

106. *See id.*

107. *See id.* at 319-20.

108. 2003 CCA LEXIS 70 (N-M. Ct. Crim. App. Mar. 11, 2003).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* n.2.

113. *Id.* at *8.

114. 58 M.J. 643 (N-M. Ct. Crim. App. 2003).

and digitally penetrated her, and then masturbated until he ejaculated.[116]

The victim in *Schnable* was both mentally challenged and physically underdeveloped. When she testified at trial, the members saw a "small and short" child who did not appear to be thirteen-years old.[117] Moreover, she used terms less sophisticated than one might expect from a teenager: for example, she told the members that "yellow stuff" came out of the appellant's "dingle" when they "rubbed it."[118] The government called the victim's mother to the stand, who testified that the victim suffered from a mild degree of mental retardation.[119]

The NMCCA affirmed the military judge's decision to permit this line of questioning. In its analysis, the NMCCA examined the plain language of MRE 701 and stated that there are just two requirements for lay opinion testimony: the testimony must be rationally based on the perception of the witness, and it must be helpful to the fact finder.[120] Mrs. Schnable's opinion was rationally based on her perception as a witness. She was the mother of six children, she was familiar with the victim's physical and mental development, and she had home-schooled the victim for several years. She was able to testify both as a mother and as an educator that the victim lagged behind her other children in math and reading skills.[121] The testimony was also helpful to the members, who had heard testimony from a thirteen-year old who was physically underdeveloped and who was not able to provide information at the same level one might expect from a young teenager. The mother's opinion testimony helped the members place the victim's testimony in its proper perspective, understand her testimony, and weigh the victim's overall credibility.[122] The NMCCA rejected arguments that testimony related to retardation is the exclusive province of experts. Mrs. Schnable had not testified as to the level of the victim's impairment, nor had she attempted to answer questions about how a mentally retarded person would react under certain types of questioning; she merely gave an opinion drawn directly from her observations as a mother and an educator.[123]

Schnable provides a clear example of the appropriate limits of lay opinion testimony at courts-martial. Trial and defense counsel alike may want to consider introducing appropriate lay opinion testimony at trial as an alternative to expert testimony. If a witness can rationally base her opinion on her perceptions as a witness in a manner helpful to a panel, she will meet the qualifications of MRE 701.[124]

Expert Testimony

In *United States v. Billings*,[125] the ACCA affirmed a creative use of expert testimony that helped the government link the appellant to a robbery. The appellant was the leader of a criminal gang called the Gangster Disciples. Among other crimes,[126] gang members robbed the manager of an apartment complex and took cash and a Cartier Tank Francaise watch worth about $15,000. Although the watch itself was never recovered, investigators recovered photographs of the appellant

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115. MCM, *supra* note 1, MIL. R. EVID. 701. Military Rule of Evidence 701 permits lay witnesses to give opinion testimony within certain constraints. *Id.* The rule states:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

Id.

116. *See Schnable*, 58 M.J. at 646-47.

117. *Id.* at 652.

118. *Id.* at 648.

119. *Id.* at 651.

120. *Id.*

121. *Id.* at 651-52.

122. *Id.* at 651.

123. *See id.* at 652 (distinguishing the *Schnable* case from other cases in which experts might be called to testify on the issue of retardation).

124. MCM, *supra* note 1, MIL. R. EVID. 701.

125. 58 M.J. 861 (Army Ct. Crim. App. 2003).

126. *See id.* The appellant ordered a hit on a local businessman that lead to the deaths of two people. The appellant was tried for murder and conspiracy to commit murder, but was convicted of assault consummated by a battery and conspiracy to commit assault. She was also convicted of conspiracy to commit robbery and robbery with a firearm. *See id.*

wearing a watch that appeared similar to the stolen watch. The government sought to use these photographs to link the appellant to the robbery of the apartment complex manager.[127]

The government called a local jeweler to testify as an expert witness to help the panel determine whether the watch in the photograph shared characteristics with Cartier Tank Francaise watches. The military judge permitted the jeweler to testify, but he did not permit the jeweler to draw the ultimate conclusion that the watch in the photograph was, in fact, a Cartier Tank Francaise watch. Interestingly, the jeweler had never actually seen a Cartier Tank Francaise watch in real life. The jeweler testified that he was familiar with the characteristics of Cartier watches, and that he was able to tell from looking at a photograph whether a piece of jewelry was made of solid gold or was merely gold-plated metal. He had over twenty-five years of experience in the jewelry business, had experience appraising gold jewelry, and was a member of the National Jewelers Association of Appraisers. The jeweler was able to tell the members that the watch bore many characteristics of a Cartier watch, that it was made of real gold, that the pattern of the links in the watchband would be difficult to duplicate, and that he had never seen a copy or replica of a Cartier watch made out of solid gold.[128]

The ACCA applied a straightforward analysis under MRE 702[129] and the *Daubert/Kumho Tire* line of cases in affirming the military judge's decision to permit the jeweler to testify as an expert. The ACCA noted that the trial judge is required to assume a gate-keeping function both for scientific and technical experts, assessing whether the reasoning or methodology underlying the expert's testimony is sound, and whether that reasoning or methodology has been properly applied to the facts in issue.[130]

In this case, the jeweler focused on matters that were within his expertise. His testimony was based on personal knowledge and twenty-five years of experience, and it was relevant, reliable, and probative. Accordingly, the military judge did not abuse his discretion in admitting the evidence.[131]

Billings provides a superb example to practitioners of the clever use of an unconventional expert to help prove a critical element of the case. The government needed the photograph of the watch to link the appellant to the robbery. Without an expert, there would have been no way to establish the common characteristics between the watch in the photograph and a Cartier Tank Francaise watch. Counsel and military judges alike can use *Billings* for guidance in evaluating novel uses for technical experts in courts-martial.

Ultimate Opinion Testimony

On its face, MRE 704 does not prohibit expert testimony on ultimate issues in a case such as the guilt or innocence of the accused; the rule simply states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[132] Following the drafter's analysis in the *MCM*, however, MRE 704 does not permit a witness to give an opinion as to the guilt or innocence of the accused.[133] In *United States v. Diaz*,[134] the CAAF held the line on the permissible limits of opinion testimony under MRE 704, holding that the military

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127. *Id.* at 866.

128. *Id.* at 867.

129. MCM, *supra* note 1, MIL. R. EVID. 702. Military Rule of Evidence 702 provides for expert testimony. The version in force during *Billings* stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. In December 2000, Federal Rule of Evidence (FRE) 702 was amended to reflect the Supreme Court's guidance in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). *See* 2000 Amendment Committee Note, *reprinted in* 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 702.04 [2], at 702-249 (8th ed. 2002). The new FRE 702 states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if *(1) the testimony is based upon sufficient facts of data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Id. § 702.01, at 702-7 (emphasis added). By operation of law under MRE 1102, amendments to the FRE apply to the MRE eighteen months after their effective date, unless the President takes action to the contrary. *See* MCM, *supra* note 1, MIL. R. EVID. 1102. Accordingly, the changes to FRE 702 took effect in the MREs on 1 June 2002. Those changes have not yet, however, appeared in the *Manual*. *See* MCM, *supra* note 1.

130. *See Billings*, 58 M.J. at 867.

131. *Id.*

132. MCM, *supra* note 1, MIL. R. EVID. 704.

133. *See id.* app. 22, at A22-50.

judge erred in denying a mistrial after a government expert testified that the death of Nicole Diaz was a homicide and the appellant was the perpetrator.[135]

The appellant in *Diaz* was charged, among other things, with the murder of his infant daughter Nicole.[136] At issue on appeal was the opinion testimony of two government witnesses, a social worker who testified that she had confronted the appellant with her belief that he had killed his daughter,[137] and a pediatric child abuse expert. The pediatric child abuse expert testified—contrary to the military judge's ruling on a defense motion in limine—that Nicole's death was a homicide and the appellant was the perpetrator.[138] Following the social worker's testimony, the defense counsel expressed concern with the improper opinion, and the military judge gave a limiting instruction.[139] After the pediatrician's testimony, the defense counsel moved for a mistrial. Before denying the motion for a mistrial, the military judge gave extensive limiting instructions to the members, conducted group voir dire of the members, and individually questioned each of them about their ability to comply with his instructions.[140]

In holding that the military judge erred in denying the mistrial, the CAAF's analysis focused on the permissible limits of opinion testimony and the combined prejudicial effect of the improper opinion testimony and acts of uncharged misconduct that the government introduced against the appellant. The CAAF observed that MREs 702-705 establish a liberal standard for admissibility of expert testimony. Combined with MRE 403, these rules create a four-part standard for admissibility: (1) is the witness qualified to testify as an expert; (2) is the testimony within the limits of the witness's expertise; (3) was the opinion based on sufficient factual basis to render it relevant; and (4) can the evidence survive an MRE 403 balancing test.[141] "These rules, stated the CAAF, "reflect the intuitive idea that experts are neither omnipotent nor omniscient."[142]

The CAAF then cited MRE 704 and its own precedent for the proposition that an expert "may not opine concerning the guilt or innocence of an accused."[143] The court specifically referred to the Drafter's Analysis of MRE 704 to support this assertion.[144] The CAAF agreed with the military judge that the opinion testimony of the social worker and the expert opinion testimony of the pediatrician violated the permissible limits of opinion testimony on the guilt or innocence of the accused.[145]

The CAAF next examined the military judge's remedy. The military judge gave curative instructions and conducted individual voir dire rather than granting a mistrial, an action that the CAAF found to be an abuse of discretion.[146] The CAAF based this conclusion on its assessment that the members would not be able to put aside the inadmissible evidence.[147] Several factors combined to make a mere instructional remedy insufficient. First, because the two key issues in the case were the cause of Nicole's death and the identity of the perpetrator, the pediatrician's testimony had an ineradicably prejudicial impact on the members. The government relied extensively on the pediatrician's experience and testimony from opening state-

134. 59 M.J. 79 (2003), *aff'd*, 56 M.J. 795 (Army Ct. Crim. App. 2002).

135. *Id.* at 91.

136. *See id*. at 79; *supra* notes 21 through 33 and accompanying text (setting out the facts of *Diaz*).

137. *Diaz*, 59 M.J. at 84-85. It is not entirely clear from the opinion whether the social worker testified as an expert or not. She did, however, testify that she interviewed the appellant on several occasions, and during one particular interview, she told him that she believed he had killed Nicole. The appellant replied, "You don't know the half of it." *Id.*

138. *See id*. at 86-87. The pediatrician, Dr. Stuemky, was a member of Oklahoma's Death Review Board. Because of the unexplained past injuries to Nicole, the Death Review Board concluded that Nicole's death was a homicide and the appellant was the perpetrator. During a motion in limine, the military judge ruled that Dr. Stuemky could testify that the injuries were consistent with a child abuse death, but he could not say, "Specialist Diaz murdered his daughter." *See id*. at 86-87. Dr. Stuemky testified, however, that the death was caused by physical abuse and the appellant was the perpetrator. *Id.* at 87.

139. *Id.* at 85-86.

140. *Id.* at 87-89.

141. *Id.* at 89. In essence, the first three elements of this test are quite similar to the language in the newest version of MRE 702. *See* MCM, *supra* note 1, MIL. R. EVID. 702; *supra* note 129.

142. *Diaz*, 59 M.J. at 89.

143. *Id.*

144. *Id.*

145. *Id.* at 90.

146. *Id.* at 91.

147. *See id.*

ments through rebuttal arguments.[148] Second, the context of the pediatrician's opinion was important. His opinion came after the social worker testified of her belief the appellant had killed his daughter. The juxtaposition of these two witnesses made a "cumulative prejudicial impact" on the members.[149] In the CAAF's opinion, the military judge's instructions were not only unclear, but also unworkable; there was no way to "unring the bell."[150] Finally, the CAAF looked at the trial as a whole and measured the impact of the opinion testimony in the light of uncharged misconduct evidence that it declared had been improperly admitted.[151]

Diaz appears to lower the bar for the mistrial remedy in courts-martial. Trial counsel should be wary of introducing anything that looks like opinion testimony on the guilt or innocence of an accused because such testimony could ultimately result in a mistrial or reversal. If such testimony is introduced, the defense counsel should move for a mistrial, using the CAAF's approach in *Diaz* to convince the military judge that the evidence is improper in form and unduly prejudicial in context when combined with other evidence introduced at trial. *Diaz* puts military judges in a difficult position because after *Diaz* extensive limiting instructions may not be enough. If the witness offering the opinion is sufficiently credible and the other evidence in the case hotly contested, the CAAF has indicated a willingness to second-guess a military judge's efforts to salvage the trial. In the end, military judges may be more readily tempted to declare mistrials than risk reversals and rehearings.

Hearsay

Impeachment by Contradiction vs. Hearsay

Impeachment by contradiction is one of the five primary recognized modes of impeachment.[152] An attorney can impeach a witness by showing either on cross-examination or through the use of extrinsic evidence that something the witness said was wrong.[153] *United States v. Hall*[154] presents an example in which the rules governing impeachment clash[155] with the general prohibition against the use of hearsay[156] at trial.

The appellant in *Hall* was convicted of cocaine use based on the results of a urinalysis test and the testimony of a forensic toxicology expert. She presented an innocent ingestion defense in which she claimed that she had ingested Trimate tea—made from de-cocainized coca leaves—that her mother had sent her to help with weight control. She also introduced testimony from an expert witness that de-cocainized teas can produce positive cocaine metabolites above the Department of Defense's nanogram cut-off level.[157]

On rebuttal, the government called a U.S. Army Criminal Investigation Command (CID) agent to testify about an interview he had with the appellant's mother. The CID agent testified that the appellant's mother told him she had never given the appellant any herbal teas. The appellant's mother did not attend the trial because the government failed to perfect its subpoena by providing travel funds for her.[158] The government sought to introduce the statement under MRE 803(2),[159] the excited utterance exception to the hearsay rule.[160] The military judge refused to admit the statement for its truth as an excited utter-

148. *See id.*

149. *Id.* at 92.

150. *See id.* at 92-93.

151. *See id.* at 93-94.

152. *See* MUELLER & KIRKPATRICK, *supra* note 67, § 6.18, at 464-65. According to Mueller & Kirkpatrick, the five modes of impeachment are as follows: (1) showing the bias or motivation of a witness; (2) showing defects in the witness's mental or sensory capacity; (3) showing character for untruthfulness of a witness; (4) showing that the witness has made prior inconsistent statements; and (5) contradiction of the witness's testimony, either on cross-examination or by extrinsic evidence. *See id.*

153. *See id.* at 465.

154. 58 M.J. 90 (2003).

155. Neither the FRE nor the MRE specifically provide for impeachment by contradiction. *See* MUELLER & KIRKPATRICK, *supra* note 67, § 6.18, at 465. Impeachment by contradiction, however, is regulated by Rules 403 and 611. Rule 403 permits a judge to exclude evidence if it is prejudicial, misleading, confusing, or a waste of time. Rule 611 gives judges the discretion to control the examination of witnesses. *Id.*; *see* MCM, *supra* note 1, MIL. R. EVID. 403, 611.

156. *See* MCM, *supra* note 1, MIL. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.").

157. *Hall*, 58 M.J. at 90-91.

158. *Id.*

159. MCM, *supra* note 1, MIL. R. EVID. 803(2). The excited utterance exception permits the introduction of "[a] statement relating to a startling event or declaration made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

ance, but he did admit it as a statement of impeachment by contradiction.[161] The military judge instructed the members that they could not consider the statement for its truth, but only "for the limited purpose to determine what impeachment value it has only concerning the accused's testimony that her mother sent her the tea."[162]

The CAAF reversed and set aside the findings and sentencing. The CAAF began its analysis by noting the constitutional underpinnings of the hearsay rule: admitting hearsay can deprive the party against whom it is offered the opportunity to test the evidence by cross-examination, a right that is "at the core of the confrontation clause."[163] Because the appellant was deprived of the opportunity to cross-examine the declarant, it was a constitutional error to improperly admit the statement.[164] In holding that the statement of the appellant's mother was hearsay, the CAAF took a practical approach. The manner in which the evidence was introduced made it virtually inevitable that the members would consider it for its truth.[165] The members could not have found contradiction of the appellant's statement without considering the mother's statement as a fact contrary to the appellant's in-court testimony.[166] The judge's limiting instruction "was impossible to apply and could only confound the error."[167]

The error was not harmless. Given the evidentiary backdrop of the case, the hearsay statement from the appellant's mother went to the heart of the appellant's innocent ingestion defense. Both the government and the defense expert had agreed that decocainized teas could produce positive urinalysis results. The appellant testified she had ingested tea obtained from her mother. As the CAAF stated, "Short of repudiating her own testimony, it is difficult to imagine anything that could more decimate this defense."[168] Thus, the CAAF found it impossible to determine beyond a reasonable doubt—the standard required for constitutional errors—that the improper admission of this hearsay statement did not contribute to the finding of guilt.[169]

Hall provides a practical template for analyzing out-of-court statements. The "arid doctrinal logic"[170] that might permit the admission of a statement for non-hearsay purposes must be measured against the likely effect the statement will have on a fact-finder. Examined against the evidentiary backdrop of the case, even a carefully crafted limiting instruction may not be enough to overcome the impact of the out-of-court statement on the members. If a statement would inevitably be considered for its truth and does not fit within a hearsay exception, prudence would suggest that excluding the statement might be the better course.

Excited Utterance

The excited utterance exception to the hearsay rule, codified in MRE 803(2),[171] "rests on the idea that spontaneous reaction is powerful enough to overcome reflective capacity."[172] Reactive statements are considered trustworthy for two primary reasons: (1) the stimulus of a startling event leaves the declarant momentarily incapable of fabrication; and (2) the declarant's memory is fresh because the impression remains in her mind.[173] Time plays an important—albeit not dispositive—role in helping to determine whether a statement is an excited utterance. In

160. *Hall*, 58 M.J. at 92.

161. *Id.*

162. *Id.* The military judge's ruling illustrates what Mueller & Kirkpatrick call the "arid doctrinal logic" that can occur when a court admits "otherwise excludable evidence as counterproof tending to contradict initial testimony." MUELLER & KIRKPATRICK, *supra* note 67, § 6.45, at 537. They use the example of a defendant charged with auto theft who testifies on direct he has never committed a crime. Character evidence rules would not permit proof that he stole cars on four prior occasions, but the testimony would likely be admitted for its tendency to contradict his broad claim. The defendant would be entitled to a limiting instruction because doctrinally, the evidence could not be considered as proof of the defendant's guilt. *See id.* at 537-38. "This doctrinal consequence does not often make a practical difference." *Id.* at 538.

163. *Hall*, 58 M.J. at 93.

164. *See id.*

165. *Id.* at 94.

166. *Id.*

167. *Id.*

168. *Id.* at 95.

169. *Id.*

170. *See supra* note 162.

171. MCM, *supra* note 1, MIL. R. EVID. 803(2); *see supra* note 159.

172. MUELLER & KIRKPATRICK, *supra* note 67, § 8.36, at 807.

general, statements that occur immediately after or within a few minutes of a startling event will meet the exception.[174] Even when there has been a time lapse greater than a few minutes, the exception will apply if the proponent of the evidence can demonstrate that the declarant was still under the stress of the event when he made the statement.[175]

The CAAF decided two excited utterance cases this term, *United States v. Feltham*[176] and *United States v. Donaldson*.[177] In each case, the CAAF demonstrated a willingness to stretch time, eschewing a strict temporal connection between event and statement and placing heavy reliance on the military judge's findings that the hearsay declarants were still under the stress of a startling event.

In *United States v. Feltham*, the victim, a male sailor, had too much to drink at a local bar. The appellant, also a male sailor, offered to let the victim sleep at his nearby apartment until morning, when the victim would be sober enough to drive home. The victim agreed, and after arriving at the appellant's apartment, went to sleep on the couch. During the night, the victim, in the middle of a sexual dream, woke up to discover that he was ejaculating into the appellant's mouth as the appellant performed fellatio on him.[178] The two men jumped away from each other. The victim demanded to know what was going on and told the appellant it "wasn't cool." The appellant agreed that it was "messed up," but then asked the victim if he had enjoyed it.[179] The appellant left the living room and went back to bed. Meanwhile, in a self-described state of shock, the victim sat in the living room for about five minutes, then got into his truck to drive home. He began to cry. He drove ten to fifteen minutes back to his barracks, still crying, and woke up his roommate to tell him what had happened, beginning at the bar and ending with the sodomy.[180]

At trial, the victim's testimony was the lynchpin of the government's case. The defense attacked the victim's credibility. To bolster the victim's credibility, the government offered his statements to his roommate under the excited utterance and residual hearsay exceptions to the hearsay rule. The military judge admitted the statements as excited utterances, specifically finding that no more than one hour had passed, and the victim was still under the stress of the startling event of waking up to discover the appellant performing oral sodomy on him.[181]

On appeal, the CAAF affirmed the admission of the evidence, holding that the military judge did not abuse his discretion in admitting the statements under the excited utterance exception.[182] The CAAF's analysis focused on the heart of the excited utterance exception—that such statements are reliable because a person who is still under the stress of a startling event or condition will speak truthfully because there is no opportunity for fabrication.[183] The CAAF examined the statements under the three-pronged test first articulated by the COMA in *United States v. Arnold*:[184] (1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection or deliberation; (2) the event prompting the utterance must be startling; and (3) the declarant must be under the stress of excitement caused by the event.[185]

In the instant case, the CAAF relied almost exclusively on the military judge's findings of fact in applying the *Arnold* test. The military judge found that the statements met the first *Arnold* prong because they were "spontaneous, unrehearsed, and not given in response to any interrogation . . . [while the victim was] in a state of shock and was not thinking clearly."[186] There was little doubt that the event was startling, thus meeting the second prong of the *Arnold* test.[187]

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173. *See id.*

174. *Cf. id.* at 810-11 (discussing the differences between the present sense impression exception, which requires immediacy, and the excited utterance exception, which does not).

175. *See id.* at 811 (giving several examples of utterances following a lapse of time).

176. 58 M.J. 470 (2003).

177. 58 M.J. 477 (2003).

178. *Feltham*, 58 M.J. at 471-72.

179. *Id.* at 472.

180. *Id.*

181. *Id.* at 473.

182. *Id.* at 475.

183. *See id.* at 474.

184. 25 M.J. 129 (C.M.A. 1987).

185. *Feltham*, 58 M.J. at 474.

The third *Arnold* factor—that the declarant must be under the stress of excitement caused by the event—occupied most of the CAAF's analysis. As with the other *Arnold* factors, the military judge had made a specific finding that the victim was, in fact, under the stress of the event. The CAAF noted that elapsed time between the event and the statement is one factor to consider in determining whether the statement is an excited utterance, and the CAAF cited several examples involving rather lengthy passages of time between the event and utterance. The CAAF acknowledged that a lapse of time between the event and the utterance creates a strong presumption against admissibility, citing *United States v. Jones*.[188] In *Jones*, the COMA rejected a statement made twelve hours after the event, in response to a question, and after the declarant had missed an opportunity to comment on the event.[189] Conversely, in *Feltham*, less than one hour had elapsed between the event and the statement, the victim made the statements at his first opportunity, and the statements were not made in response to interrogation.[190] The CAAF concluded its analysis with two observations. First, the critical determination of the excited utterance exception is whether the declarant was under the stress of the startling event, not the lapse of time. Second (and perhaps of greater significance in this case), the military judge made a specific finding in this case that the declarant was under the stress of the event.[191]

In *United States v. Donaldson*,[192] the appellant committed indecent acts with the victim, a three-year-girl, early one morning and threatened to kill her family if she told anyone. The victim and her mother spent the day shopping and in the company of either the mother's adult friends or the victim's brother. Throughout the day, the victim behaved in an uncharacteristically quiet, withdrawn way and would not let her mother out of her sight. That evening, nearly twelve hours after the incident with the accused, the mother gave the victim a bath. This was the first time all day the mother and victim were alone together. The victim became hysterical. The mother noticed irritation in the victim's vaginal area, and when the mother asked what was the matter, the victim told her, "Him touched me," then explained that "him" was the appellant. In response to a question, the victim also told her mother that the appellant had threatened to kill her family if she told anyone.[193] The military judge denied a pre-trial defense motion in limine and admitted the statements as excited utterances under MRE 803(2), or in the alternative, as residual hearsay under MRE 807.[194]

The CAAF affirmed, holding that the military judge did not abuse his discretion in admitting the statements to the mother as excited utterances. The CAAF applied the three-prong *Arnold/Feltham* test in evaluating the evidence. There was little doubt that sexual abuse accompanied by the threat of harm constituted a startling event. Thus, the statements met the first prong of the test. The appellant argued that the statements could not meet the second and third prongs of the test because they were not spontaneous statements made under the stress or excitement of a startling event. The appellant focused on the lapse of nearly twelve hours from the startling event to the statement, arguing that the victim had time to calm down and reflect on the event. Therefore, any later excitement was the result of trauma on reflection and not an excited utterance. The appellant also argued that because the victim spent the entire day with her mother, she had ample opportunity to report the incident earlier.[195]

In rejecting the appellant's argument, the CAAF noted that it is an unsettled legal question whether statements made after one has actually calmed down can be excited utterances.[196] The CAAF declined to address that issue in this case, however, because it was convinced that there was sufficient evidence for the military judge to conclude that the victim was under the stress of excitement caused by the event when she made the statements to her mother.[197] Although a lapse of time between the startling event and the statement creates a strong presumption against admissibility, courts tend to be more flexible in

186. *Id.* at 475.

187. *Id.*

188. 30 M.J. 127, 128 (C.M.A. 1990).

189. *See Feltham*, 58 M.J. at 475 (construing the facts of *Jones*).

190. *Id.* at 475.

191. *Id.*

192. 58 M.J. 477 (2003).

193. *Id.* at 479-80.

194. *Id.*

195. *Id.* at 483.

196. *See id.*

197. *Id.*

cases in which the statement was made during the child's "first opportunity alone with a trusted adult."[198] Furthermore, the CAAF examined the evidence supporting the judge's finding. The declarant was three-years old. She was able to demonstrate where the appellant touched her. Her behavior throughout the day had been abnormal, and she became hysterical when her mother attempted to wash her vaginal area. The lapse in time was rendered less significant because the appellant had threatened to kill the victim and her family. Therefore, it was not clearly erroneous for the judge to find that the victim was still under the stress of a startling event.[199]

Both *Feltham* and *Donaldson* illustrate the importance of developing the record in the admission of hearsay statements. The party seeking admission of statements under the excited utterance exception should follow the example of government counsel in *Feltham*, who managed to overcome nearly an hour's lapse in time by focusing on the state of the declarant's mind. During cross-examination, the party seeking to exclude the statements will need to focus not on the lapse of time, but on the opportunities such a lapse provides for reflection and deliberation. In *Feltham*, the victim had five minutes alone in the appellant's apartment, followed by a walk to his vehicle, a fifteen-minute drive to his barracks, and a walk from the vehicle to the barracks. Each of these time segments potentially provided an opportunity to reflect on the event. In child cases in which there is a substantial delay between the startling event and the statement, *Donaldson* teaches counsel to focus on what the child did during the intervening time. The child's behavior, opportunities to talk alone to a trusted adult, and the child's demeanor when making the statement are all significant factors to develop on the record. Finally, *Feltham* and *Donaldson* show that the CAAF grants substantial deference to the findings of the military judge in these matters. To avoid reversal, military judges should ensure that the evidence in the record supports their findings, and they should follow the *Arnold/Feltham* template in drafting the findings.

Then Existing Mental, Emotional, or Physical Condition

In *United States v. Holt*,[200] the appellant pled guilty to fifty-eight specifications of dishonorable failure to maintain sufficient funds for the payment of checks, and a court of officer members sentenced him to a bad-conduct discharge, one year confinement, total forfeitures, and reduction to E1. During the pre-sentencing case, the trial counsel entered eighteen exhibits into evidence. Exhibits seventeen to thirty-two and thirty-four were copies of cancelled checks with markings on their backs, debt collection documents, a pawn ticket, and bad check notification documents. The markings on the checks and the other documents were all written by third parties and not by the appellant. The military judge admitted the exhibits into evidence as non-hearsay evidence in aggravation to show the complete set of circumstances surrounding the offenses, the accused's state of mind when the offenses were committed, and impact on the victims. The judge specifically instructed the members that they could not consider the exhibits for the truthfulness of the matters asserted therein.[201]

On appeal to the AFCCA, the appellant argued that the exhibits had been improperly admitted into evidence for a number of reasons ranging from improper authentication to the fact that the rules of evidence had not been relaxed at sentencing to hearsay.[202] The AFCCA ruled that exhibits eighteen to thirty-four were admissible for the truth of the matters asserted under MRE 803(3)[203] as evidence of the appellant's state of mind.[204]

The CAAF set aside the decision of the AFCCA. The government conceded on appeal to the CAAF that MRE 803(3) did not properly apply to the exhibits because the markings and documents were created by third parties, not the appellant. The CAAF held that documents and markings created by third parties could not be used to reflect the appellant's state of mind.[205] Relevant state of mind can be proven by "the person's own, out-of-court, uncross-examined, concurrent statements as to its existence."[206] The CAAF also held that the AFCCA exceeded the proper bounds of review under UCMJ, Article 66[207] when it

198. *Id.* at 484.

199. *Id.*

200. 58 M.J. 227 (2003).

201. *Id.* at 229.

202. *See id*. at 230.

203. MCM, *supra* note 1, MIL. R. EVID. 803(3). The rule reads as follows:

> (3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Id.

204. *Holt*, 58 M.J. at 230.

205. *Id.* at 232.

changed the evidentiary nature of the exhibits on appeal from non-hearsay to hearsay. The military judge, not the intermediate appellate courts, defines the evidentiary nature of exhibits entered at trial.[208]

Holt teaches subtle lessons on the uses of state-of-mind evidence. The military judge admitted the exhibits as circumstantial evidence that could help show the full facts and circumstances of the crimes, the impact on the victims, and the appellant's own state of mind. He did not, however, permit the panel to consider the contents of the documents for the truth of the matters asserted therein. Arriving at the appellant's state of mind would require the panel to draw a series of inferences from the evidence: the appellant wrote bad checks and received letters from creditors and notices from the bank; nevertheless, he continued to write bad checks, which led to more letters and notices from the bank; therefore, the panel could infer that he viewed the matter of maintaining sufficient funds in his bank accounts with some indifference. The AFCCA's approach, which converted the exhibits into documents admissible for the truth of the matters asserted, changed the logical chain: the appellant wrote bad checks and received letters from creditors and notices from the bank; the information in the letters and notices was all true; the information directly proved that the appellant had an indifferent state of mind. Missing from the AFCCA's approach, however, was any evidence *directly from the appellant* attesting to his state of mind. Circumstantial evidence may help to prove someone's state of mind through an inferential chain, but unless a statement comes directly from the individual himself, it will not meet the requirements of MRE 803(3).

Holt also teaches how critical it is to establish the evidentiary nature of an exhibit at the trial level. In this case, the military judge admitted the evidence as non-hearsay. No court could thereafter change the evidentiary nature of the exhibits. Counsel should be aware of the final nature of these rulings as they affect appellate review under UCMJ Article 66(c) and should press for definitive rulings under the new change to MRE 103(2).[209] Counsel and military judges may also want to consider admitting evidence under alternative theories when it would not be clearly ridiculous to do so. For instance, it would strain credulity to admit evidence both as hearsay and as non-hearsay, but admitting under alternative hearsay exceptions might be a good approach in close cases.

Medical Hearsay Exception

In *United States v. Donaldson*,[210] the three-year-old victim of a sexual assault made a series of statements about the offense to her mother, a police investigator, and a child psychologist.[211] The victim met with the child psychologist a total of thirteen times over a two-year period, during which she told the psychologist that the appellant had touched her vaginal area and had threatened to kill her and her family.[212] The military judge admitted these statements to the psychologist as medical hearsay under MRE 803(4),[213] and alternatively as residual hearsay under MRE 807, making specific findings that the victim made the statements for the purpose of medical diagnosis with some expectation of receiving a medical benefit.[214]

On appeal, the CAAF affirmed the admission of the statements to the psychologist as medical hearsay. The CAAF noted that MRE 803(4) is not limited to statements made to licensed

206. *Id.* (quoting Rayborn v. Hayton, 208 P.2d 133, 136 (1949) (citations omitted)).

207. UCMJ art. 66(c) (2002). In relevant part, Article 66 provides for review by the service courts of criminal appeals as follows:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weight the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Id.

208. *See Holt*, 58 M.J. at 232-33.

209. On 1 December 2000, an amendment to FRE 103(2) became effective in the federal courts. By operation of law under MRE 1102, the change became effective in the military system eighteen months later on 1 May 2002. It has not yet been published in the *MCM*. The amendment follows:

> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence as made known to the court by offer or was apparent from the context within which the questions were asked. *Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*

See generally MCM, *supra* note 1, MIL. R. EVID. 103(2) (emphasis added).

210. 58 M.J. 477 (2003).

211. For a more thorough discussion of the facts, see *supra* notes 192-94 and accompanying text.

212. *Donaldson*, 58 M.J. at 481.

physicians. The exception also contemplates statements made to other health care professionals, including psychologists and social workers.[215] There are two key requirements for statements to be admissible under MRE 803(4): (1) they must be made for the purpose of medical diagnosis or treatment; and (2) (and most critically), the patient must make the statement with some expectation of receiving a medical benefit.[216] Because small children are not always able to articulate their expectation of treatment, it can be important for caregivers to explain the importance of the treatment in terms the child can understand.[217]

The CAAF then examined the evidence in *Donaldson* that would support a finding that the child victim had a subjective expectation of treatment. The CAAF first looked at the child's visits with the psychologist and concluded that the visits alone would not have created an expectation of medical treatment. The office was located in a shopping center, the psychologist did not wear a doctor's coat, the psychologist conducted no physical examinations or other tests, and the visits often consisted of the victim and psychologist playing or drawing together.[218] In addition, the CAAF found the testimony of the doctor somewhat contradictory. She testified on direct that she told the victim she was a doctor, but she admitted on cross that she was not exactly sure what she told the victim, or whether the victim understood she was a doctor or the purpose of the victim's visits.[219] The CAAF then turned its attention to the victim's mother, who testified that she told the victim she was taking her to a doctor who would help her get better and help with the nightmares. The mother also said the victim appeared to understand the purpose of the visits.[220] Finally, the CAAF looked at the testimony of the victim and found that it was not conclusive. The victim was only able to nod "yes" to a leading question from the trial counsel on direct, and it was unclear from the victim's testimony that she expected a medical benefit at the time she began her treatment.[221]

Nevertheless, the CAAF found the evidence met the requirements of MRE 803(4). The key to this determination was the findings of the military judge. The CAAF found that this was a close case, but there was enough testimony supporting the judge's finding of a subjective expectation of treatment that the CAAF was reluctant to hold the military judge committed clear error in reaching it.[222] The CAAF ended the opinion by contrasting the facts of *Donaldson* with those of *United States v. Faciane*[223] and *United States v. Siroky*,[224] in which the COMA and the CAAF respectively held that the young child victims did not have subjective expectations of medical benefit.[225] There was insufficient evidence in *Faciane* and *Siroky* to conclude that the victims knew they were receiving treatment.[226] In contrast, the victim in *Donaldson* at least appeared to know she was visiting a doctor in order to "feel better."[227]

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213. MCM, *supra* note 1, MIL. R. EVID. 803(4). Military Rule of Evidence 803(4) is the medical hearsay exception:

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

214. *Donaldson*, 58 M.J. at 481.

215. *Id.* at 485.

216. *See id.*

217. *Id.*

218. *See id.*

219. *See id.* at 485-86.

220. *Id.*

221. *Id.*

222. *See id.*

223. 40 M.J. 399 (C.M.A. 1994).

224. 44 M.J. 394 (1996).

225. *Donaldson*, 58 M.J. at 486-87.

226. *See generally id.* (discussing the particular facts of each case and focusing on the inability of doctors and caregivers to remember exactly what they had told the child victims).

227. *Id.* at 487.

Donaldson demonstrates that a strong set of findings by the military judge can tip the scales of admissibility in a close case. Trial counsel seeking to introduce the testimony of young children under MRE 803(4) must develop the record by including testimony from the caregivers and doctors concerning what they told the child about the purpose of the treatment. Defense counsel can attack admissibility based on the circumstances surrounding the treatment and can exploit the inability of medical professionals to remember exactly what they told a child victim about treatment. In the end, however, the CAAF has signaled that the military judge's findings will often carry the day.

Residual Hearsay

Military Rule of Evidence 807, the military's residual hearsay exception, permits the admissibility of hearsay statements that are "not specifically covered by Rule 803 or 804 but [that have] equivalent circumstantial guarantees of trustworthiness."[228] The CAAF decided three residual hearsay cases this year, *United States v. Donaldson*,[229] *United States v. Holt*,[230] and *United States v. Wellington*,[231] each of which addresses a different aspect of the proper use of residual hearsay evidence at trial.

In *United States v. Donaldson*, the CAAF took a close look at the circumstances surrounding the declarant's statement. After the victim in *Donaldson* informed her mother that the appellant assaulted her, the mother called the police to report the incident. The appellant's girlfriend also arrived at the house, and the victim's mother began arguing with her about the appellant inappropriately touching the victim. Eventually, a trained child abuse investigation specialist from the Fayetteville Police Department arrived and took the victim into the bedroom for a private interview.

During the interview, the victim told the investigator that the appellant had hurt her. The investigator asked how he hurt her, and the victim pointed to her vaginal area and said, "He touched me there." When the investigator followed up by asking whether the appellant had touched the victim on the inside or the outside of her vagina, the victim lay back on the bed, pulled her panties aside, and "stuck her finger . . . real close in her vaginal area." The investigator testified that she had never seen another child abuse victim respond in such a manner.[232]

The military judge admitted this evidence under the excited utterance[233] and residual hearsay exceptions to the hearsay rule. The ACCA found that the statements to the investigator were not excited utterances because the victim made them in a calm, matter-of-fact manner, indicating that they were the product of recall and reflection. The ACCA, however, did affirm admission of the statements under the residual hearsay exception.[234]

The CAAF affirmed, holding that the circumstances surrounding the victim's statement to the investigator provided sufficient circumstantial guarantees of trustworthiness as the enumerated hearsay exceptions. According to the opinion, there are four primary indicia of reliability the CAAF considers: (1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated.[235] Other indicators include the declarant's age and the circumstances under which the statement was made.[236]

The CAAF examined the evidence surrounding the victim's statement to the investigator but did not carefully follow its own analytical template listed above. Instead, the court considered the following factors in favor of admission: the spontaneity of the victim's non-verbal conduct of pulling aside her

228. MCM, *supra* note 1, MIL. R. EVID. 807. In full, MRE 807 states as follows:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

229. 58 M.J. 477 (2003).

230. 58 M.J. 227 (2003).

231. 58 M.J. 420 (2003).

232. *Donaldson*, 58 M.J. at 480.

233. MCM, *supra* note 1, MIL. R. EVID. 803(2).

234. *Donaldson*, 58 M.J. at 482.

235. *Id.* at 488.

236. *Id.*

panties and pointing to her vagina, the degree of specificity in the statements, and the statements the victim made to others that corroborated the story she told to the investigation specialist.[237] Factors mitigating against admission were that the statement was solicited by a police investigator in private, and that it followed several emotionally charged conversations that the victim overheard between her mother and others. Those conversations could have colored the victim's recollection of events.[238] The two factors that seemed most important to the CAAF were the victim's act of pulling aside her panties in response to a question and the hearsay statements she made to her mother and the doctor that corroborated her story to the investigator.[239] Granting great deference to the military judge's findings, the CAAF held that the military judge did not abuse his "considerable discretion" in admitting the statements to the investigator as residual hearsay.[240]

Practitioners should use *Donaldson* as authority to press for the admission of hearsay evidence under alternative theories, under both an enumerated hearsay exception and the residual hearsay exception. In addition, *Donaldson* provides authority for practitioners to use other hearsay statements of the declarant as corroboration. So long as the declarant has told the same story to others under circumstances that meet one of the enumerated hearsay exceptions, those statements can be used in corroboration. Military judges may want to follow the lead of the trial judge in *Donaldson*, who admitted the evidence under an enumerated exception and the residual hearsay exception, thereby freeing the appellate courts to select the exception they deemed most applicable to the facts at bar.

In *United States v. Holt*,[241] the government offered a letter from one of the victims on sentencing to show victim impact and the full circumstances of the offenses. The military judge admitted the letter into evidence as non-hearsay and specifically instructed the members they could not consider it for the truth of the matters asserted therein.[242] On appeal, the AFCCA held that the letter was admissible for the truth of the statements therein under MRE 807 because it was "more probative on the issue of victim impact than any other evidence offered by the government."[243]

The CAAF disagreed. As previously discussed, the CAAF held that the AFCCA exceeded the bounds of permissible review under UCMJ, Article 66(c) when it changed the evidentiary nature of the exhibit on appeal.[244] But the CAAF found additional problems with the AFCCA's approach. First, the AFCCA subtly shifted the requirement of MRE 807 that the evidence be "more probative on the point for which offered than other evidence which the proponent can *procure* through reasonable efforts"[245] to a standard much more generous to the government: "more probative on the issue . . . than any other evidence *offered* by the government."[246] There was nothing to indicate in the record whether the government could have procured the attendance of the victim who wrote the letter at trial, and the CAAF held that the AFCAA "misapplied this foundational requirement of MRE 807, looking at the evidence that was produced rather than at evidence that could have been produced . . . ."[247] Second, by *sua sponte* converting the exhibit into MRE 807 residual hearsay evidence, the AFCCA violated the notice provisions of MRE 807, which requires a proponent to give sufficient advance notice for the adverse party to prepare.[248]

Counsel can benefit from *Holt*'s residuary hearsay opinion in two primary ways. First, the CAAF has emphasized that the procedural notice requirements of the rule are not merely window dressing. If counsel intend to use the residual hearsay exception, either as the primary or alternate theory of admissibility, they should comply with notice requirements. Conversely, defense counsel should remain alert for efforts to apply the residual hearsay exception to evidence without proper notice and should lodge objections if either trial counsel or military judges attempt to characterize evidence as residual hear-

237. *See id.*

238. *See id.* at 488-89.

239. *Id.* at 489.

240. *See id.*

241. 58 M.J. 227 (2003). For a more thorough discussion of the facts, see *supra* notes 200-08 and accompanying text.

242. *Id.* at 229.

243. *Id.* at 230.

244. *See supra* notes 207-08 and accompanying text.

245. *See* MCM, *supra* note 1, MIL. R. EVID. 807.

246. *Holt*, 58 M.J. at 230 (emphasis added).

247. *Id.* at 231.

248. *Id.*

say without first giving the proper notice. Second, the CAAF's opinion reinforces the plain language of the rule. The decisive factor isn't what evidence the proponent actually produces at trial, but rather what evidence could reasonably be procured for trial. Counsel should develop the record to demonstrate why residual hearsay evidence is being offered in lieu of live testimony or some other type of evidence.

In *United States v. Wellington*, the appellant was convicted of indecent assault, attempted rape, and attempted forcible sodomy of his stepdaughter.[249] The allegations against him first surfaced during his stepdaughter's hospitalization from a leukemia relapse in 1999. Her physicians believed there was no hope for her recovery. On the night of 17-18 March 1999, the victim began experiencing excruciating abdominal pain and was also suffering from an extremely high fever. Her doctor was summoned to the hospital, and in response to her questions, he told her she was dying. She requested to see her family. In the early morning hours of 18 March, the victim confessed to her mother that she and an aunt had molested the victim's brother. She then told her mother that the appellant had kissed her, touched her breasts, and rubbed his private parts against hers. She also said that the appellant had climbed into her hospital bed with her and "rubbed on her." She said she had not previously told her mother about these incidents for fear her mother would no longer love her.[250]

Over the next ten days, the victim made several additional statements. Late in the day on 18 March, a state official conducted a videotaped interview of her. A CID agent, the victim's mother, and a doctor were also in attendance. The victim told them that the appellant had begun touching her shortly after her sixteenth birthday. During the family's move to a temporary guest house, the appellant climbed in bed with her and French-kissed her while she pretended to be asleep. An hour or so later, he began rubbing her breasts and touching her vagina and buttocks. When the family moved back to their home, he came to her room at night, sucked her breasts, pulled off her underwear, and attempted to penetrate her. He also removed her underwear and rubbed his penis against her buttocks. The final incident she related in this interview was the appellant's attempt to have sexual intercourse with her one night while her mother was in the hospital having a baby. At this point, the victim began crying uncontrollably and terminated the interview.[251]

The next day, a doctor conducted a gynecological interview of the victim in an attempt to determine the source of her multiple infections. The doctor explained to her that the exam was necessary to determine if she had an infection that hadn't been treated. After this explanation, the victim told the doctor that after "he" was done, she would go to the bathroom to get the "yuckie stuff" out, there would be blood on the tissue when she wiped, and she would experience urinary pain. The doctor described her as mentally alert and involved when she made this statement.[252]

The final statement occurred on 26 March. Like the interview on the afternoon of the 18th, it was videotaped. This time, two doctors and a CID agent accompanied the state official. During this interview, the victim said that at least one of the incidents had occurred while she was in the hospital. The appellant, who had agreed to watch her overnight, climbed into bed with her and rubbed her vagina, buttocks, and breasts. She also said that the appellant had attempted vaginal intercourse with her, but she told him to stop because it hurt. On another occasion, she was lying on her stomach when the appellant tried to commit anal intercourse with her; she described trying to move away and said, "it would—it—the penis would go in, or something . . . ."[253] Like the earlier videotaped interview, this one ended with the victim in tears.[254]

The victim did not die during this hospitalization. She was, in fact, available to testify at the appellant's trial, although she passed away some four months later.[255] At trial, she testified that the appellant had French-kissed her, rubbed her breasts and legs, rubbed his finger on her vagina, and rubbed his penis between her legs near her vagina—conduct she characterized as "fooling around." She testified that she had no recollection of saying that the appellant had ever touched her buttocks with his penis, and she said she remembered nothing that happened in the hospital because of her medication.[256]

The prosecution offered the two videotaped statements and the statements to the mother and doctor under the residual hearsay exception. The defense argued that the statements were unreliable because the victim was heavily medicated, hallucinating, running a high fever, and in and out of consciousness.[257] Nevertheless, the military judge admitted the statements as residual hearsay.

249. 58 M.J. 420, 421 (2003).

250. *See id*. at 421-22.

251. *See id*. at 422.

252. *Id.*

253. *Id.* at 422-23.

254. *See id.* at 423.

255. *Id.* at 421.

256. *Id.* at 424.

The CAAF affirmed the admission of the evidence, applying a practical approach to the evidence. The CAAF first noted that there is a two-prong test for admitting residual hearsay: (1) the evidence must be highly reliable, and (2) the evidence must be necessary. When the declarant testifies (thereby satisfying the Sixth Amendment Confrontation Clause),[258] reliability can be established by the circumstances immediately surrounding the declaration and by external corroborating evidence.[259] The CAAF characterized the necessity prong as, in essence, a "best evidence" requirement, which can be satisfied when a witness cannot remember or refuses to testify and there is no other more probative evidence of the fact.[260]

The CAAF then examined each of the four statements to determine reliability. Each of the statements demonstrated characteristics similar to those required for enumerated hearsay exceptions, a factor that played a major role in both the trial judge's and the CAAF's analysis. The victim's statement to her mother on 18 March, shortly after a physician had informed her she would die, was similar to a dying declaration under MRE 804(b)(2).[261] The statement was made to someone she loved in a private, non-coercive setting, and the statement contained a confession of wrong-doing on the victim's part similar to a statement against interest under MRE 804(b)(3).[262] The two videotaped statements were also similar to dying declarations because they were given at a time when the victim believed her death was imminent. In addition, the military judge was able to watch the videotape to observe the victim's demeanor, evaluate the questioning techniques and the victim's clarity of thought, and observe the physical surroundings.[263] The statement to the doctor during the gynecological examination was spontaneous, made immediately after the doctor told the victim she was looking for sources of infection, and similar to a statement made for medical diagnosis or treatment under MRE 803(4).[264]

The military judge also considered a number of other factors for reliability, upon which the CAAF favorably commented: (1) the proximity of the statements in time to the described events; (2) internal consistency of the statements; (3) consistency of the statements with each other; (4) the victim's apparent intelligence and use of age-appropriate terminology; (5) the victim's lack of bias or motivation to lie; and (6) the absence of any evidence of efforts to cause her to fabricate, lie, or embellish.[265] The CAAF noted that the military judge had heard testimony from witnesses who saw the victim give the statements and had been able to view videotapes to independently evaluate her mental condition. Based on all these factors, the CAAF concluded that the military judge did not abuse his discretion in determining that the statements met the reliability prong of MRE 807.[266]

The CAAF then turned its attention to the necessity prong. The victim's testimony at trial corroborated the appellant's confession to various indecent acts,[267] but she could not remember either the sexual abuse in the hospital or the statements she made at the hospital concerning various acts of abuse. Her

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257. *Id.*

258. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

259. *Wellington*, 58 M.J. at 425.

260. *Id.*

261. MCM, *supra* note 1, MIL. R. EVID. 804(b)(2). Military Rule of Evidence 804(b)(2) states:

> (2) *Statement under belief of impending death*. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

Id.

262. *See Wellington*, 58 M.J. at 426. Military Rule of Evidence 804(b)(3) contains the following hearsay exception for statements against interest:

> (3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true.

MCM, *supra* note 1, MIL. R. EVID. 804(b)(3).

263. *See Wellington*, 58 M.J. at 426.

264. *Id.* For the text of MRE 803(4), see *supra* note 211.

265. *Wellington*, 58 M.J. at 426.

266. *Id.*

267. Although the appellant did confess to some acts, he was convicted at trial contrary to his pleas. *See id.* at 421, 427.

statements were the only evidence that supported the charges of rape and forcible sodomy and the only evidence corroborating the appellant's confession to committing indecent acts.[268] Accordingly, the evidence met the necessity prong, and the military judge did not abuse his discretion in admitting it.[269]

Although it is doubtful many practitioners will face fact patterns similar to those of *Wellington*, the case is nevertheless a rich vein of residual hearsay information. Counsel should carefully research the enumerated hearsay exceptions to learn why they are presumptively reliable. When evidence is somewhat similar to an enumerated hearsay exception, counsel should consider using *Wellington* to argue that the similarities help support a finding of reliability. For example, the victim's statements to her mother and the videotaped statements in *Wellington* did not strictly qualify as dying declarations because they had nothing to do with the cause of the victim's death. Society, however, traditionally accepts the idea that persons on their deathbeds have little reason to deceive anyone; this belief is at the heart of the dying declaration.[270] Counsel who can persuasively argue by analogy to enumerated hearsay exceptions may be able to use the residual hearsay exception to bring valuable and necessary evidence into the courtroom.

Authentication

In *United States v. Schnable*,[271] the appellant committed indecent acts with his adopted, mildly retarded thirteen-year-old daughter in the cab of his pickup truck parked on the side of a two-lane country highway.[272] The appellant's defense counsel had prepared a videotape that purported to show the route the appellant and victim had taken on the day of the incident. The appellant wanted the members to see the videotape to support his theory that he would not have chosen the side of a busy highway as the place to molest a child.[273]

The appellant chose not to testify at trial. Instead, civilian defense counsel attempted to introduce the videotape on his own representation that this was the route appellant told him he had driven. The military judge excluded the videotape on the grounds that the appellant had failed to lay a proper foundation to authenticate the contents of the videotape under MRE 901(a).[274]

On appeal to the NMCCA, the appellant argued that the military judge erred in excluding the videotape and claimed that he should not have to take the stand in order to have the evidence admitted. The NMCCA, however, affirmed, holding that the military judge committed no error in excluding the videotape, but rather demonstrated a sound understanding of the rules of evidence. A videotape is considered a photograph under the MREs. In order to admit the videotape into evidence, the appellant would have to call a witness who could testify that the contents of the videotape depicted a particular scene. Only two people could do that—the appellant and the victim—and the victim proved unable to testify about specific routes or locations. By exercising his right not to testify, the appellant failed to lay a proper foundation for the evidence.[275]

Schnable is a good reminder to counsel about the importance of doing their homework on evidentiary foundations before trial. If a videotape, photograph, or other exhibit is important enough to introduce at trial, the proper foundational elements must be met. In some cases, defense counsel will have to present their clients with the difficult choice the appellant in *Schnable* hoped to avoid—testify, or do without the evidence.

Conclusion

If there is one over-arching lesson from this year's crop of military appellate court opinions, it is this: develop the record. The courts dealt with several close cases this year involving evidentiary issues that could have gone either way, and in nearly every case, the courts refused to disturb the military judge's findings. Counsel must be prepared to call the right witnesses and ask the right questions in order ensure that the military judge has the right information to make detailed findings of fact. This year's appellate cases provide a rich storehouse of evidentiary wisdom from which counsel can draw in preparing for the challenging fact patterns and legal issues that arise in courts-martial.

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268. *Id.* at 426-27.

269. *Id.*

270. *Cf.* MUELLER & KIRKPATRICK, *supra* note 67, § 8.71, at 926 (citing Shakespeare for the proposition that death removes the temptation to falsehood but also noting instances when the dying have persisted in their viciousness).

271. 58 M.J. 643 (N-M. Ct. Crim. App. 2003).

272. For a more thorough discussion of the facts, *see supra* notes 116-18 and accompanying text.

273. *Id.*

274. *Id.* at 652. Military Rule of Evidence 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MCM, *supra* note 1, MIL. R. EVID. 901(a).

275. *Schnable*, 48 M.J. at 653.

Self-Incrimination: Big Changes in the Wind

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Introduction

Like the winds, which do not blow evenly, the number of self-incrimination cases reviewed by the Supreme Court ebbs and flows from year to year. Although the 2003 Court term was relatively quiet, the 2004 Court term has already resulted in the review of four self-incrimination cases. Based on the Court's past practice, this is an unusually high number. This article examines the self-incrimination cases that have been decided by both the Court and the Court of Appeals for the Armed Forces (CAAF) during their 2003 terms. It then examines the four cases for which the Court has granted certiorari in its 2004 term, and discusses some of the big changes that appear to be in the wind for self-incrimination law.

During its 2003 term, the Court reviewed only one case in which self-incrimination was the central issue.[1] Although it was a civil suit, the Court examined the criteria that must be met before courts can find that the government has violated a citizen's Fifth Amendment right against self-incrimination.[2] The 2003 term was also relatively quiet in the area of self-incrimination for the CAAF. The CAAF addressed only two cases involving these protections; one dealing with the sufficiency of Article 31(b) warnings[3] and the other with grants of testimonial immunity.[4]

In its 2004 term, the Court heard arguments on three cases that involved the admissibility of derivative evidence obtained through the use of unwarned statements.[5] The fourth case is from the Ninth Circuit in which the juvenile status[6] of a suspect, and its influence on the *Miranda* "in-custody" determination, is the central issue.[7] As of the date of this article, the Court has decided only one of these four cases.[8]

The Supreme Court's 2003 Term

As mentioned, the Court addressed only one case during its 2003 term in which the right against self-incrimination was the primary issue. The incident giving rise to the civil suit of *Chavez v. Martinez*[9] began when police officers Salinas and Peã were investigating suspected drug activity in a California neighborhood.[10] While questioning an individual, the officers heard a bicycle approaching on a darkened path. They immediately ordered the rider to dismount, spread his legs, and place his hands behind his head. The rider, Oliverio Martinez, complied with the officers' request. As Officer Salinas began conducting a pat-down frisk of Martinez, he discovered a knife in Martinez's waistband.[11] At this point, a struggle erupted between Salinas and Martinez. Officer Salinas claimed that

1. Chavez v. Martinez, 538 U.S. 760 (2003).

2. *Id.*

3. United States v. Pipkin, 58 M.J. 358 (2003).

4. United States v. Mapes, 59 M.J. 60 (2003).

5. *See* Fellers v. United States, 124 S. Ct. 1019 (2004); State v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003); United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003).

6. In keeping with the Criminal Law Department's tradition of having each Military Justice Symposium author quote a common source, I will note that Groucho Marx, our chosen source for this year, once said "[a]ge is not a particularly interesting subject. Anyone can get old. All you have to do is live long enough." The Columbia World of Quotations (Robert Andrews, Mary Biggs, & Michael Seidel eds., 1996); Groucho Marx, Groucho and Me ch. 1 (1959) (quoting Groucho Marx (1895–1977), U.S. comic actor).

7. Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2002), *cert. granted sub nom.*, Yarborough v. Alvarado, 2003 U.S. LEXIS 5428 (Sept. 30, 2003).

8. *See Fellers*, 124 S. Ct. at 1019. The Court decided this case on 26 January 2004. *Id.*

9. 538 U.S. 760 (2003).

10. *Id*. at 763.

11. *Id*.

Martinez grabbed Salinas' pistol during the scuffle and pointed it at him.[12] Officer Salinas immediately yelled, "He's got my gun."[13] In response, Officer Peã drew her weapon and shot Martinez several times. The resulting injuries left Martinez permanently blinded and paralyzed from the waist down.[14] Before the paramedics arrived, the officers placed Martinez under arrest.[15]

A patrol supervisor, petitioner Ben Chavez, arrived at the scene within a few minutes. Officer Chavez then accompanied Martinez and the paramedics to the hospital.[16] While in the emergency room, Chavez began questioning Martinez about the incident. Chavez, however, did not read Martinez his *Miranda*[17] rights before or during the interview.[18] Despite Martinez's responses, which included "I don't know," "I am dying," "I am choking," and "I am not telling you anything until they treat me," Officer Chavez continued questioning Martinez, insisting that he provide answers. The actual interview time lasted approximately ten minutes but was spread out over a forty-five-minute period.[19]

Martinez eventually made several incriminating statements, including the admissions that he used heroin regularly and that he took the weapon from Salinas' holster and pointed it at the officer.[20] Although Martinez was never charged with a crime and his statements were never used against him in a criminal prosecution, he filed a civil suit alleging that the patrol supervisor's actions had violated both his Fifth Amendment and Fourteenth Amendment rights. Martinez hoped to show that Officer Chavez was not entitled to the qualified immunity from civil suit that protects law enforcement officers in the execution of their duties, since Officer Chavez violated a constitutional right of Martinez's that was "clearly established."[21]

In deciding the case, the Court first turned to the plain language of the Fifth Amendment, which states "no person . . . shall be compelled in any criminal case to be a witness against himself."[22] The Court noted that the Fifth Amendment prevents statements that have been compelled during police interrogations from being used against an individual during a *criminal* trial. Therefore, it is not until they are actually used in a criminal proceeding that a violation of the self-incrimination clause occurs.[23]

Petitioner Martinez had asked the Court to rule that the term "criminal case" encompasses the entire criminal investigation process, to include police interrogations.[24] The Court declined to adopt this expansive interpretation.[25] The Court noted that Martinez was never forced to be a witness against himself because his statements were never used in a criminal proceeding against him. Further, the Court found that Martinez's situation was much like that of a reluctant witness who is granted immunity and forced to give testimony. In both instances, the statements cannot be used against the declarant.[26] The Court also noted that *Miranda's* warnings, and exclusionary rule were prophylactic measures designed to prevent violations of the core right granted by the self-incrimination clause—preventing statements obtained through a police-dominated, incommuni-

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12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. Miranda v. Arizona, 384 U.S. 436 (1966). Once a custodial interrogation triggers *Miranda*, police must inform the subject of his rights: (1) to remain silent; (2) to be informed that any statement he makes made may be used as evidence against him; and (3) to the presence of an attorney. *Id*. at 465.

18. *Chavez*, 538 U.S. 763.

19. *Id*.

20. *Id*.

21. *Id*. at 765.

22. *Id*.

23. *Id*. at 766-67.

24. *Id*.

25. *Id*. at 765.

26. *Id*. at 768-69.

cado, custodial interrogation from being used against the individual in a criminal proceeding. Such prophylactic rules, the Court held, do not extend the scope of the constitutional rights they were designed to protect.[27] Therefore, Officer Chavez's failure to read Martinez his *Miranda* warnings did not by itself give rise to grounds for a civil action.

With regard to the claim that Officer Chavez also violated Martinez's Fourteenth Amendment rights, the Court again turned to the relevant language of the Constitution, which provides that "no person shall be deprived of life, liberty, or property, without due process of law."[28] This clause protects individuals from convictions based on evidence obtained through methods that are "so brutal and so offensive to human dignity" that they "shock the conscience."[29]

The Court concluded that the patrol supervisor's questioning of Martinez was neither "egregious" nor "conscience shocking." The Court relied on the facts that the supervisor did not attempt to harm Martinez by intentionally interfering with his ongoing medical treatment, and that medical personnel were able to treat Martinez throughout the entire interview process.[30] The Court also noted that the supervisor ceased questioning to allow tests and medical procedures to be performed on Martinez and that the supervisor's questioning of Martinez did not exacerbate his existing injuries.[31]

Finally, the Court concluded that there was a justifiable government interest in questioning Martinez—in order to determine if there had been police misconduct—this evidence would have been lost if Martinez had died before giving his version of the events.[32] Since Martinez had failed to prove that Officer Chavez violated either his Fifth Amendment or Fourteenth Amendment rights, the patrol supervisor was entitled to qualified immunity from civil suit. Accordingly, the Court reversed the judgment of the Court of Appeals for the Ninth Circuit.[33]

Analysis of Chavez v. Martinez

As a civil case, *Chavez v. Martinez* offers only limited lessons for military defense counsel. Although a service member cannot be granted relief in either a criminal or civil proceeding[34] for a violation of the individual's *Miranda* rights unless the unwarned statement is used against him in a criminal proceeding, defense counsel should still consider other available avenues to address intentional or egregious violations of a client's constitutional rights by military authorities. If the offending official is a service member, such avenues could include filing a complaint through the chain of command,[35] to the Inspector General,[36] or to the service member's congressional representative. As additional legal support for the argument that military officials have an independent duty to warn service members of their rights against self-incrimination, defense counsel can cite the requirements under the Uniform Code of Military Justice (UCMJ), Article 98, Noncompliance with Procedural Rules.[37]

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27. *Id*. at 770-74.

28. *Id*. at 774.

29. *Id*.

30. *Id*.

31. *Id*.

32. *Id*. at 774-777.

33. *Id*. at 775-76.

34. A service member will likely be barred from financial recovery if the offending official is also a service member. Feres v. United States, 340 U.S. 135 (1950).

35. UCMJ art. 138 (2002).

36. *See generally* U.S. Dep't of Army, Reg. 20-1, Inspector General Activities and Procedures (29 Mar. 2002).

37. UCMJ art. 98. Article 98 states, "Any person subject to this chapter who . . . (2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct." *Id.*

The CAAF's 2003 Term

United States v. Pipkin

The CAAF addressed the adequacy of Article 31(b) warnings[38] in *United States v. Pipkin*.[39] Here, Air Force Office of Special Investigations (OSI) agents interviewed a suspected drug dealer. The drug dealer informed agents that his former roommate, the appellant, had provided him money to purchase his "working stock" of ecstasy.[40] Before interviewing the appellant, the agents read him his rights under Article 31(b), orally informing him that he was suspected of "use, possession and distribution of controlled substances."[41] The appellant declined counsel[42] and agreed to answer questions. At no time did the agents inform the appellant that they suspected him of conspiracy to distribute a controlled substance.

When the agents asked the appellant if he knew why he had been brought in for questioning, he replied that it had to do with his former roommate and that it must be about drugs.[43] After denying any involvement with either the use or purchase of illegal drugs, the appellant agreed to the agent's request to complete a written statement. At this point, the appellant was shown an Air Force Form 1168.[44] This form stated that the appellant was suspected of "wrongful use and possession of a controlled substance"; it did not indicate that the appellant was suspected of either distributing drugs or conspiring to distribute drugs.[45]

While completing his written statement, the OSI agents confronted the appellant with a witness's statement that disputed the appellant's denial. As a result, the appellant recanted his earlier denial and admitted to knowingly providing money for the purchase of illegal drugs. He reduced this subsequent admission to writing.[46] The appellant was eventually charged with use of marijuana, use of ecstasy, and conspiracy to distribute ecstasy.[47] At trial, the appellant's defense counsel unsuccessfully tried to suppress the appellant's oral and written statements regarding the conspiracy.[48]

In upholding the conviction, the CAAF reaffirmed its well-established case law in this area. Discussing the purpose and adequacy of the first of the three Article 31(b) rights warnings, the court referred to language from prior cases that stated, "It is not necessary [for the questioner] to spell out the details" of a suspected offense "with technical nicety";[49] nor, are government agents required to advise a suspect of "each and every possible charge under investigation . . . ."[50] Instead, the goal of this part of the Article 31(b) warnings is to focus the person toward the "circumstances surrounding the event" by informing him of the "general nature of the allegation," to include the "area of suspicion."[51]

In applying these standards to the facts of this case, the CAAF concluded that the appellant was sufficiently focused on an the area of suspicion and to the nature of the accusation through a combination of the agent's verbal warnings and the

38. *Id*. art. 31(b). Article 31(b) states the following:

> No person subject to this chapter may interrogate, or request any statement from an accused or a 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.

39. 58 M.J. 358 (2003).

40. *Id*. at 359.

41. *Id*.

42. It is interesting to note that although the court's opinion refers to the appellant as having waived his right to counsel after being read his Article 31(b) rights, these rights do not provide a suspect with the right to counsel. *See* UCMJ art. 31(b).

43. *Pipkin*, 58 M.J. at 359.

44. U.S. Dep't of Air Force, AF Form 1168, Statement of Suspect/Witness/Complainant (1 Apr. 1998).

45. *Pipkin*, 58 M.J. at 359.

46. *Id*. at 359-60.

47. *Id*. at 358.

48. *Id*. at 360.

49. *Id*. (quoting United States v. Rice, 29 C.M.R. 340, 342 (C.M.A. 1960)).

50. *Id*. (quoting United States v. Davis, 24 C.M.R. 6, 10 (C.M.A. 1957)).

51. *Id*. (quoting United States v. Rice, 29 C.M.R. 340, 342 (C.M.A. 1960)).

appellant's own admission that he knew he was going to be questioned about his roommate's involvement with drugs.[52] The CAAF quickly disposed of the inconsistency issue between the verbal warnings and the written warnings by stating that such a discrepancy was not enough to conclude that the military judge's finding—that the government had met its burden of establishing compliance with the warning requirements of Article 31(b)—was clearly erroneous.[53]

United States v. Mapes

The CAAF was not as deferential to the government's handling of the self-incrimination issues presented in *United States v. Mapes*,[54] specifically, the complex issue of dual grants of testimonial immunity. In *Mapes*, the appellant, Specialist (SPC) Kenji Mapes, returned from leave in New York City with fourteen or fifteen "dime bags" of heroin. He sold these drugs to Private (PVT) Smoyer, a fellow soldier who eventually became SPC Mapes' co-accused.[55] Private Smoyer divided the contents of a single bag into three lines and SPC Mapes, PVT Smoyer, and SPC Coffin each snorted a line. Private Smoyer then "cooked-up" more heroin and injected it into himself and SPC Coffin.[56] Eventually, SPC Mapes and PVT Smoyer helped SPC Coffin back to his dormitory room and left him there for the night.

The next morning SPC Mapes returned to wake up SPC Coffin, but found him unconscious. The appellant sought PVT Smoyer's assistance but he refused to help. Instead, PVT Smoyer attempted to sanitize SPC Mapes' room of any evidence of drug use.[57] When questioned by responding medical personnel, SPC Mapes kept SPC Coffin's drug use secret and suggested instead that SPC Coffin's condition might be due to food poisoning.[58] Specialist Coffin eventually died of a massive heroin overdose.[59]

Although the initial investigation by the Army's Criminal Investigation Command (CID) revealed circumstantial evidence of SPC Mapes' and PVT Smoyer's involvement in SPC Coffin's death, no direct evidence could be found linking them to the crime.[60] During interviews with the CID, both SPC Mapes and PVT Smoyer continued to deny any involvement in SPC Coffin's death. As the investigation stalled, the staff judge advocate (SJA) recommended that the convening authority grant testimonial immunity to both SPC Mapes and PVT Smoyer to force them to reveal what they knew. In his recommendation to the convening authority, the SJA stated that they needed immunity to establish the charges of distribution and involuntary manslaughter, and he "didn't think [they] were going to get there without grants of immunity to both accuseds."[61] The convening authority agreed and eventually granted testimonial immunity to both SPC Mapes and PVT Smoyer.[62]

In an attempt to prevent the improper use of the immunized statements against their makers, the government formed separate prosecution and investigation teams for each co-accused. They then attempted to erect an informational "Chinese wall" between the two separate investigation and prosecution teams to prevent cross-contamination. Unfortunately, the government allowed the same CID agent to supervise both investigative teams.[63]

Despite the grant of immunity, PVT Smoyer refused to cooperate and on multiple occasions denied any involvement in SPC Coffin's death. Specialist Mapes, however, gave an immunized statement admitting that he, PVT Smoyer, and SPC Coffin each used heroin on the night in question and that PVT

52. *Id.*

53. *Id.*

54. 59 M.J. 60 (2003).

55. *Id.* at 61.

56. *Id.*

57. *Id.* at 62.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Smoyer injected himself and SPC Coffin with the heroin.[64] The agents again approached PVT Smoyer for an interview but he continued to deny any involvement in SPC Coffin's death. Based on SPC Mapes' statement, the government preferred charges against PVT Smoyer, including the charge of the involuntary manslaughter.[65]

At PVT Smoyer's Article 32 hearing, SPC Mapes testified it was PVT Smoyer who had injected SPC Coffin with the heroin. The following day, PVT Smoyer dropped his denials and provided a statement to CID in which he admitted that he was the one who had injected the heroin into SPC Coffin. His statement also detailed SPC Mapes' involvement in SPC Coffin's death. As a result of PVT Smoyer's cooperation, several charges were later preferred against SPC Mapes, including the charge of the involuntary manslaughter.[66]

Although PVT Smoyer did not testify at SPC Mapes' Article 32 investigation, a CID agent did testify about the investigation, to include repeated references to the statements PVT Smoyer made implicating SPC Mapes in the offenses.[67] After the Article 32 hearing, SPC Mapes signed a pretrial agreement that allowed him to enter into a conditional plea that preserved his right to appeal all adverse determinations resulting from pretrial motions.[68] During a motion to dismiss the charge, PVT Smoyer appeared as a witness for the government and stated that SPC Mapes' appearance as a witness against him at the Article 32 hearing had no impact on his ultimate decision to give a statement implicating SPC Mapes. PVT Smoyer claimed he had determined to "come clean" before his Article 32 testimony so that he could enter into a favorable pretrial agreement.[69] The trial judge ruled that the government had met its burden to show that SPC Mapes' immunized testimony was not used either to persuade PVT Smoyer to testify against SPC Mapes or in the decision to prosecute SPC Mapes. The Army Court of Criminal Appeals agreed with the military judge's ruling and affirmed the case.[70] The CAAF, however, disagreed.

In its opinion, the CAAF discussed the fact that immunity statutes allow the government to compel its citizens to provide any information they may posses, but at the same time it prevents the government from using that information against the citizen in a criminal prosecution. If the government is challenged in court, it is placed under a "heavy burden" to show that it has not used the immunized testimony against its maker.[71] To do this, the government must affirmatively prove that its evidence "is derived from a legitimate source wholly independent of the compelled testimony" and that the decision to prosecute was not tainted by the immunized testimony.[72]

In deciding whether the government had met its burden, the court considered the four factors previously established to evaluate the propriety of prosecutions based upon immunized testimony.

> 1. Did the accused's immunized statement reveal anything which was not already known to the government by virtue of the accused's own pretrial statement?
>
> 2. Was the investigation against the accused completed prior to the immunized statement?
>
> 3. Had the decision to prosecute the accused been made prior to the immunized statement? and,
>
> 4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?[73]

In applying these criteria to the facts of this case, the court noted that SPC Mapes' immunized statement revealed important new information that was not already known to the government. This included information on the degree of culpability of

64. *Id.* at 63.

65. *Id.*

66. *Id.* at 62-63.

67. *Id.* at 64.

68. *Id.* Specialist Mapes' pretrial agreement, stated, in relevant part, that "[t]he government expressly agrees to allow SPC Mapes to enter a conditional plea under Rule for Courts-Martial 910(a)(2) [hereinafter R.C.M.]. This conditional plea preserves SPC Mapes' right to appeal all adverse determinations resulting from pretrial motions." *Id.*

69. *Id.*

70. *Id.* at 64-65.

71. *Id.* at 67.

72. *Id.*

73. *Id.* (citing United States v. England, 33 M.J. 37 (C.M.A. 1991); United States v. Gardner, 22 M.J. 28 (C.M.A. 1986)).

both the appellant and PVT Smoyer, such as, who supplied the heroin and who injected it into SPC Coffin.[74] Secondly, the investigation against the appellant was not complete, and in fact had reached an impasse, in which the command believed the only way to make progress in the case was to grant immunized testimony to both the appellant and PVT Smoyer.[75] Thirdly, the decision to prosecute had not been made despite the government's assertions to the contrary. The charges against SPC Mapes were not preferred until months after immunity had been granted. Although the government may have desired to prosecute the appellant for involuntary manslaughter, it was not until they were able to secure an immunized statement from him and use it to prosecute PVT Smoyer, that they were able to obtain PVT Smoyer's statement and thereby substantiate the charges against the appellant.[76]

Lastly, the court concluded that the appellant's own immunized statement tainted the government's decision to prosecute. Although the government attempted to construct a "Chinese wall" to prevent the taint from affecting the two prosecution and investigation teams, the court found that the convening authority, the SJA, and the supervising investigator all had knowledge of both investigations.[77]

In addressing the case's most important aspect, whether it was SPC Mapes' immunized statement that persuaded PVT Smoyer to testify against the appellant, the court was unconvinced by PVT Smoyer's assertions that his motivation for coming forward was that he wanted to "come clean" and to secure a favorable pretrial agreement. The court noted that PVT Smoyer provided several conflicting and untruthful statements that undermined his credibility. Additionally, his claims were not supported by the factual record or chronology of events. The court noted that although PVT Smoyer had plenty of opportunities to come forward and disclose what he knew under the grant of immunity, he had refused to do so until the appellant testified against him at the Article 32 hearing.[78]

Accordingly, the court dismissed all charges in which the decision to prosecute was tainted, and set aside the sentence. The two remaining charges were returned to the Judge Advocate General of the Army for submission to a new convening authority.[79]

Analysis of the CAAF' s 2003 Term Cases

There are lessons counsel can learn from both *Pipkin* and *Mapes*. First, although the *Pipkin* case does not signal a shift in Article 31(b) law, it does take existing law and apply it to a new set of facts, specifically, the conspiracy to distribute drugs. Trial counsel should not limit their use of the *Pipkin* opinion to cases involving a conspiracy to distribute drugs only. Instead, they should feel confident in using the case as persuasive authority any time government agents properly warn a suspect of the underlying offense, but fail to warn of an associated theory of accomplice liability.[80] When doing so, trial counsel should cite the court's refusal to require that government agents inform a suspect of "each possible theory of accomplice liability a prosecutor might later pursue."[81]

The *Mapes* case also provides valuable lessons, especially for trial counsel and SJAs that are considering recommending testimonial immunity for co-accuseds. The fact that the government in *Mapes* was aware in advance of the potential pitfalls in granting such immunity and tried to take precautionary measures, yet still failed, shows how difficult this legal procedure is to manage effectively. Before moving ahead with grants of immunity, trial counsel should first carefully read the *Mapes* opinion and its predecessors to extract the lessons learned.

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74. *Id*. at 68.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Id*. at 70.

79. *Id*. at 71-72.

80. *Id*. For theories of accomplice liability see UCMJ art. 77, which states:

> Any person punishable under this chapter who—
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.

UCMJ art. 77 (2002).

81. *Id*.

In its *Mapes* opinion, the CAAF provided precautionary clues that the government should take before giving such grants of immunity to avoid cross-contamination of separate investigations and prosecutions. Specifically, the court addressed the importance of ensuring completely separate investigation and prosecution teams. This includes making sure not only the trial counsel and investigators are separate, but also that the supervisors for each team are different and that they exercise influence over one case only.[82] One possible resolution is to have one of the investigative teams' CID supervisor assigned from a different post. Likewise, one of the prosecution teams could facilitate the jurisdictional transfer of a case to a separate general court-martial convening authority (GCMCA). The SJA of that GCMCA would then supervise this separate prosecution team.

Additionally, the government must exercise great caution to ensure that it does not use immunized testimony in its possession to procure derivative evidence for use against the immunized declarant, including statements from co-accuseds. The *Mapes* case demonstrates that the government runs a heightened risk of creating reversible error if they confront an uncooperative suspect with the accusations of an immunized co-conspirator. Courts have shown that they will carefully scrutinize any admissions gained through the use of these tactics to determine whether the admissions "were 'directly or indirectly derived' from immunized testimony."[83] The safer course of action for the government would be to restrict the use of such immunized testimony to the court-martial venue, and not use it against a co-accused during the investigative or pretrial stages.

Finally, before granting immunity, the government should collect any evidence they have in their possession, catalogue it, and list it in a memorandum.[84] The government failed to do this in the *Mapes* case.[85] The memorandum should also list the charges they plan to pursue at that time.[86] This will help ensure that the subsequent statements of the co-accuseds cannot be alleged to have influenced the investigation or prosecution of the other. The government must always remember that they carry a "heavy burden" to prove that there has been no taint between the two investigations or prosecutions.[87] The steps listed above should help the government meet this burden.

The Supreme Court's 2004 Term

Overview

Three of the four cases for which the Court has granted certiorari this term involve the admissibility of derivative evidence gained through the use of an unwarned statement. In two of these cases, the derivative evidence is a subsequent warned statement while the third case involves physical evidence. The fourth case is completely unique from the other three cases, in that it involves the appropriateness of considering a suspect's juvenile status when determining whether he is "in-custody" for *Miranda* warnings purposes. This section of the article first examines the three derivative evidence cases and then discusses the juvenile status case.

Derivative Evidence: Overview of the Issue

Although the Fifth Amendment's protection against compelled self-incrimination[88] has been in existence since the inception of the Bill of Rights, its familiar procedural protections were not crafted until 1966, when the Court issued its opinion in the landmark case of *Miranda v. Arizona*.[89] The *Miranda* Court sought to establish procedural safeguards that would protect individuals from giving compelled confessions when they were subjected to the inherently coercive environment of a police-dominated, incommunicado interrogation. Failure to give *Miranda* warnings before a "custodial interrogation" makes any resulting confession per se involuntary and subject to suppression.[90] The two reasons the Court enunciated for suppressing such unwarned statements were to deter police misconduct and to avoid the risk of admitting unreliable confessions.[91]

82. *Id.* at 68.

83. *Id.* at 69 (citing United States v. Boyd, 27 M.J. 82, 86 (C.M.A. 1988) (citing United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976), *on remand*, 422 F. Supp. 487, 489 (S.D.N.Y. 1976))).

84. *Id.* at 69.

85. *Id.*

86. *Id.*

87. *Id.* at 67.

88. U.S. CONST. amend. V. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

89. 384 U.S. 436 (1966).

90. *Id.*

91. *See Miranda*, 384 U.S. at 442-48.

To date, however, the Court has been unwilling to extend the range of judicial suppression to encompass derivative evidence gained through the use of an unwarned statement. Before the Court's 2000 term, many legal scholars hypothesized the reason for this reluctance was because *Miranda's* warnings were "prophylactic" in nature, as opposed to being constitutionally required.[92] The Court, however, eviscerated this argument with their opinion in *United States v. Dickerson*.[93] As a result, the debate over the admissibility of derivative evidence has been revived among both legal scholars and lower courts.

The Court used the *Dickerson* case to examine whether 18 U.S.C. § 3501,[94] a statute Congress passed as a challenge to the *Miranda* decision, violated the Constitution. Under this statute, a police officer's failure to provide a suspect *Miranda* warnings did not make any statement obtained presumptively involuntary. Instead, *Miranda* warnings were just one of several factors a trial judge must consider when determining the voluntariness of a suspect's statement.[95] In *Dickerson*, the Court specifically reaffirmed the warning requirements of *Miranda* and declared it a "constitutional rule," one Congress was not empowered to legislate away.[96] Additionally, the Court took special care to pronounce that *Miranda's* progeny cases also remained viable and unaltered by the *Dickerson* decision.[97]

Miranda's progeny include cases that carved out exceptions to the warning requirement. Consequently, an unwarned statement might be admissible if it was obtained out of a concern for public safety,[98] or if the statement is introduced only to impeach the testimony of the defendant.[99] Additionally, certain derivative evidence that is the product of an initial unwarned statement, such as a subsequent warned statement[100] or the identification of a prosecution witness,[101] may still be admissible.

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92. *See generally* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805 (1992).

93. 530 U.S. 428 (2000).

94. 18 U.S.C. § 3501 (2000). The law regarding the admissibility of confessions is as follows:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including
>
> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,
>
> (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,
>
> (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,
>
> (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and
>
> (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

Id.

95. *Id.*

96. *Id.* at 431, 439, 441, 444. The Court also described the *Miranda* decision as being "constitutionally based," as having a "constitutional basis," as being a "constitutional decision," and as having "constitutional underpinnings," and called *Miranda*'s warnings, "constitutional guidelines." *Id.*

97. *Id.* at 441.

98. New York v. Quarles, 467 U.S. 649 (1984).

99. Harris v. New York, 401 U.S. 222 (1971).

100. Oregon v. Elstad, 470 U.S. 298 (1985) (holding that the exclusionary rule does not apply to a voluntary, warned confession obtained after an earlier voluntary confession was obtained in violation of *Miranda*).

101. Michigan v. Tucker, 417 U.S. 433 (1974).

The confusion over the admissibility of derivative evidence was the natural and predictable consequence of the *Dickerson* opinion.[102] The reason for this confusion among legal scholars[103] and lower courts[104] revolves around the perceived logical inconsistency between *Miranda's* "constitutional" status versus the continued viability of post-*Miranda* cases that allow the admission of derivative evidence from unwarned statements. Those believing that the rationale of the *Dickerson* opinion now requires the suppression of derivative evidence argue that if *Miranda* is indeed a constitutional decision, then derivative evidence obtained in violation of its requirements should be treated the same way as other derivative evidence obtained from violations of other constitutional requirements—suppressed as "fruit of the poisonous tree."[105]

Those holding a contrary view cite the Court's language in *Dickerson*. This language claims the reason the *Elstad* Court did not extend the "fruits" doctrine to *Miranda* violations was not because *Miranda* was "a nonconstitutional decision," but because "unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment."[106] The Court, however, did not clarify these differences in their opinion. These disparate interpretations of the *Dickerson* opinion have led lower courts to reach diametrically opposed results on the admissibility of derivative evidence.[107] How lower courts have ruled on this issue since *Dickerson* has depended on several factors, including: their interpretation of *Dickerson's* meaning and impact; whether the derivative evidence in question is physical or is a subsequent warned statement; and whether the government's failure to give *Miranda* warnings was intentional or negligent.[108]

In an apparent effort to add clarity in this area, the Court granted certiorari to three cases involving the admissibility of derivative evidence gained from an unwarned statement. As of the date of this article, the Court has only decided *United States v. Fellers*.[109] Here, the Court addressed the issue of whether a statement taken in compliance with *Miranda* should be suppressed if it was tainted by an earlier unwarned statement in violation of the right to counsel under the Sixth Amendment.

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102. *Id*. at 455. As part of his dissent, Justice Scalia predicted the legal conundrum that the majority's decision would create:

> And if confessions procured in violation of *Miranda* are confessions "compelled" in violation of the Constitution, the post-*Miranda* decisions I have discussed do not make sense. The only reasoned basis for their outcome was that a violation of Miranda is not a violation of the Constitution. If, for example, as the Court acknowledges was the holding in Elstad, "the traditional 'fruits' doctrine developed in Fourth Amendment cases" (that the fruits of evidence obtained unconstitutionally must be excluded from trial) does not apply to the fruits of Miranda violations . . . ; and if the reason for the difference is *not* that Miranda violations are not constitutional violations (which is plainly and flatly what *Elstad* said); then the Court must come up with some *other* explanation for the difference.

Id.

103. *See generally* Kirsten Lela Ambach, *Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV 757 (2002); Jeffrey Standen, *Policy at the Intersection of Law and Politics*, 12 CORNELL J.L. & PUB. POL'Y 555, 563-64 (2003).

104. The Third and Fourth Circuits have ruled that the physical fruits of a Miranda violation are never subject to suppression. United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002); United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002). The First Circuit excludes the fruits of a *Miranda* violation only when there is a "strong need for deterrence," such as intentional violations of *Miranda*. United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002). The Tenth Circuit ruled that suppression of physical evidence is appropriate regardless of whether the violation by police is intentional or unintentional. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003). The Eighth Circuit ruled that derivative physical evidence and subsequent incriminating statements are both admissible. United States v. Villalba-Alvarado, 345 F.3d 1007 (8th Cir. 2003). In ruling on a habeas corpus petition, the Fifth Circuit refused to overturn a state court's ruling as a violation of "clearly established" court jurisprudence when the state court admitted both derivative physical evidence and subsequent incriminating statements. Burgess v. Dretke, 350 F.3d 461 (5th Cir. 2003). The Missouri Supreme Court suppressed a warned subsequent confession in which police intentionally withheld warnings before obtaining the first incriminating statement. State v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003). The Supreme Court of Wisconsin ruled that intentional violations of *Miranda* require suppression of physical derivative evidence. Wisconsin v. Knapp, 666 N.W.2d 881 (Wis. 2003).

105. For suppression of derivative evidence gained through violations of the Fourth Amendment's protections against unreasonable searches and seizure, see *Wong Sun v. United States*, 371 U.S. 471 (1963). "Fruit of the poisonous tree" is the term the Court used to describe evidence derived directly from a violation of one's constitutional rights. *Id.* For suppression of derivative evidence gained through violations of the Fifth Amendment's protection against self-incrimination, see *Kastigar v. United States*, 406 U.S. 441 (1972) (holding that a grant of testimonial immunity bars the government's use of the resulting compelled testimony and any derivative evidence gained from it). For suppression of derivative evidence gained through violations of the Sixth Amendment's right to counsel, see *United States v. Wade*, 388 U.S. 218 (1967) (holding the government could not use the results of a post-indictment line-up in which the defendant was identified, since they never secured a waiver of the defendant's right to counsel.); *see also* Nix v. Williams, 467 U.S. 431 (1984) (applying an inevitable discovery exception to the Sixth Amendment's exclusionary rule).

106. *Nix*, 467 U.S. at 431.

107. *See generally supra* note 105.

108. *See generally id.*

109. 285 F.3d 721 (8th Cir. 2002), *cert. granted*, 538 U.S. 905 (2003).

Derivative Statement Evidence

United States v. Fellers

In *Fellers*, based upon an indictment, two police officers went to Feller's home to arrest him for conspiracy to distribute drugs.[110] Once there, the officers informed Fellers that they wanted to speak with him about his involvement with methamphetamines and his associations with certain individuals. Fellers informed the officers that he had used methamphetamines and that he had associated with the individuals in question.[111]

At no time before or during this conversation did officers read Fellers his *Miranda* rights. The officers then arrested Fellers and took him to the police station. The officers read Fellers his *Miranda* warnings at the police station, which he waived. During the subsequent interrogation, Fellers reiterated his earlier incriminating admissions.[112] Fellers sought to suppress his second statement as "fruit of the poisonous tree" of his first unwarned statement.[113]

The Court of Appeals for the Eighth Circuit, citing the Fifth Amendment case of *Oregon v. Elstad*,[114] concluded that Feller's *Mirandized* statement at the police station was not coerced and that he knowingly and voluntarily waived his rights. Additionally, in a cursory, two-line opinion, the Eighth Circuit found no violation of Feller's Sixth Amendment right to counsel since the officers did not "interrogate" him at his home.[115] The Court disagreed.

In a unanimous opinion, the Court concluded that the agents had violated the petitioner's Sixth Amendment rights when they "deliberately elicited" information from him after he had been indicted and without having secured a waiver of counsel.[116] Writing for the Court, Justice O'Connor reiterated that the test for violations of the Sixth Amendment was separate and distinct from those for the Fifth Amendment. Whereas Fifth Amendment analysis applies a "custodial-interrogation" standard,[117] the Sixth Amendment applies a "deliberate elicitation" standard.[118] Government agents violate the Sixth Amendment when they "deliberately elicit" information from an individual against whom judicial proceedings have been initiated.[119]

The Court found that the Eighth Circuit erred when it incorrectly applied the Fifth Amendment's "interrogation" standard, instead of the Sixth Amendment's "deliberate-elicitation" standard.[120] The Eighth Circuit compounded this error when they evaluated the petitioner's subsequent warned statement—given at the jail house—under the standards set forth in *Oregon v. Elstad,* a Fifth Amendment based case.[121]

In remanding the case, the Court acknowledged that they had never decided the issue of whether the rationale of *Elstad* also applies to cases in which there has been an initial violation of a suspect's Sixth Amendment right to counsel, in which a suspect makes an incriminating statement following a knowing and voluntary waiver of counsel.[122] No matter how the Eighth Circuit decides this issue of first impression, it is likely the Court will again review the Eighth Circuit's opinion.

The *Fellers* case serves as a reminder to practitioners of the importance of carefully identifying and applying the correct legal standards to any issues they either argue or decide. This is especially true in the complex and esoteric area of self-incrimination law within the military, in which a statement by a suspect can involve protections of the Fifth Amendment, Sixth Amendment, Article 31 of the UCMJ, and the voluntariness doctrine. What further complicates this area is that these sources of protection are not mutually exclusive and can over-

110. *Id.* at 723.

111. *Id.*

112. *Id.*

113. *Id.*

114. 470 U.S. 298 (1985).

115. *Fellers*, 285 F.3d at 724.

116. Fellers v. United States, 124 S. Ct. 1019, 1023 (2004).

117. *Id.*

118. *Id.* at 1022.

119. *Id.*

120. *Id.* at 1023.

121. *Id.*

122. *Id.*

lap and interplay in any given situation. In *Fellers*, the Court has once again made it clear that the standards for each self-incrimination protection are separate and distinct, and that failure to identify or apply them correctly can constitute reversible error.

State v. Seibert

The Supreme Court of Missouri also grappled with the derivative evidence issue in *State v. Seibert.*[123] In this case, Patrice Seibert conspired with two of her teenaged sons and two of their friends to set fire to Seibert's mobile home in the hopes of covering up the death of Jonathan, her severely handicapped son. Although Jonathan had died in his sleep the previous night, Seibert was concerned that authorities would conclude he died of neglect, since he was covered with bedsores.[124] To make it appear that she had not left her son alone, Patrice Seibert arranged to have Donald, a mentally handicapped teenager who was living with her, also die during the fire.[125]

Five days after the fire and murder of Donald, officers arrested Seibert and took her to the police station for questioning. Before questioning Seibert, the officers decided to intentionally withhold *Miranda* warnings from her.[126] As one of the officers questioned Seibert, he repeatedly squeezed her arm and accused her of intentionally killing Donald. Seibert eventually admitted to Donald's murder, after which, the officer gave her a twenty-minute break for coffee and a cigarette.[127]

When the officer resumed the interrogation, he turned on a tape recorder and advised Seibert of her *Miranda* rights, which she waived. During the second interview, the officer referred back to the admissions she made during the unwarned interview. Seibert repeated her earlier admissions on tape.[128] These admissions were offered against her at trial where she was convicted of second-degree murder.[129] The officer later testified he intentionally withheld *Miranda* warnings in the hopes that he could "get an admission of guilt" from Seibert.[130] The officer also testified that he learned this procedure during his interrogation training and that it was standard procedure at his police department.[131]

The Missouri Supreme Court reversed the judgment against Seibert, ruling that the warned confession should have been suppressed,[132] since the officer's tactic of deliberately withholding *Miranda* warnings elicited "a confession that was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights."[133] Concluding that Seibert was subjected to "a nearly continuous period of interrogation,"[134] the Court gave little weight to the fact that Seibert had signed a waiver of her *Miranda* rights before her second confession.[135] Finally, the Court made clear its disapproval of the tactic of deliberately withholding *Miranda* warnings by calling it an intentional "end run" around the protections afforded under *Miranda*.[136]

Derivative Physical Evidence

Like the Missouri Supreme Court, the United States Court of Appeals for the Tenth Circuit also wrestled with its own derivative evidence issue in *United States v. Patane*.[137] The key difference, in *Patane*, was the admissibility of physical evidence

123. 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003).

124. *Id.* at 701.

125. *Id.* at 702.

126. *Id*.

127. *Id*.

128. *Id*.

129. *Id.* at 701.

130. *Id.* at 702.

131. *Id*.

132. *Id.* at 707.

133. *Id.* at 705.

134. *Id.* at 705-06.

135. *Id*. at 705.

136. *Id.* at 704.

137. 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003).

as opposed to a subsequent statement. In *Patane*, two police officers went to Patane's house to arrest him for violating a restraining order and for possessing a firearm as a convicted felon. Once there, officers placed Patane under arrest and handcuffed him. As one of the officers began advising Patane of his *Miranda* rights, Patane interrupted and stated that he already knew his rights.[138] The officer did not give Patane the rest of his warnings, which the government admits on appeal was a violation of *Miranda*.[139] The officers then told Patane they were interested in the "Glock" pistol that Patane possessed. After some initial reluctance, Patane told the officers the pistol was located in his bedroom on a wooden shelf, and then, per their request, gave the officers permission to enter his home and seize it.[140]

In deciding that the gun should be suppressed, the Tenth Circuit reasoned that since *Dickerson* conclusively established *Miranda* as a constitutional rule, derivative evidence was now controlled by *Wong Sun v. United States*,[141] which requires the suppression of the "fruits" from unconstitutional governmental conduct.[142] The court distinguished this case from *Elstad* (a subsequent warned statement) and *Tucker* (identification of a witness), observing that neither of those cases involved physical evidence.[143] Specifically, the court noted that *Elstad* involved a subsequent confession after an initial unwarned confession, and that this second confession was the product of a voluntary decision by the declarant after *Miranda* warnings were properly administered. This situation differed from the present case, since the physical fruits of a *Miranda* violation do not involve a voluntary decision by the suspect to provide derivative evidence.[144]

The Tenth Circuit held the *Tucker* case could also be distinguished since it involved pre-*Miranda* conduct. Therefore, the same prophylactic concern in deterring police misconduct was not an issue for the *Tucker* court.[145] The Tenth Circuit also reasoned that since *Miranda* was now a constitutional rule, lower courts were no longer free to expand the already judicially established exceptions to *Miranda's* suppression requirement.[146]

As to whether negligent failures to give *Miranda* warnings should be treated differently than intentional failures, the court found that the deterrent effect of suppressing negligent violations also, would help ensure that officers were properly trained to protect this important constitutional right of its citizens.[147] Finally, the court reasoned that the policy of only suppressing evidence in cases of intentional violations would be too difficult to implement, since it would require courts to determine the subjective motivations of the offending police officers.[148]

Juvenile Status

In *Alvarado v. Hickman*,[149] during an investigation into a murder that occurred at a shopping mall, police contacted Michael Alvarado's mother and asked to speak with her seventeen-year-old son. She agreed and, along with Alvarado's father, accompanied their son to the police station. Once there, Alvarado's parents asked to be present during the interview. The police denied their request.[150]

During the initial phase of the questioning, Alvarado denied any involvement in the shopping mall death. In response to this exculpatory account, the interviewing officer expressed disbelief at Alvarado's story and stated that she had a witness who gave a contrary account of the events. Alvarado then made several incriminating admissions that were used against him at his

138. *Id.* at 1015.

139. *Id.*

140. *Id.*

141. 371 U.S. 471 (1963).

142. *Patane*, 304 F.3d at 1019.

143. *Id.* at 1024.

144. *Id.* at 1020-21.

145. *Id.* at 1019-20.

146. *Id.* at 1024-25.

147. *Id.* at 1028.

148. *Id.* at 1029.

149. 316 F.3d 841 (9th Cir. 2002), *cert. granted sub nom.*, Yarborough v. Alvarado, 2003 U.S. LEXIS 5428 (Sept. 30, 2003).

150. *Id.* at 844.

trial. He was eventually convicted of second-degree murder and attempted robbery.[151] At no time before or during the two-hour interview did police ever give Alvarado his *Miranda* warnings.[152]

The Ninth Circuit reversed the lower court's denial of Alvarado's petition for a writ of habeas corpus.[153] The Ninth Circuit concluded the lower court committed "clear error"[154] when it failed to evaluate whether Alvarado's juvenile status affected the "in-custody" determination in its *Miranda* analysis.[155] After conducting a de novo review, the Ninth Circuit concluded Alvarado was "in custody" for *Miranda* warnings purposes.[156]

The Ninth Circuit rested its determination on the fact that Alvarado was only seventeen-years old at the time of his interrogation,[157] and his lack of a prior criminal history made him inexperienced in dealing with the police.[158] The court also noted that to get Alvarado to the station for questioning, police used his parents both to arrange the interview and to transport him, never obtaining Alvarado's direct consent for the interview.[159] Additionally, the police refused the parents' request to be present during the interrogation.[160]

The court also found that Alvarado would not have felt free to leave since, at no point before or during the interview at the police station, did the police ever inform him that he was not under arrest.[161] Additional facts the court found significant included the length of the interrogation, which lasted two hours, and the officer's expressed repeated disbelief and reference to witnesses who had provided contrary accounts of the murder when Alvarado expressed his innocence.[162] Having decided that juvenile status is a factor that must be considered when determining whether a suspect is in custody for *Miranda* purposes, the Ninth Circuit has set the stage for the Supreme Court to provide clear guidance to other lower courts who must address this issue.[163]

Regardless of how the Court decides this case, it will have little impact on military justice, since the vast majority of service members are over the age of eighteen. Even if the Court agrees with the Ninth Circuit and holds that a suspect's juvenile status must be taken into consideration, it potentially could have little impact even for those few service members who are seventeen-years old, especially if the Court adopts a sliding scale-based test (e.g., the younger a suspect, the more likely he will perceive himself as being in custody.) Under such a test, a seventeen-year-old suspect will likely not be treated much differently than an eighteen-year-old suspect.

Conclusion

Although the cases from the CAAF do not establish new law, trial practitioners should still be familiar with their facts and holdings to effectively use them in motions practice. Specifically, the *Mapes* case provides helpful tips to the wary trial counsel who does not want to taint evidence gained from immunized statements, thereby creating the potential for reversible error.

Although the Supreme Court's 2003 term was a relatively quiet one for self-incrimination law, the Court's 2004 term promises far more excitement. While the *Alvarado* case provides an interesting issue on how a suspect's age affects the "in-custody" determination for *Miranda* warnings, the real issue this term will be the rulings the Court makes on the admissibility of derivative evidence from unwarned statements. Unfortunately, practitioners who were looking for clear guidance in this

151. *Id.*

152. *Id.*

153. *Id.* at 857.

154. *Id.* at 855.

155. *Id.* at 844-45.

156. *Id.* at 851.

157. *Id.* at 850.

158. *Id.* at 846.

159. *Id.* at 854.

160. *Id.* at 851.

161. *Id.*

162. *Id.* at 850.

163. After the Court had granted certiorari to the *Alvarado* case, the Seventh Circuit also ruled that a suspect's juvenile status is a relevant factor for the "in-custody" determination when it decided *A.M., a minor, v. Jerry Butler*, 2004 U.S. App. LEXIS 7912 (7th Cir. Apr. 22, 2004). Although factually similar to *Alvarado* in many aspects, one significant difference is that the suspect in *Butler* was only eleven-years old when the police questioned him.

area were disappointed by the *Fellers* opinion. One can only hope that the Court's pending opinions in *Patane* and *Seibert* will provide answers to the questions created by the split of circuit and state court opinions. Regardless of whether these two opinions serve as the oracles for which many are hoping, all criminal law practitioners should look for their publication, since they have the potential of being harbingers of big change in the wind for derivative evidence.

New Developments in Instructions: 2003 Term of Court

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This article surveys decisions, which impact instructions, issued by the Court of Appeals for the Armed Forces (CAAF) and the Army Court of Criminal Appeals (ACCA) during the 2003 term. These decisions are organized based on their influence in the following areas: (1) offenses; (2) defenses; (3) sentencing instructions; and (4) evidentiary instructions. This year's cases illustrate the difficult challenges that trial judges and practitioners face when drafting instructions. Several cases[2] remind practitioners of the wisdom of simply following the pattern instructions. Conversely, another case[3] shows that judges must be able to deviate from the model instructions when necessary. All of these cases, however, illustrate that preparing instructions requires thought and care.[4]

Offenses

Disobedience

In *United States v. Thompkins*,[5] the CAAF considered Airman First Class (A1C) Tomal R. Thompkins' conviction of disobedience of a superior commissioned officer.[6] In reviewing the legal sufficiency of the conviction, the CAAF gave important guidance about willfulness.[7]

The accused was involved in a heated dispute between Army and Air Force personnel. As a result of this altercation, a civilian bystander was wounded by gunfire. Following this incident, the accused's commander issued a no-contact order. The accused was prohibited from having direct or indirect contact with six named individuals. The purpose of the order was to prevent those under investigation from discussing the incident.[8]

Airman First Class Smallwood, one of the individuals named in the no-contact order, had a compact disc that belonged to the accused. After receiving the no-contact order, the accused contacted A1C Smallwood's girlfriend and told her that he wanted his compact disc from A1C Smallwood. Several days later, the accused met with A1C Smallwood who gave the accused a compact disc. Air Force Office of Special Investigations (OSI) personnel videotaped this meeting.[9]

The CAAF found that the conviction of disobedience was legally sufficient.[10] One of the essential elements of this offense is that the accused "*willfully* disobey[ed] a lawful command of his superior commissioned officer."[11] Addressing the order, the CAAF stated,

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2. *See, e.g., infra* notes 79-89 and accompanying text.

3. *See, e.g., infra* notes 58-78 and accompanying text.

4. *See, e.g., infra* notes 144-63 and accompanying text; note 209.

5. 58 M.J. 43 (2003).

6. *Id.* at 44.

7. "Appellant has not challenged the . . . [legality of the order] in the present appeal. The granted issue addresses the legal sufficiency of the evidence." The defense challenged the legality of the order at trial and the trial judge found the order lawful. *Id.* at 44-45.

8. *Id.* at 44.

9. *Id.*

10. The test for legal sufficiency is whether a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. The appellate court views the evidence in the light most favorable to the prosecution. United States v. Turner, 25 M.J. 324 (C.M.A. 1987).

> Public policy supports a strict reading of this no-contact order. A military commander who has a legitimate interest in deterring contact between a service member and another person is not required to sort through every contact to determine, after the fact, whether there was a nefarious purpose. A service member, like Appellant, who initiates contact contrary to the terms of such an order, is subject to punishment . . . without the necessity of proof that the contact was undertaken for an improper purpose.[12]

This determination is consistent with the *Manual for Courts-Martial* (*MCM*)[13] and the *Military Judges' Benchbook* (*Benchbook*).[14] "'Willful disobedience' means an intentional defiance of authority."[15] *Thompkins* makes clear that the accused's purpose for violating the no-contact order is unimportant. What is important is the accused's intent to defy authority. Here, the court found sufficient evidence of intentional disobedience.[16]

In a similar case, an instruction based on the language quoted above may be appropriate to explain the relationship between the accused's intent and the accused's purpose.[17] The government has the burden to prove willful disobedience, that is, an intentional defiance of authority. The relevant intent is the intent to disobey the order. The government need not prove that the accused intended to engage in the conduct that gave rise to the no-contact order, in this case, to keep the suspects from talking during the investigation. Although negligence is a defense,[18] an innocent motive for violating the no-contact order is irrelevant if the order was intentionally disobeyed. The interaction between intent and motive may confuse the fact finder, and a tailored instruction based on *Thompkins* will clarify the issue.[19]

Child Endangerment

In *United States v. Vaughan*,[20] the CAAF considered whether child neglect that does not result in harm to the child is an offense under the Uniform Code of Military Justice (UCMJ). Airman First Class Sonya R. Vaughan left her forty-seven-day-old daughter unattended in her crib for six hours, from 2300 to 0500, while she went to a club. Airman First Class Vaughan arranged with the child's father to watch the baby, but she left for the club when he did not show up. The baby suffered no apparent physical or mental harm during her mother's absence. Airman First Class Vaughan was charged with child neglect under clause 2 of Article 134.[21]

On appeal, A1C Vaughan argued that she was not on notice that her conduct was criminal, that her conduct fell outside the definition of child neglect because her daughter suffered no harm from being left unattended, and that her conduct was not service discrediting.[22] The court rejected all three arguments.[23] The second issue is of particular interest to trial judges.

Airman First Class Vaughan argued that the specification and the military judge's providence inquiry[24] failed to define the elements of child endangerment. Since the *MCM* does not specifically list the elements of child endangerment, the military judge had to define them. The military judge told A1C

11. *Thompkins*, 58 M.J. at 45 (emphasis added).

12. *Id.*

13. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 14c(2)(f) (2002) [hereinafter MCM].

14. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

15. *Id.* para. 3-14-2d.

16. *Thompkins*, 58 M.J. at 43.

17. *Cf.* United States v. Huet-Vaughn, 43 M.J. 105 (C.M.A. 1995) (explaining the difference between motive and intent).

18. "Failure to comply with an order through heedlessness, remissness, or forgetfulness is not [willful disobedience]." *Thompkins*, 58 M.J. at 45 (quoting MCM, *supra* note 13, pt. IV, ¶ 14c(2)(f)).

19. *Id.*

20. 58 M.J. 29 (2003).

21. MCM, *supra* note 13, pt. IV, ¶ 60c(3) (noting that clause 2 is conduct of a nature to bring discredit upon the armed forces).

22. *Vaughn*, 58 M.J. at 30-31.

23. *Id.*

24. Airman First Class Vaughan entered a conditional plea of guilty to the child endangerment offense. *Id.* at 30.

Vaughan that the offense of child endangerment had four elements:

> The first element of this specification is that between on or about 2 January 1999 and on or about 3 January 1999, at or near Pickliessem, Germany, you neglected your daughter[.] The second element is that you did so by leaving [your daughter] in your house without supervision or care for an unreasonable period of time, without regard for the mental or physical health, safety, or welfare of [your daughter]. The third element is that [your daughter] is a child under the age of one year. And the fourth element is that under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[25]

The court approved of the trial judge's determination that child neglect requires culpable negligence and that this offense does not require a showing of harm. Child neglect requires "an absence of due care measured by an absence of regard for the mental or physical health, safety or welfare of the child."[26] Approving the elements crafted by the trial judge, the CAAF noted "the elements she listed captured the essence of 'child neglect' as reflected in military custom and regulation as well as a majority of state statutes."[27]

This case is important but it is of limited help to trial judges and practitioners. The accused's offense was committed before 6 October 1999. An executive order, signed on 6 October 1999,[28] added reckless endangerment as an offense in violation of Article 134.[29] Although *Vaughan* provides an approved blueprint for defining the elements of child endangerment, judges will probably see this type of conduct charged as reckless endangerment.

Child Pornography

In *United States v. O'Connor*,[30] the CAAF considered the impact of *Ashcroft v. Free Speech Coalition*[31] on child pornography cases. The CAAF had affirmed the accused's conviction and sentence before *Free Speech Coalition*. On remand from the Supreme Court, the CAAF set aside the accused's findings of guilty to two specifications of wrongfully possessing child pornography.[32]

O'Connor was a standard pre-*Free Speech Coalition* child pornography case. The accused was suspected of possessing and receiving over 6,500 files of child pornography. The accused pled guilty to two "clause 3" offenses under Article 134, UCMJ[33] for violating the Child Pornography Prevention Act of 1996 (CPPA).[34] Fifty-nine images were admitted as part of the stipulation of fact. The military judge used 18 U.S.C. § 2256(8) to define child pornography.[35] In *Free Speech Coalition*, the Supreme Court held that any prosecution under the CPPA based on "virtual" child pornography violates the First Amendment.[36] Specifically, the Court found the "or appears to be" language of § 2256(8)(B) and all of the language of § 2256(8)(D) to be unconstitutional.[37]

The CAAF reviewed the providence inquiry to see if *Free Speech Coalition* created a basis for questioning the providence of the accused's plea. The court noted that the most prominent feature of the *Free Speech Coalition* decision is "the distinction between 'actual' and 'virtual' images."[38] The military judge used the pre-*Free Speech Coalition* definition of child pornography, and the accused stated to the judge that the images were child pornography because "the occupants in the pictures appeared to be under the age of [eighteen]."[39] Based on the

25. *Id*. at 33-34. The trial judge indicated the third element was that A1C Vaughan's daughter was a child under one-year old, no doubt because that was the way the offense was pled. The opinion has an appendix that summarizes thirty-four statutes that punish child neglect. These statutes vary in their definition of the upper age of a child, ranging from age ten to eighteen. *Id*. at 36-42. The court makes clear that gross negligence is contextual. Therefore, the age of the child will be important. While leaving a newborn unattended for six hours is grossly negligent, leaving a sleeping sixteen-year old unattended may not be. Judges should not be concerned that there does not seem to be a bright line age for child endangerment.

26. *Id.* at 35.

27. *Id.*

28. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

29. *See* MCM, *supra* note 13, ¶ 100a.

30. 58 M.J. 450 (2003).

31. 535 U.S. 234 (2002).

32. The Court granted certiorari and remanded for further consideration in light of the newly decided *Ashcroft v. Free Speech Coalition. Id.*

33. MCM, *supra* note 13, pt. IV, ¶ 60(c)(4) (Crimes and offenses not capital (clause 3)).

34. 18 U.S.C. §§ 2251-60 (2000).

record, the CAAF concluded that it was unclear whether the accused pled guilty to the possession of virtual or actual child pornography: "[I]n the absence of any discussion or focus in the record before us regarding the 'actual' character of the images, we cannot view Appellant's plea of guilty to violations of the CPPA as provident."[40]

The court also addressed whether the convictions could be sustained as a lesser-included clause 2 offense. The CAAF distinguished two prior cases, *United States v. Augustine* and *United States v. Sapp*, noting that in these cases the military judges had a discussion with each accused about the service discrediting nature of his conduct.[41] In *O'Connor*, there was no discussion between the judge and the accused about the service discrediting nature of the accused's conduct. Interestingly, the accused stipulated to the service discrediting nature of his conduct, but the court found that insufficient given the new constitutional dimension not involved in *Augustine* and *Sapp*.[42]

O'Connor contains several lessons for practitioners.[43] The most obvious is that judges should not include the constitutionally objectionable language when defining "child pornography" in instructions or during a providence inquiry.[44] Judges should make the record clear about which subsection of the definition is involved in the case. Most cases seem to involve 18 U.S.C. § 2256(8)(B),[45] and judges should make sure that the record clearly states that only images containing actual minors engaged in sexually explicit conduct are prohibited. Judges

35. *O'Connor*, 58 M.J. at 452-53. At the time, 18 U.S.C. § 2256(8) defined child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where --
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or
>
> (B) such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id. (emphasis added).

Judges should note that the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 redefined child pornography in light of *Free Speech Coalition. See Free Speech Coalition*, 535 U.S. at 234. The PROTECT Act redefined child pornography as follows:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No 108-21, § 502, 117 Stat. 650, 678-79 (2003); *see also* 18 U.S.C. § 2256(8) (LEXIS 2004).

36. *Free Speech Coalition*, 535 U.S. at 234; *see* U.S. CONST. amend. I.

37. *O'Connor*, 58 M.J. at 452; *see also Free Speech Coalition*, 535 U.S. at 256-58.

38. *O'Connor*, 58 M.J. at 453.

39. *Id.*

40. *Id.* at 454.

41. The CAAF has upheld convictions for child pornography offenses as a lesser-included clause 2 offense. *See* United States v. Augustine, 53 M.J. 95 (2000); United States v. Sapp, 53 M.J. 90 (2000).

42. *O'Connor*, 58 M.J. at 454.

43. *Id.*

should be very careful about child pornography defined under 18 U.S.C. § 2256(8)(D).[46] Eliminating the words "that conveys the impression" may not correct the constitutional deficiency. In addition to the "actual" versus "virtual" distinction, the Court was concerned that § 2256(8)(D) prohibits a pornographic film that contains no children, just because someone incorrectly marketed, described or sold it as a visual depiction of children engaged in sexually explicit conduct.[47] Once § 2256(8)(D) is corrected for both problems, it is difficult to distinguish it from § 2256(8)(B).[48] Finally, judges should discuss the service discrediting nature of the conduct with the accused during the providence inquiry; a stipulation may be insufficient. In cases involving images with actual children, possession or receipt would be service discrediting because such conduct violates the law. It is not clear that possession or receipt of images with virtual children is service discrediting.[49]

In a similar case, *United States v. Tynes*,[50] the ACCA reviewed the child pornography instructions given to members before *Free Speech Coalition*.[51] As discussed above, the Supreme Court struck down portions of the federal child pornography statute that criminalized visual depictions that appeared to be minors or conveyed the impression of minors.[52] The Court held that the unconstitutional provisions were severable from the remaining provisions pertaining to images of actual minors or "morphed" images of actual minors.[53]

In *Tynes*, the trial judge included the unconstitutional subsections when he defined child pornography. He also instructed the members, however, that to find the accused guilty, the government must prove that the accused knew or believed the persons depicted were minors and that the persons depicted were minors.[54] The issue addressed by the ACCA was the effect of the erroneous instructions on the findings. The court explained the test for harmless error in such a situation—"[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"[55] The court first observed that the defense did not object to the instructions at trial. To conclude that any error was harmless, the court then relied on the instruction on the accused's knowledge or belief described above, the "overwhelming" evidence that the depictions were of real minors, and the absence of any evidence presented by the defense that the images were not of real minors.[56] The ACCA upheld the conviction declaring that the instructions, taken as a whole, "negated the possibility that the members may have found that the minors depicted in the images were 'virtual' rather than real minors."[57]

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44. *See supra* note 35. At a minimum, the italicized language in footnote 35 should be omitted for offenses committed before 30 April 2003, the effective date of the PROTECT Act. For offenses committed after 30 April 2003, judges should use the new definition of child pornography contained in the PROTECT Act. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No 108-21, § 502, 117 Stat. 650, 678-79 (2003).

45. 18 U.S.C. § 2256(8)(B) (2000).

46. *Id.* § 2256(8)(D).

47. *Id.* "Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, section 2256(8)(D) is substantially overbroad and in violation of the First Amendment." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002); *see* U.S. CONST. amend. I; 18 U.S.C. § 2256(8)(D).

48. 18 U.S.C. § 2256(8)(B), (D).

49. *Compare* United States v. O'Connor, 58 M.J. 454-55 (2003), *with* United States v. Augustine, 53 M.J. 95 (2000), *and* United States v. Sapp, 53 M.J. 90 (2000).

> Essential to our holding in *Sapp* was the recognition that the providence inquiry there demonstrated that the accused "clearly understood the nature of the prohibited conduct." In the wake of *Free Speech Coalition*, the "virtual" or "actual" status of the images at issue has constitutional significance. That constitutional significance may, in turn, bear on "the nature of the prohibited conduct", i.e., its service-discrediting character . . . . Accordingly, we do not address the question of whether, in the wake of *Free Speech Coalition*, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") can constitute conduct of a nature to bring discredit upon the armed forces for purposes of clause 2 of Article 134.

O'Connor, 58 M.J. at 454-55.

50. 58 M.J. 704 (Army Ct. Crim. App. 2003).

51. *Free Speech Coalition*, 535 U.S. at 258.

52. *See supra* notes 35-36.

53. *Free Speech Coalition*, 535 U.S. at 242.

54. The ACCA criticized this portion of the instructions, commenting that the judge should have explained that the accused must have known that the depictions showed sexually explicit conduct. *Tynes*, 58 M.J. at 708.

55. *Id.* at 709 (quoting United States v. Neder, 527 U.S. 1, 18 (1999)); *see also* United States v. Sanchez, 59 M.J. 566 (A.F. Ct. Crim. App. 2003) (finding that photographs admitted at judge-alone contested trial provided adequate evidence, without corroboration, that images were of real children).

Rape

This term, the CAAF decided a case familiar to criminal law practitioners, *United States v. Simpson*.[58] Staff Sergeant (SSG) Delmar Simpson, a drill sergeant, pled guilty to ten specifications of failure to obey a lawful general order based on engaging in sexual activity with trainees. The charges in this case arose in the Advanced Individual Training student-drill sergeant context.[59] Contrary to his pleas, the accused was convicted of three specifications of failure to obey a lawful general order, two specifications of cruelty and maltreatment of a subordinate, eighteen specifications of rape, one specification of forcible sodomy, two specifications of consensual sodomy, one specification of assault consummated by a battery, twelve specifications of indecent assault, one specification of committing an indecent act, and two specifications of communicating a threat.[60] The CAAF granted review on two issues; one issue was whether the trial judge's instructions on constructive force were erroneous.[61]

"[R]ape is a deceptively simple crime, with only two elements . . . . Practically speaking, however, rape is often a complex offense because of the interrelationships among the legal concepts of force, resistance, consent, and mistake of fact."[62] One element of rape requires proof the act of sexual intercourse was committed by force and without the consent of the victim. It is well settled that military law "recognizes that there may be circumstances in which [force and lack of consent] may be proved by the same evidence."[63] Force can be actual or constructive. Constructive force may be shown by proof of a coercive atmosphere, including the special environment where trainees and drill sergeants interact.[64]

Before the ACCA, the accused argued that the military judge should not have instructed on constructive force.[65] The ACCA rejected this claim stating,

> With respect to constructive force in the sexual assaults [of some of the victims], we note: (1) the appellant's physically imposing size; (2) his reputation in the unit for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.[66]

Before the CAAF, the issue was whether the constructive force instruction was correct.

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56. *Tynes*, 58 M.J. at 709-10. The ACCA also concluded that even if the error was not harmless, the remedy would not be to dismiss the specifications at issue but to affirm a conviction for an attempt under article 80 or for service discrediting conduct under article 134. *Id.* at 710; *see* UCMJ arts. 80, 134 (2002). As of the date of this article, the CAAF had not acted on the appellant's petition for review.

57. *Tynes*, 58 M.J. at 710. Judges should also note that the court suggests pattern instructions for the offense of receipt of child pornography and the offense of possession of child pornography. *Id.* at 710-13.

58. 58 M.J. 368 (2003). "Aberdeen Proving Grounds, Maryland (APG), became the focus of a nationwide media blitz [footnote omitted] on 7 November 1996, when military officials disclosed that two drill sergeants and one training company commander were under investigation for sexual misconduct with trainees." United States v. Simpson, 55 M.J. 674, 679 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003).

59. *Simpson*, 58 M.J. at 377.

60. *Id.* at 370.

61. The CAAF specified this issue as:

> I. WHETHER THE MILITARY JUDGE GAVE AN ERRONEOUS INSTRUCTION REGARDING "CONSTRUCTIVE FORCE—ABUSE OF MILITARY POWER" WITH RESPECT TO THE RAPE AND FORCIBLE SODOMY SPECIFICATIONS WHICH SUBSTANTIALLY PREJUDICED APPELLANT'S CASE.

Id.

62. *Simpson*, 55 M.J. at 695.

63. *Simpson*, 58 M.J. at 377.

64. *Id.*

65. *Simpson*, 55 M.J. at 697.

66. *Id.* at 707.

There, the defense tried to exploit the differences between the constructive force instruction given by the trial judge and the model constructive force instruction contained in the *Benchbook*.[67] The defense complained that the given instructions created a "loophole" large enough to permit the members to find constructive force if they concluded only that the accused abused his position even if the victims had "no reasonable belief that death or great bodily harm would be inflicted upon them and had no reasonable belief that resistance would be futile."[68] This proposition is hard to maintain given the trial judge's actual instructions:

> In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power to compel the victim to submit against her will. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, thus satisfying the requirement of force . . . .
>
> Hence, when the accused's actions and words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that further resistance would be futile, the act of sexual intercourse has been accomplished by force. There is evidence which, if believed, may indicate that the accused used or abused his military position and/or rank and/or authority in order to coerce and/or force the alleged victim to have sexual intercourse. In deciding whether the accused possibly used or abused his position, rank or authority and whether the alleged victim had a reasonable belief that death or physical injury would be inflicted on her and that further resistance would be futile under the totality of the circumstances, you should consider all the evidence presented in this case that bears on those issues.[69]

The defense also complained about the degree of harm perceived by the victim in the judge's constructive force instruction. The judge instructed the members that the victim's reasonable belief that death or *physical injury* would be inflicted on her and that further resistance would be futile was sufficient for constructive force.[70] The defense pointed out that the *MCM* requires fear of death or *great bodily harm* to negate the permissive inference of consent that may arise when the victim does not physically resist.[71] The trial judge included this greater degree of perceived harm in the instructions on consent.[72] The CAAF concluded that the judge's instructions were adequate on both issues.

The *Simpson* opinion is important to trial judges and practitioners for three reasons. First, trial judges must recognize the importance of tailoring instructions based on the facts of the case. While the current *Benchbook* reflects a Herculean effort to anticipate the circumstances in which constructive force may be raised, new contexts will arise. Trial judges, like the judge in *Simpson*, must be willing and able to deviate from the standard *Benchbook* instructions and tailor the instructions to the facts of the case when warranted. The instructions must be an accurate statement of the law and sufficient to guide the deliberations of the court members. Second, trial judges must be aware of the subtle difference in the *Benchbook* instruction between the degree of perceived harm required for constructive force and that necessary to negate the permissive inference of consent. It may be appropriate to substitute "physical injury" for "great bodily harm" in the consent portion of "Constructive force—abuse of military power" section in Instruction 3-45-1.[73]

The third lesson is not discussed in the CAAF opinion but is implicit in the ACCA's discussion of the legal and factual sufficiency of the rape convictions.[74] In cases when the victim is repeatedly abused, once the victim has determined that resistance is futile, the reasonable measure of resistance to negate the permissive inference of consent may be lowered. The accused's abuse of Private First Class (PFC) PR is a good

67. BENCHBOOK, *supra* note 14, para. 3-45-1 n.6.

68. *Simpson*, 58 M.J. at 378. Recent CAAF cases make clear that rank disparity alone does *not* constitute constructive force. *See Simpson*, 55 M.J. at 697 n.40.

69. *Simpson*, 58 M.J. at 377-79.

70. *See id*. This degree of perceived harm is consistent with prior case law. *See* United States v. Cauley, 45 M.J. 353 (1996); United States v. Palmer, 33 M.J. 7 (C.M.A. 1991).

71. MCM, *supra* note 13, ¶ 45c(1)(b). The model instruction also includes this level of perceived harm. *See* BENCHBOOK, *supra* note 14, para. 3-45-1, n.4.

72. *Simpson*, 55 M.J. at 697 n.39. This footnote shows that the BENCHBOOK may require a greater degree of fear than the case law actually requires. *See* United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

73. *See* BENCHBOOK, *supra* note 14, para. 3-45-1 n.6.

74. *Simpson*, 55 M.J. at 699-709.

example. The accused was convicted of raping her eight times. Early on the day she was raped for the first time, PFC PR made her lack of consent clear when she held onto her PT shorts when the accused tried to pull them down.[75] Later that same day, when the accused was about to rape her for the first time, PFC PR protested verbally and physically. Private First Class PR tried to push the accused away and tried to prevent penetration by keeping her legs together while telling the accused that she did not want to have sex with him.[76]

The victim resisted a lot initially compared to the level of resistance she offered before he raped her the final two times. The last two rapes occurred in the accused's quarters. On these occasions, the victim was very compliant because her resistance was futile on the other occasions. Private First Class PR got into the accused's car, entered his quarters, and "[o]nce in the room, she just stood frozen when he told her to undress and did not resist when he undressed her himself."[77] The ACCA found all of these rape convictions legally and factually sufficient.[78] Therefore, when a witness alleges multiple episodes of abuse and describes some level of resistance initially but the resistance tapers off over time to little or no resistance, the accused may be convicted of rape for acts of sexual intercourse after the resistance has tapered off. This pattern may arise in child sexual abuse cases as well as improper superior-subordinate relations cases.

Attempts

In *United States v. Redlinski*,[79] the CAAF considered the providence of the accused's guilty plea to attempted distribution of marijuana. In his appeal, the accused claimed that the military judge did not sufficiently explain the elements of this offense. The court agreed that the accused did not have an adequate understanding of the elements of attempted distribution of marijuana and reversed his conviction for this offense.[80]

During the providence inquiry, the military judge listed the elements of attempted wrongful distribution of marijuana as:

> Essentially that at Long Island, New York, on or about 16 February 1999, you attempted to distribute some amount of marijuana, a controlled substance. Again, that you actually knew you attempted to distribute the substance, that you actually knew that the substance you attempted to distribute was marijuana or of a contraband nature, and that the distribution, if completed would have been wrongful.[81]

As to this offense, the accused admitted to the judge that he had accepted $300 from a fellow sailor to purchase the marijuana and had driven off in his car to execute the sale. Law enforcement officials, however, stopped the accused's car, and he never purchased the marijuana.[82]

The CAAF noted that a military judge must explain to the accused the elements of an offense for an accused's plea of guilty to that offense to be knowing and voluntary. The accused must know the elements and admit them freely.[83] "Rather than focusing on a technical listing of the elements of an offense, [the CAAF] looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially."[84]

The court concluded that the appellant did not receive an adequate explanation of the element of attempted distribution. The military judge simply added the words "attempted to" to the elements of wrongful distribution, thereby missing the elements that are unique to an attempt.[85] "Although the appellant is not entitled to receive a hornbook review of this distinction, the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond

75. *Id.* at 700.

76. *Id.*

77. *Id.* at 702.

78. *Id.* at 699-700.

79. 58 M.J. 117 (2003).

80. *Id.* at 119. The court set aside the finding of guilty for attempted distribution of marijuana and the sentence, but the court affirmed other drug-related findings of guilty. *Id.*

81. *Id.* at 118.

82. *Id.* at 119.

83. *Id.*

84. *Id.*

85. *Id.* ("Unlike some simple military offenses, attempt is a more complex, inchoate offense that includes two specific elements designed to distinguish it from mere preparation.").

preparatory steps and be a direct movement toward the commission of the intended offense."[86] The court concluded that elements of attempted wrongful distribution, as given by the trial judge, did not provide the accused with a sufficient understanding of the elements of the offense, and, therefore, his guilty plea was not knowing and voluntary. As a result, the court reversed the conviction on this offense.[87]

This case is a reminder that an attempt is a separate crime with unique elements.[88] When preparing a providence inquiry or findings instructions for members, judges should describe the elements of the attempt using the format in *Benchbook* Instructions 3-4-1, 3-4-2, or 3-4-3.[89] Modifying the elements of the attempted offense is insufficient.

Absent Without Leave

In *United States v. Rogers*,[90] the ACCA recommended a new instruction when the issue of voluntary termination to an unauthorized absence is raised at trial. This case did not involve the instructions given at trial since it was a guilty plea. The case is covered here because the proposed instruction was significantly modified and adopted as a change to the *Benchbook*.[91]

In *Rogers*, the accused was charged, among other offenses, with multiple absences without leave (AWOL) from Fort Hood. She remained in the local area and sometimes visited her unit where she saw some of her noncommissioned officers, who knew she was AWOL. In upholding the providence of the accused's guilty pleas, the ACCA reviewed the law regarding voluntary termination of an unauthorized absence. The ACCA concluded that an AWOL is not terminated by the absentee's "casual presence for personal reasons."[92] The court then set forth the following test for determining whether an AWOL has been voluntarily terminated. The accused must do the following: (1) present herself with an intent to return to military duty—this may be accomplished by an overt act, in person, and cannot be done by telephone; (2) present herself to a military authority, someone with authority to apprehend the soldier;[93] (3) identify herself to the military authority and disclose her AWOL status, unless the authority is already aware of that status; and (4) submit to the actual or constructive control exercised by the military authority to which the absentee has presented herself.[94]

With the increasing number of AWOL cases being tried in the Army due to the current policy of returning absentees to their home installations, counsel and judges now have a new instruction to use.

Conspiracy

In *United States v. Mack*,[95] the CAAF addressed a scenario in which the accused was convicted of two specifications of conspiracy[96] even though the facts presented at trial proved only one agreement. Specialist Mack and her cohort in crime conspired to steal $3000 from the American Red Cross by stealing a check and forging it in that amount.[97]

On appeal, the government conceded error, and the CAAF resolved the issue by consolidating the two specifications into one. The court concluded the error had no impact on the findings or the sentence.[98]

86. *Id.*

87. *Id.*

88. *See* UCMJ art. 80 (2002).

89. *See* BENCHBOOK, *supra* note 14, paras. 3-4-1, 3-4-2, 3-4-3. These instructions incorporate the elements of the offense attempted in the discussion of the required specific intent. *Id.*

90. 59 M.J. 584 (Army Ct. Crim. App. 2003).

91. *See* BENCHBOOK, *supra* note 14.

92. *Rogers*, 59 M.J. at 586 (quoting United States v. Coglin, 120 M.J. 670, 673 (A.C.M.R. 1981)).

93. Such an authority can include a commissioned officer, a noncommissioned officer, or a military police officer. *Id*. at 587.

94. *Id*.

95. 58 M.J. 413 (2003).

96. UCMJ art. 81 (2002).

97. *Mack*, 58 M.J. at 418.

98. *Mack*, 58 M.J. at 418-19. As to the findings, the accused was convicted of several other charges, and no additional evidence was presented to prove the two conspiracy specifications. As to the sentence, the maximum confinement would have been thirty-five and one-half years instead of forty years had there been a single conspiracy conviction. Since the sentence included confinement for a period of only two years, the CAAF found no prejudicial impact there either. *Id.*

Practitioners should be alert to these issues. Frequently in a conspiracy, there is but a single agreement. Parties may join at different times and various crimes may be committed, but normally there is, as here, only one agreement. If not before, it may be appropriate to consolidate specifications before deliberations on the findings. Defense counsel should be especially vigilant to this issue, because reducing the accused's exposure to conviction of a greater number of offenses and a higher maximum punishment is certainly in the client's best interests.

Defenses

Mistake of Fact

In *United States v. Hibbard*,[99] the accused claimed that the military judge should have provided a mistake of fact instruction as a defense to a rape charge. The accused was charged with maltreatment, rape, indecent assault, making a false official statement, and dereliction of duty. The accused's defense at trial was that no act of sexual intercourse with the victim occurred and that she fabricated the rape allegations.[100] The CAAF stated that the mistake of fact instruction is required when reasonably raised by the evidence, but the court determined that the evidence in this case did not raise a reasonable belief that the victim consented. The CAAF affirmed the conviction.[101]

The accused was assigned to sponsor the victim, who had recently arrived in Saudi Arabia. On her third day in country, the accused took the victim to his apartment and then to a swimming pool. During the course of the day, the accused made several sexually suggestive statements and actions that were not accepted by the victim, yet the victim did not firmly reject some of them. According to the victim, she and the accused had sexual intercourse, and the accused did not stop until the second time she told him to stop.[102]

The defense's theory at trial was that the act of sexual intercourse never happened. In its opening statement, the defense claimed that the victim fabricated the rape charge to avoid serving in Saudi Arabia. The defense's cross-examination of the victim and the defense case in chief was consistent with this theory. Before closing argument, however, the defense counsel requested a mistake of fact instruction. The trial judge denied the request for the instruction, claiming the evidence did not raise the defense.[103]

Of course, a military judge has a *sua sponte* duty to instruct on defenses that are reasonably raised by the evidence.[104] The mistake of fact defense for rape, a general intent crime, requires both an honest and reasonable mistaken belief that the victim consented. A military judge has no reason to provide this instruction when "the evidence [does] not reasonably raise the issue of whether the appellant had a reasonable but mistaken belief as to consent."[105] The CAAF focused on whether the evidence raised the issue of whether the accused had a reasonable but mistaken belief as to consent. The CAAF noted:

> [W]e consider whether the record contains some evidence of a reasonable mistake to which the members could have attached credit if they had so desired. In doing so, we consider the totality of the circumstances at the time of the offense . . . . [We also] take into account the manner in which the issue was litigated as well as the material introduced into evidence at trial.[106]

Given both the defense's failure to present evidence of a reasonable mistake of fact and the defense's tactical choice to claim the victim fabricated her allegations, the CAAF determined that no mistake of fact instruction was required and affirmed the decision of the Air Force Court of Criminal Appeals (AFCCA).[107]

This case is an important reminder to practitioners that the manner in which the litigants chose to argue their cases is an appropriate factor in determining what instructions are appropriate. Although this is not a new development,[108] it is a subtle point that is often overlooked.

The ACCA also considered the mistake of fact defense, as it applies to larceny, in *United States v. Bankston*.[109] In this case,

99. 58 M.J. 71 (2003).

100. *Id.* at 73.

101. *Id.* at 75-77.

102. *Id.* at 73-74.

103. *Id.* at 73-75.

104. MCM, *supra* note 13, R.C.M. 920(e)(3).

105. *Hibbard*, 58 M.J. at 75.

106. *Id.* at 75-76.

107. *Id.* at 77.

SSG John L. Bankston was charged with larceny and conspiracy to commit larceny. At the Post Exchange, the accused and another individual, SSG Blount, loaded a shopping cart with approximately forty items worth about $1,200, merchandise they jointly selected. They approached a cash register, which SSG Blount's wife was operating. Staff Sergeant Blount went out to the parking lot while SSG Bankston paid the bill. Mrs. Blount scanned six items for which the accused paid. She scanned some of the other items but then deleted them from the cash register receipt. In the end, the accused paid $70.24 for merchandise worth $1,200. According to the accused, SSG Blount told him that his wife would later pay the balance with a credit card during her break.[110]

At trial, the judge gave an "honest and reasonable" mistake of fact instruction[111] as to the wrongfulness of the taking. The defense also requested an "honest" mistake of fact instruction[112] as to the specific intent element of permanently depriving the owner of the property, but the judge ruled that the evidence had not raised that defense.

On appeal, the defense argued that the honest mistake of fact instruction should have been given. The ACCA agreed, relying on *United States v. Binegar*,[113] which was decided after SSG Bankston's trial. In *Binegar*, the CAAF held that both the "intent permanently to deprive" element and the "wrongfulness" element of larceny are specific intent elements.[114] Consequently, the ACCA held that the judge should have instructed the members that SSG Bankston's mistake need only be honest.[115]

Using the *Binegar* standard, the accused's misunderstanding about the later payment by Mrs. Blount for the remaining items need only be honest. The ACCA set aside his conviction, because an honest mistake of fact instruction might have caused the members to interpret the accused's testimony differently.

Sentencing Instructions

Punitive Discharge

In *United States v. Rasnick*,[116] the CAAF considered the appeal of Airman Basic Daniel Rasnick. The accused was convicted of three specifications of disrespect toward a superior commissioned officer, insubordinate conduct toward a noncommissioned officer, and disobeying an order.[117] In his sentencing instructions, the military judge did not include the word "ineradicable" in characterizing the stigma of a bad-conduct discharge. The accused claimed that the judge's refusal to use the word ineradicable was an error.

The accused argued that the military judge should have described the stigma attached to a bad-conduct discharge as ineradicable because the *Benchbook* uses this term in its model instruction.[118] The CAAF determined that the military judge's instruction on a bad-conduct discharge sufficiently described the "enduring stigma of a punitive discharge" because the instruction "adequately advised the members that a punitive discharge was a 'severe' punishment, that it would entail specified adverse consequences, and that it would affect Appellant's 'future with regard to his legal rights, economic opportunities, and social acceptability.'"[119] Thus, for a punitive discharge, the military judge need not use this specific term provided the members of the court-martial are told about its negative effects.[120]

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108. *See, e.g.*, United States v. Peel, 29 M.J. 235 (C.M.A. 1989).

109. 57 M.J. 786 (Army Ct. Crim. App. 2002).

110. *Id*. at 786-87.

111. BENCHBOOK, *supra* note 14, para. 5-11-2 (Ignorance or Mistake-When Only General Intent is in Issue).

112. *Id.* para. 5-11-1 (Ignorance or Mistake-Where Specific Intent or Actual Knowledge is in Issue).

113. 55 M.J. 1 (2001).

114. *Id*. at 4-6.

115. *Bankston*, 57 M.J. at 788. The ACCA conducted a harmless error analysis and concluded that because the case was a close one and the trial counsel argued that SSG Bankston's actions were not reasonable, the erroneous instruction materially prejudiced the accused. *Id.*

116. 58 M.J. 9 (2003).

117. *Id.*

118. *Id.* at 10; *see* BENCHBOOK, *supra* note 14, para. 2-6-10 (Punitive Discharge).

119. *Rasnick*, 58 M.J. at 10.

120. In fact, this change was incorporated in Change 2 to the BENCHBOOK. *See* BENCHBOOK, *supra* note 14, para. 2-6-10 (C2, 1 July 2003).

Pretrial Confinement

In *United States v. Miller*,[121] the CAAF determined that a military judge must instruct court-martial members about pretrial confinement. The court explained that pretrial confinement is a mitigating factor for the members to consider in deciding an appropriate sentence for the accused.[122] The accused, Senior Airman Matthew J. Miller, was tried by general court-martial and, pursuant to his pleas, convicted of drunk-driving and wrongful possession and distribution of methamphetamines. Before the court- martial, he had served three days in pretrial confinement at a civilian facility. At trial, the military judge instructed the court-martial members to consider all evidence in extenuation and mitigation, but he did not specifically mention the three days of pretrial confinement, despite a request by the defense.[123] After instructions, the defense made no specific objection to the judge's instructions as given.[124] The members sentenced the accused to a bad-conduct discharge and reduction to the grade of A1C.[125]

On appeal, the issue was whether the failure to instruct the members about the accused's pretrial confinement as a mitigating factor was an error.[126] The CAAF ruled that, for fashioning an appropriate sentence, the military judge must inform court-martial members of an accused's pretrial confinement based on Rule for Courts-Martial (RCM) 1005 and its earlier decision in *United States v. Davidson*.[127] The accused's failure to object to the instructions during the court-martial was irrelevant because the instruction is mandatory.

> Although [the accused] did not object to the instructions as given, waiver is inapplicable . . . The military judge bears the primary responsibility for ensuring that mandatory instructions, including pretrial confinement instruction mandated by the President in [RCM] 1005(e) and by this Court's decision in *Davidson*, are given and given accurately.[128]

As a result, the military judge's instructions, without the pretrial confinement information, were "inadequate as a matter of law."[129]

Despite its warnings about the mandatory nature of a pretrial confinement instruction, the CAAF affirmed the lower court's decision using the standard for denials of non-mandatory requested instructions.[130]

> Denial of a requested instruction is error if: (1) the requested instruction is correct; (2) "it is not substantially covered in the main [instructions]"; and (3) "it is on such a vital point in the case that the failure to give it deprived [the] defendant of a defense or seriously impaired its effective presentation."[131]

The court found that the defense met the first two parts of the test, but failed the third. Given the *de minimis* nature of the three-day pretrial confinement, the court ruled that the military judge's error did not prejudice the accused.[132]

From this case, it is clear that the CAAF considers the pretrial confinement credit to be a mandatory sentencing instruction in cases when the accused has served pretrial confinement.[133] A majority of the court also will not find waiver of the issue based on a failure to object to the given instructions or a failure to request a tailored pretrial confinement instruction. Prudent judges should give the instruction *sua sponte*.

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121. 58 M.J. 266 (2003).

122. *Id.* at 269.

123. *Id.* at 267-68.

124. *Id.* at 270.

125. *Id.* at 267.

126. *Id.*

127. *Id.*. at 269-70 (citing United States v. Davidson, 14 M.J. 81 (C.M.A. 1982)); *see* MCM, *supra* note 13, R.C.M. 1005.

128. *Id.* at 270.

129. *Id.*

130. *Id.* at 270-71.

131. *Id.* at 270 (quoting United States v. Zamberlan, 45 M.J. 491 (1997) (involving an instruction concerning previous nonjudicial punishment)).

132. *Id.* at 271.

Unsworn Statements

In *United States v. Tschip*,[134] the CAAF reviewed the military judge's instruction regarding the accused's unsworn statement made during sentencing. The court determined that, given the particular facts of this case, the judge had properly placed in context for the members the accused's reference to the possibility of an administrative discharge during his unsworn statement.[135]

Airman First Class Steven Tschip pled guilty to dereliction of duty and dishonorably failing to maintain sufficient funds in his checking account. Before his sentencing by the members, he made an unsworn statement about his military career and future plans.[136] The accused's unsworn statement included: "As much as I would like the chance to redeem myself, I know that my commander can discharge me even if I do not receive a bad conduct discharge today."[137] The accused then told the members that he wanted to remain in the Air Force, finish his degree, and earn a commission.[138]

In response, the military judge instructed the members:

> In his unsworn statement, the accused made reference to the possibility of an administrative discharge. Although an unsworn statement is an authorized means to bring information to your attention, and must be given the consideration it is due, as a general evidentiary matter, information about administrative discharges and the procedures related thereto, are not admissible in trials by courts-martial. The issue concerning the possibility of the administrative discharge of the accused is not a matter before this court. This is what we call a collateral matter. You should not speculate about it. After due consideration of the accused's reference to this matter, you are free, in your discretion, to disregard the reference if you see fit. This same caution applies to any references made concerning this information by counsel during arguments.[139]

Neither side objected to the judge's instructions.[140]

On appeal, the accused asserted that the military judge provided "misleading instructions about the possibility of appellant being administratively discharged" and that "his right to give an unsworn statement was impermissibly impaired by the reference to administrative discharges in the military judge's instructions."[141] The CAAF rejected this argument:

> In view of Appellant's unfocused, incidental reference to an administrative discharge, the military judge did not err by providing instructions that placed Appellant's statement in the appropriate context for purposes of their decision-making process. We need not decide whether the instructions provided by the military judge would be appropriate in a case involving different references to an administrative discharge. Under the facts of this case, the instructions by the military judge did not constitute error, much less plain error.[142]

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133. *Compare* UCMJ art. 51 (2002) (not including the pretrial confinement instruction as a mandatory instruction), *and* MCM, *supra* note 13, R.C.M. 1005(e) (not including the pretrial confinement instruction as a mandatory instruction), *with* United States v. Davidson, 14 M.J. 81 (C.M.A. 1982). In *Davidson*, the Court of Military Appeals found error when the judge did not instruct the members that the accused had served 143 days in pretrial confinement and the members sentenced the accused to the maximum amount of confinement authorized. This sentence to confinement was approved by the convening authority and affirmed by the Air Force Court of Military Review. *Id. Davidson* was decided before *United States v. Allen*, 17 M.J. 126, 128-29 (C.M.A. 1984) (holding that the accused was entitled to sentence credit for pretrial confinement based on a Department of Defense instruction). *Id.* at 128-29. *But see* MCM, *supra* note 13, R.C.M. 1005(e)(5) discussion ("[T]ailored instructions should bring attention . . . [to] any pretrial restraint imposed on the accused.").

134. 58 M.J. 275 (2003).

135. *Id.* at 277.

136. *Id.* at 275-76.

137. *Id.* at 276.

138. *Id.*

139. *Id.* at 277.

140. *Id.*

141. *Id.* at 276-77.

142. *Id.* at 277.

Consequently, the CAAF affirmed the lower court's decision.

This case is helpful to trial judges because it provides an example of how to deal with the accused talking about the possibility of an administrative separation in his unsworn statement. Judges, however, must be cautious of this opinion; the court repeatedly comments that its decision is limited to facts of the case. Here, there was no objection to the instruction, and the comment about the administrative separation was vague and undeveloped. It was unclear how this comment fit within the defense's strategy during the sentencing phase.[143] When the thrust of the defense's sentencing case is that a punitive discharge is inappropriate, this instruction may not be adequate because the instruction may not place the issue in context. This is particularly dangerous when there is an objection to the instruction. This is a good case for judges to remember, but it should be handled with caution.

Evidentiary Instructions

Curative Instructions

In *United States v. Diaz*,[144] the CAAF reversed the accused's convictions for murder and child abuse because the court held that the military judge abused his discretion when he denied the defense's motion for a mistrial and gave a curative instruction instead.[145] The court found the trial judge's curative instruction was "inadequate and confusing"[146] and "a futile attempt to 'unring the bell.'"[147] This case reminds military judges to be very careful when drafting instructions, especially unscripted curative instructions.

In *Diaz*, the accused was convicted of murdering his daughter, Nicole, and physically abusing his other daughter, Jasmine. Nicole died on 11 February 1994, while she was alone with her father. The accused denied any wrongdoing. The medical examiner could not determine the cause of death but considered the death suspicious. The medical examiner testified that the autopsy findings were consistent with suffocation, but he could not rule out Sudden Infant Death Syndrome (SIDS). On 30 July 1995, the accused burned Jasmine's inner thigh with a heated cigarette lighter. He claimed he accidentally dropped the lighter. A military doctor that examined Jasmine determined that the burn was not an accident. Based on the doctor's evaluation, Child Protective Services (CPS) removed Jasmine from her parents' custody.[148]

When the accused was reassigned to Fort Drum, New York, his wife remained in Hawaii to regain custody of Jasmine. The accused sought counseling to be reunited with his wife and daughter, as required by CPS. During counseling, the social worker, Ms. Reagan Amlin, confronted the accused. She told the accused that she was convinced that he had killed Nicole. The accused responded with strange and equivocal answers.[149]

The prosecution's theory at trial was that the accused suffocated Nicole and intentionally burned Jasmine. The defense's theory was that Nicole's death was unexplained, perhaps SIDS, and that Jasmine's burn was accidental. The government's case consisted primarily of Ms. Amlin's testimony and expert medical testimony, including testimony about other physical injuries to Nicole.[150]

The defense moved *in limine* to limit Ms. Amlin's testimony. Specifically, the defense sought to prevent Ms. Amlin from testifying that she thought the accused had killed Nicole. The government indicated it did not intend to elicit that testimony, but Ms. Amlin, while explaining her therapy, testified that she confronted the accused with her belief that he killed Nicole. When the defense complained, the judge gave a limiting instruction.[151]

Immediately after the members heard the curative instruction related to Ms. Amlin's testimony, the defense moved *in limine* to limit the scope of the testimony of the government's main medical expert, Dr. John Stuemky. In particular, the defense sought to prevent Dr. Stuemky from opining that Nicole's death was a homicide (and from stating the same opinion of the state Death Review Board of which Dr. Stuemky was a member) and to prevent Dr. Stuemky from expressing his opinion that the accused was the perpetrator. The judge allowed Dr. Stuemky to testify about the ultimate issue and his background with the Death Review Board.[152] The judge interrupted Dr. Stuemky's direct examination and suggested an Article 39(a) session.[153] During the Article 39(a) session, the judge clarified his previous ruling about the limits of Dr. Stuemky's

143. *Id.*

144. 59 M.J. 79 (2003).

145. *Id.* at 97.

146. *Id.* at 93.

147. *Id.* at 92.

148. *Id.* at 84.

149. *Id.* at 84-85.

150. *Id.* at 93-96. The CAAF considered the admitted uncharged misconduct in determining the adequacy of the curative instruction given by the trial judge. In its discussion, the court found much of the uncharged misconduct evidence inadmissible. *Id.*

testimony and made sure the trial counsel understood it.[154] Subsequently, when asked to state his conclusions, Dr. Stuemky testified, "My conclusions were that this was a homicide death—this was a physical abuse death. And furthermore, I felt that the perpetrator was the father."[155] The defense moved for a mistrial. The judge denied the motion for a mistrial and instead gave another curative instruction.[156]

The CAAF noted that a military judge's decision to deny a motion for a mistrial will not be reversed absent clear evidence of abuse of discretion.[157] The CAAF found an abuse of discretion in this case because the trial judge misapprehended the prejudicial impact of Dr. Stuemky's testimony and because his curative instruction about it was inadequate. The court noted that the central issues of the murder charge were (1) the cause of Nicole's death and (2) if a homicide, the identity of the perpetrator.[158] The CAAF stressed the significance of Dr. Stuemky's testimony:

> Dr. Stuemky's testimony identifying Appellant as a perpetrator violated a fundamental rule of law that experts may not testify as to guilt or innocence. His testimony was particularly egregious as the defense filed a motion to exclude this testimony, the judge expressly ruled that this testimony was improper, and trial counsel stated he had informed the witness of the judge's ruling to limit the witness's testimony. . . . Dr. Stuemky's testimony was presented as a definitive resolution of the issues of both cause of death and identity of the perpetrator. In this homicide prosecution, the prejudicial impact of linking

151. *Id.* at 86. The judge instructed the members:

> Members of the court, yesterday afternoon you heard the testimony of Ms. Reagan Amlin. She testified about her four sessions with Specialist Diaz. She testified that during one or more of the sessions, she told Specialist Diaz that she either didn't believe him, or she confronted him with her thoughts that a crime was committed. You members, as the voice of the community, have to decide the issues in this case based upon the evidence that's presented to you in court. *Nobody can tell you what happened. That's your job and there are no shortcuts. There is no witness that can tell you that a crime occurred; that's your job to determine that issue.*
>
> So to the extent that you believe that Ms. Amlin testified or implied that she believed that Specialist Diaz committed a crime, committed a murder, committed an intentional burn, *you may not consider that as evidence that a crime occurred, because that's your job*. She used that technique during her therapy to talk with the client. Do you understand what I'm telling you here? *You've got to make the decisions in this case, and there's nobody that can shortcut your job, although I'm sure that would make it easier for you.*

Id. (emphasis added).

152. *Id.* at 86-87. The judge ruled:

> Concerning the defense's objection to the testimony of Dr. Stuemky as to the ultimate issue, I'm denying that motion in limine. I find that his testimony, given the case to this point, is material, and I believe it's probative. I believe he has the qualifications to do it, from what I've been told by counsel. I believe that the information he relied upon is information that would put him in a unique position to be able to make that determination. Applying a[n] [M.R.E.] 403 balancing test, I find that the probative value of the evidence is not substantially outweighed by the likelihood of harm to the accused.
>
> Concerning his testimony about this [Death Review Board], I'm going to allow him to testify about the [Death Review Board], why it was created, what they do. I'm not going to let him talk about any statistics concerning the [Death Review Board], as to how many times they're correct, or how many times they're wrong, or anything like that. I will allow him to testify about his background with the [Death Review Board], how many investigations he's conducted and he's been involved in.
>
> Concerning his testimony about the basis for his determination, I believe he has a sufficient basis to form the opinion that he's going to offer. I would tell the defense, however, that depending on what their cross is, and how they attack him, you may open the door as to his testifying about other evidence that he considered.

Id.

153. UCMJ art. 39 (2002). Article 39(a) of the Uniform Code of Military Justice provides for sessions of court without the presence of the members. *Id.*

154. *Diaz*, 59 M.J. at 87. The judge stated:

> Earlier when I ruled about the ultimate conclusion, I want to make clear that you understand what my ruling is. My ruling is not that this witness can say, "Specialist Diaz murdered his daughter." My ruling does allow you to ask whether the injuries are consistent with a child abuse death; whether he has an opinion as to whether the injuries were caused by child abuse; whether he has an opinion as to whether this was a SIDS death, or inconsistent with a SIDS death. I'll let him do that. I want to make sure you understand that my ruling did not say that he could stand up there and point a finger at specialist [sic] Diaz and say, "He killed his daughter." Do you understand my prior ruling?

Id.

155. *Id.*

> these two issues was immediate, direct, and powerful, as it was an impermissible expert opinion of Appellant's guilt. . . . Dr. Stuemky's inadmissible opinion testimony immediately followed the testimony of Ms. Amlin that she "was convinced that he killed his daughter."[159]

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156. *Id.* at 88-89. The judge instructed the members:

> Members of the court, early on in this trial and during the case on several occasions, I've told you that you have to decide the facts in this case, and you have to make a determination as to whether a crime occurred. You have to make a determination as to the believability or credibility of witnesses. And you have to follow my instructions . . . . [Y]ou all assured me that you could do that.
>
> I'm going to give you some instructions concerning expert testimony. An expert – a person is allowed to testify as an expert because his testimony may be helpful to you in coming to conclusions about issues. The witness you've been hearing has been qualified as an expert in a specific discipline because his knowledge, skill, experience, training or education may assist you in understanding the evidence, or in determining a fact in issue. But [t]he point is that you have to determine the fact in issue. Do you understand that?
>
> [Affirmative responses from the Members]
>
> You are not required to accept the testimony of an expert witness or give it any more or less weight than that of an ordinary witness. But you should consider the expert's experience and qualifications in the specific area.
>
> Expert witnesses are allowed to render opinions, and those opinions are only allowed if they're helpful to you, the fact finder. But again, bear in mind that you have the ultimate determination as to a conclusion about the issues in the case.
>
> *An expert cannot tell you that he thinks a crime occurred, because that's not helpful to you, because you have to decide that. An expert witness cannot tell you that a witness is lying or truthful, or he cannot even tell you that a crime occurred.* Because you have to decide that based on all the evidence, and only the evidence, that's been presented in the courtroom. Do you understand that?
>
> [Affirmative responses from the Members]
>
> *To the extent that Dr. Stuemky opined that he thought a crime occurred, and that a particular specific person committed that crime, you cannot consider that, because that's not helpful to you*. You have to make that decision. Do you understand that?
>
> [Affirmative responses from the Members]
>
> As I told you earlier this morning, there's nobody that can help you in that regard, because you have to make your decision based on the evidence that's presented to you here in court. Nobody else has the unique situation of being present to hear all the evidence in court. Do you understand what I'm telling you?
>
> [Affirmative responses from the Members]
>
> *I'm telling you that you must disregard any testimony about whether a crime occurred, or whether this soldier committed a crime*. Do you understand that?
>
> [Affirmative responses from the Members]
>
> And you can't consider that for any reason during your deliberations. Do you understand that?
>
> [Affirmative responses from the Members]
>
> I've gotten affirmative responses by every member to this point. You can consider evidence that [sic] certain – as to an opinion about whether injuries were consistent with SIDS or not consistent with SIDS, or whether injuries were consistent with a child abuse-type death. *But you cannot consider any testimony as to what this witness thought as to who did it.* Do you understand that?

Id. (emphasis added).

> [T]he judge denied the defense motion for a mistrial without stating on the record his findings of fact or legal analysis to support his ruling. However, the judge's actions in giving a curative instruction and conducting individual voir dire reveal that he concluded that his remedial action was sufficient to ensure that the members would be able to put aside the inadmissible evidence.

Id. at 91.

157. *Id.* at 90.

158. *Id.* at 91.

159. *Id.* at 92.

The court's decision points out several flaws in the trial judge's curative instruction. The court found the instruction inadequate because

> [g]iven the inflammatory nature of Dr. Stuemky's impermissible testimony, the military judge should have immediately instructed the members regarding the impropriety of Dr. Stuemky's testimony that Nicole was murdered and that Appellant was the perpetrator. Instead, the military judge then surrounded his admonition not to consider Dr. Stuemky's impermissible testimony with an instruction telling the members how powerful expert testimony is and an explanation that the impermissible portion of Dr. Stuemky's testimony was "not helpful." In this context, the impact of the military judge's admonition not to consider the impermissible portion of Dr. Stuemky's testimony was significantly diluted.[160]

The court determined that the instruction was confusing, because it contradicted the judge's prior rulings. The judge instructed the members that an expert witness could not opine that a crime occurred after the panel heard two witnesses testify that a crime occurred and that the father was the perpetrator. In light of the circumstances, "the judge had an obligation to be specific and precise."[161] The CAAF found an abuse of discretion and set aside the findings and sentence.[162]

Diaz is a reminder to trial judges that instructions, particularly curative instructions, must be drafted with care. Not only must instructions contain a correct statement of the law, they must also be precise and effective. A curative instruction must provide proper guidance for the court members' deliberations and cure the problem it addresses given the circumstances of the case. A curative instruction can render an error harmless, but drafting and giving a curative instruction is not a perfunctory exercise.[163] Additionally, in some situations a curative instruction may not be good enough to "unring the bell." Although mistrials are disfavored, in some cases that may be the only effective remedy when a witness has clearly exceeded the scope of permissible testimony.

Accomplice Testimony

In *United States v. Gibson*,[164] the CAAF considered the appeal of Private Scott Gibson, who claimed that the military judge erred by refusing to give a requested accomplice instruction.[165] The CAAF ruled that the military judge's instructions on conspiracy and witness credibility did not provide a satisfactory substitute for an accomplice instruction. Because the military judge's instructions were insufficient, the CAAF reversed the accused's conviction for conspiracy to commit murder.[166]

The accused was friends with a group of soldiers who discussed schemes to kill PFC Bell. Members of the group eventually attempted to murder PFC Bell. The accused's actual involvement, however, as a conspirator in the attempted murder was unclear. Several members of the conspiracy testified as witnesses against the accused, and their testimony conflicted in material ways. Three witnesses for the government testified under grants of immunity.[167] The CAAF noted that at court-martial "[t]he court members were required to decide whether Appellant engaged in idle, marijuana-induced chatter or serious planning."[168]

The CAAF clarified its earlier decision in *United States v. Bigelow*[169] by explaining that while the "standard" accomplice instruction need not be given verbatim, "the critical principles of the instruction . . . shall be given."[170] At trial, the military

160. *Id.* at 93. *See supra* note 156 to review the judge's instruction.

161. *Id.*

162. *Id.* at 97. At trial, the accused was sentenced to a dishonorable discharge, confinement for life, total forfeitures of all pay and allowances, and reduction to E1. *Id.* at 80.

163. *Id.* at 92 (citing United States v. Armstrong, 53 M.J. 76, 82 (2000); United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979)).

164. 58 M.J. 1 (2003).

165. *See* BENCHBOOK, *supra* note 14, para. 7-10.

166. *Gibson*, 58 M.J. at 8. The CAAF, however, affirmed convictions on the other charges, noting that the failure to provide the requested accomplice instruction was harmless error for the other charges because other evidence corroborated the conviction on the other charges. *Id.*

167. *Id.* at 3-4.

168. *Id.* at 7.

169. 57 M.J. 64 (2002).

170. *Gibson*, 58 M.J. at 6.

judge refused to provide the accomplice instruction requested by the defense. The trial judge reasoned,

> There's got be something in the witnesses' testimony to suggest minimizing their own involvement and pointing the blame at others, or something that they have to gain by virtue of testifying . . . . [T]here was no evidence that any of them had anything to gain . . . by virtue of testifying. And I didn't see anything to indicate that they were minimizing their own involvement.[171]

The judge's instructions covered the elements of conspiracy and witness credibility.[172] The CAAF determined that these instructions as given did not adequately describe the "'critical principles' of the accomplice instruction. The instruction on the elements of conspiracy said nothing about the weight to be given to the testimony of a co-conspirator. There was no mention of 'caution.'"[173] Moreover, the instructions did not cover a key witness who provided testimony in exchange for a reduced sentence.[174]

The CAAF emphasized the importance of the accomplice testimony instruction:

> A cautionary instruction [about accomplices] would have alerted [court] members to consider whether [the witnesses'] characterizations of Appellant's actions were colored by their desire to minimize their culpability or obtain leniency at Appellant's expense. We are "left in grave doubt" regarding the effect of the instructional error on Appellant's conviction of conspiracy.[175]

The important lesson in this case is that the military judge must give the accomplice testimony instruction at trial when an accomplice testifies against the accused. Nothing more is needed. Evidence that the accomplice tried to shift the blame, minimize their involvement, or benefit from their testimony is not required. The instruction in the *Benchbook* need not be given verbatim and other instructions can expand on the witness's credibility, but the critical principles contained in the accomplice testimony instruction must be included.

Variance

In *United States v. Teffeau*,[176] the CAAF considered the appeal of Staff Sergeant (SSgt) Charles Teffeau, a U.S. Marine Corps recruiter, whose female recruit died in an alcohol-related car crash around the time of his recruiting visit. The accused was charged, among other things, with wrongfully furnishing alcohol to the recruit.[177] The court members made findings by exceptions and substitutions, finding the accused not guilty of wrongfully furnishing alcohol to the recruit but guilty of having a nonprofessional personal relationship with her. The CAAF ruled that variance between the charge and the conviction was material and set aside the conviction.

The evidence presented at trial indicated that the accused and a fellow recruiter, SSgt Finch, had taken a government vehicle to visit two recruits, one of whom was about to depart for boot camp. The two recruiters and the two female recruits drank alcoholic beverages for at least three hours at one of the recruit's home. They took their party to another location in two vehicles. While returning, the recruit's car hit a tree—killing her and injuring Finch. The recruit's blood-alcohol level was .07; SSgt Finch's was .14. Staff Sergeant Teffeau was in a separate vehicle. Following the accident, SSgt Teffeau provided statements to civilian police officers about the circumstances surrounding the accident.[178]

One specification charged the accused with failing to obey a general order by wrongfully providing alcohol to his recruit, in violation of paragraph 6d of the Marine Corps Recruiting Depot Order 1100.4a.[179] At trial, the military judge gave the standard instructions on the elements of the offense and gave the standard variance instruction.[180] The trial judge reiterated the vari-

171. *Id.* at 5.

172. *Id.*

173. *Id.* at 7.

174. *Id.*

175. *Id.* at 7-8.

176. 58 M.J. 62 (2003).

177. *Id.* at 63.

178. *Id.* at 64-68.

179. *Id.*

180. *See* BENCHBOOK, *supra* note 14, para. 7-15.

ance instruction when explaining the findings worksheet to the members. The members of the court-martial concluded that the accused was guilty of "wrongfully and engaging in and seeking a nonprofessional, personal relationship with [the recruit]" but was not guilty of wrongfully providing alcohol to her. The substituted language reflected a violation of a different subsection of the same paragraph of the same order. The problem was that the accused had been charged with the alcohol offense, not the relationship offense.[181]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) found that the variance between the specification and the findings was material, but the NMCCA found no prejudice to the accused.[182] The CAAF took this opportunity to clarify its opinion in *United States v. Allen*.[183] In *Allen*, the court appeared to require that the accused must show both that he was misled by the variance and that the variance put the accused at risk of reprosecution.[184] The CAAF found prejudice, noting that a material variance can prejudice an accused in a number of ways. In this case, the court found prejudice based on a violation of due process; the variance changed the identity of the offense and the accused was denied the opportunity to defend against the allegation.[185]

Another important variance case is *United States v. Walters*.[186] In that case, the CAAF reversed a drug use conviction because of an ambiguous verdict. The accused was charged with use of ecstasy on divers occasions during a four-month period, and the members found him guilty of a single use but did not clarify when that use occurred. During the trial, various witnesses testified about the accused's use of ecstasy on various occasions during the charged period.[187] When the judge instructed the panel, he gave a standard variance instruction.[188] He told the members that as an example they could except out the words "divers uses" and substitute the words "one time." The judge did not further explain that they would need to change the dates or otherwise add language to clarify which incident the members convicted the accused.[189]

The AFCCA relied on Supreme Court precedent[190] and *United States v. Vidal*[191] in upholding the verdict in Walters. In *Vidal*, the CAAF had held that an accused could properly be convicted of a single specification of rape when the government presented two theories of liability: that the accused was the actual perpetrator or that he aided and abetted the rape by holding the victim down. The AFCCA interpreted *Vidal* as providing support for the "common-law rule regarding general verdicts."[192]

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181. *Teffeau*, 58 M.J. at 64-66.

182. *Id.* at 67.

183. 50 M.J. 84 (1999).

184. *Teffeau*, 58 M.J. at 67 n.2.

185. *Id.* at 67.

186. 58 M.J. 391 (2003).

187. *Id*. at 392-93. The testimony included observations of the accused snorting a crushed pill; effects of a drug on the accused such as glassy eyes, dilated pupils and twitching; the accused possessing small pills; and statements of the accused that he had just used or was planning to use ecstasy. *Id*.

188. BENCHBOOK, *supra* note 14, para. 7-15 (Variance - Findings by Exceptions and Substitutions).

189. *Walters*, 58 M.J. at 393.

190. Griffin v. United States, 502 U.S. 46 (1991). Regarding an ambiguous verdict, the Supreme Court held that at common law, a jury verdict is valid if legally supportable on one of several grounds even though the jury relied on an invalid ground. *Id*. at 49. Griffin was charged with conspiracy to defraud the United States by interfering with the Internal Revenue Service (IRS) and the Drug Enforcement Agency. At trial, only evidence concerning the IRS implicated her. On appeal, Griffin argued that her conviction should not be affirmed because it could not be determined on which basis the jury convicted her. The Court rejected her argument holding that a conviction can stand even though the evidence is insufficient to support multiple grounds charged, as opposed to a conviction based on multiple grounds, only some of which are constitutionally valid. *Id.* at 56-57.

191. 23 M.J. 319 (C.M.A.), *cert. denied*, 481 U.S. 1052 (1987). In relying on this case, the AFCCA overruled its own precedent in *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (en banc), which involved a similar factual situation. In *King*, the accused was charged with communicating a threat on divers occasions but was found guilty of only one threat. The AFCCA held that it could not affirm the conviction because it did not know which threat the accused was found to have communicated. *Id.*

192. United States v. Walters, 57 M.J. 554, 557 (A.F. Ct. Crim. App. 2002). The AFCCA concluded that because *Vidal* allowed a conviction to stand when multiple theories of criminal liability supported a charge, so too could a conviction stand when the finding rested on multiple acts. *Id.*

The CAAF rejected that view and pointed out that the appellate authority of the service courts is based on Article 66, UCMJ, and not common law. Article 66 requires that the service courts be convinced of both the legal and factual sufficiency of any finding of guilty.[193] As to the latter, the courts must be convinced of an accused's guilt beyond a reasonable doubt. Here, since it was unclear on which use the members relied, it was impossible for the Air Force court to perform this function.

The CAAF noted that in a situation such as this, the fact-finders must make it clear which conduct they have found the accused committed. Excepting out and substituting dates or locations normally suffice. In other situations, further clarification may be needed, for example, by stating what other parties were present or how the drug was used. Judges need to carefully craft their instructions and the findings worksheet to ensure that the members are given appropriate options.

Mixed Pleas

In *United States v. Kaiser*,[194] Sergeant David J. Kaiser argued that the military judge erred by informing the members of the court-martial of the offenses to which he had pled guilty before findings on the offenses to which he had pled not guilty. The CAAF agreed and reversed the lower court's rulings.[195]

The accused was charged with violating the Defense Language Institute's policy that prohibited staff members from forming non-professional relationships with the students and from engaging in unlawful sexual activities. He allegedly had unauthorized contact with four students. He pled guilty to some of the offenses and not guilty to the others. At his court-martial, the military judge told the members about his pleas over the "objection"[196] of the defense. The military judge was under the incorrect belief that the *Benchbook* required that the members be informed of the guilty pleas.[197]

The CAAF corrected the military judge's error, noting that the *Benchbook* does not contain such a requirement.[198] The

193. UCMJ art. 66(c) (2002). Article 66(c) reads in part, "It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact . . . ." *Id.*

194. 58 M.J. 146 (2003).

195. *Id.* at 151.

196. *Id.* at 148. The objection by the defense was ambiguous at best. Consider this exchange between the military judge and the defense counsel:

> MJ: Okay. Let's take up some administrative matters right now. Do we have an extra copy of the flyer that we can have marked as an appellate exhibit and has a copy of that been provided to the defense?
>
> DC: No, Your Honor. The defense doesn't even have a copy of the flyer.
>
> MJ: Why don't we just go ahead and use my copy here. Captain Salerno, please approach. [The defense counsel did as directed.] Take a moment to review that. [The military judge hands the defense counsel a copy of the flyer.]
>
> DC: Your Honor, the copy of the flyer that you just provided to me still contains a list of the specifications to which Sergeant Kaiser just pled guilty. Is it your--is it that--
>
> MJ: If you take a look at Page 46 of DA Pam 27-9, you'll note that the members are informed that that has occurred. That's why those specifications remain on it. Okay?
>
> DC: That's fine.
>
> MJ: Captain Salerno, any objection?
>
> DC: No objection, Your Honor.

Id.

197. *Id.* at 147-48.

198. *Id.* at 149. The court provides this admonition:

> Contrary to the military judge's statement that the *Benchbook* directs notification of the court members of guilty pleas as a matter of course, such notification is directed only when specifically requested by the accused. In the absence of a specific request by the accused or circumstances involving a [lessor included offense], "the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested."

Id. (citation omitted). *See also* MCM, *supra* note 13, R.C.M. 913; BENCHBOOK, *supra* note 14, para. 2-2-8 note.

CAAF determined that the error by the military judge was prejudicial:

> [O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial . . . . The circumstances under which the members were advised of Appellant's guilty pleas formed a part of the "filter" through which they viewed the evidence presented at trial and posed a heightened risk that the members felt invited, consciously or subconsciously, to draw an impermissible inference from Appellant's guilty pleas.[199]

As a result, the CAAF reversed the decision of the lower court.[200]

Trial judges frequently face this situation. In mixed plea cases when the government intends to prove the contested specifications, the general rule is not to inform the members of the pleas and findings of guilty until after findings on the contested offenses have been entered. This is only a general rule. Two recognized exceptions to the general rule are (1) when the defense counsel requests the military judge to do so and (2) when the plea is to a lesser-included offense and the government intends to prove the greater offense.[201] There may be other exceptions to the general rule, but these are the most common. Judges should be cautious about violating the general rule in other situations.

Character Evidence

In *United States v. Kasper*,[202] the CAAF considered the issue of human lie detector testimony. This type of testimony is a witness's "opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case."[203] This case serves as a reminder that use of this type of testimony is inappropriate and contrary to the military's rules of evidence. The harm caused by improper character evidence, particularly on a central issue to a case, is substantial. Should it arise, the military judge must provide effective curative instructions to the court members.

Airman First Class Michelle L. Kasper was found guilty of wrongful use of ecstasy.[204] The government introduced evidence that the accused confessed to a single use of ecstasy when an OSI agent interviewed her. The trial counsel introduced testimony of Special Agent (SA) Maureen Lozania about her interrogation of the accused.

> In response to a question from trial counsel, SA Lozania's testimony provided an opinion as to the veracity of Appellant's denial: "We decided that she wasn't telling the truth. She wasn't being honest with us and we decided that we needed to build some themes and help her to talk about what happened."
>
> According to SA Lozania, the questioning resumed and Appellant began to cry. Eventually, Appellant responded affirmatively to a question as to whether she had used ecstasy in Florida. She held up one finger, which SA Lozania interpreted as a statement that she had used ecstasy once while in Jacksonville. Trial counsel then asked: "At the time she told you that she had used ecstasy and put up her finger and started to cry, was there anything about what she said or the way she behaved that made you believe at that time that she was falsely confessing to you?" SA Lozania responded: "No."[205]

In response to the defense's cross examination, SA Lozania, on redirect examination, further stated that "we assess through body language and other things if the individual is being truthful or not."[206] Repeatedly throughout her testimony, SA Lozania commented on the accused's truthfulness when she confessed.[207] During the defense's case, the accused denied

199. *Kaiser*, 58 M.J. at 150 (internal quotation and citation omitted).

200. *Id.* at 151. Chief Judge Crawford provides a strong dissent to the decision and indicates that the court should not have reversed the decision because (1) the MRE allow evidence concerning the appellant's guilty pleas and (2) the defense did not object to use of the flyer at trial. *Id.*; *see* MCM, *supra* note 13, MIL. R. EVID. 803(22).

201. *Kaiser*, 58 M.J. at 148-49.

202. 58 M.J. 314 (2003).

203. *Id.* at 315 (citations omitted).

204. *Id.* at 314.

205. *Id.* at 316.

206. *Id.*

using ecstasy and stated that she had held up her finger "to indicate that she had been to Jacksonville on only one occasion, not that she had used ecstasy while there."[208] Apparently, the defense presented evidence of the accused's good character for truthfulness.[209] Given the facts of the case, the CAAF reversed the lower court's decision[210] with repeated warnings about the use of human lie detector testimony.

This case contains several lessons for practitioners. In its decision, the CAAF focused on SA Lozania's testimony on direct examination about the accused's untruthfulness when she denied using ecstasy and her truthfulness when she confessed to using ecstasy.[211] This type of evidence is impermissible for several reasons. First, the determination of whether someone is telling the truth is a matter beyond the scope of the witness's expertise, even an expert witness.[212] Second, such testimony violates the rules of evidence "because it offers an opinion as to the declarant's truthfulness on a specific occasion."[213] Finally, this type of opinion testimony usurps the panel's function to weigh the evidence and determine the credibility of witnesses.[214]

The court emphasized the role of the judge, particularly while the testimony is about the accused's character for truthfulness when denying culpability or when confessing:

> The importance of prompt action by the military judge in the present case is underscored by the central role of the human lie detector testimony. The testimony was not offered on a peripheral matter or even as a building block of circumstantial evidence. [It was offered] on the ultimate issue in the case.[215]

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207. *Id.* at 316-17.

208. *Id.* at 318.

209. Although the opinion does not explicitly state this point, the opinion states that the judge gave an instruction on the accused's good character for truthfulness, so it must have been raised by the evidence. The military judge instructed the members that evidence of the accused's good character for honesty and truthfulness "may be sufficient to cause a reasonable doubt as to her guilt. On the other hand, evidence of the accused's good character for honesty and truthfulness may be outweighed by other evidence tending to show the accused's guilt . . . and I'll just stop it there." *Id.* This example is a reminder to judges that they should write out their instructions about sensitive issues in advance.

210. *Id.* at 320.

211. *Id.* at 319. As the court explained,

> The picture painted by the trial counsel at the outset of the prosecution's case through SA Lozania's testimony was clear: a trained investigator, who had interrogated many suspects, applied her expertise in concluding that this suspect was lying when she denied drug use and was telling the truth when she admitted to one-time use. Such "human lie detector" testimony is inadmissible . . . . Moreover, in this case, the human lie detector evidence was presented as a physiological conclusion. SA Lozania twice stated that Appellant "gave all the physical indicators" of being untruthful. Regardless of whether there was a defense objection during the prosecution's direct examination of SA Lozania, the military judge was responsible for making sure such testimony was not admitted, and that members were provided with appropriate cautionary instructions.

Id.

212. *Id.* at 315 (citing United States v. Birdsall, 47 M.J. 404 (1998)).

213. *Id.*

214. *Id.*

215. *Id.*

The court was so emphatic, it stated that even if the evidence was properly admitted, the failure of the military judge to give cautionary instructions could be plain error.[216] This type of testimony is so sensitive that remedial action may be necessary even if the defense asked for what it got. A majority of the court warned judges that a failure to address this issue could rise to plain error. Judges should not depend on the doctrine of waiver.

Conclusion

The *Benchbook* remains the primary resource for instructions; it is the place where judge advocates should begin their research. The *Benchbook*, however, is only the first step. This article illustrates that as the law develops, instructions must be modified. Hopefully, this article will help criminal law practitioners to stay current with developments that affect instructions. Great care and a current understanding of legal developments are critical to writing instructions.

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216. *Id.*

> Even if we were to ignore the prosecution's affirmative use of human lie detector testimony and view the subsequent defense as opening the door to rebuttal, the military judge should have recognized that the repeated introduction of opinion testimony about the truthfulness of witnesses on the ultimate issue in the case required him to provide the members with detailed instructions. SA Lozania's testimony, that Appellant was giving "indicators of being untruthful," reasonably could have been perceived by the members as an expert opinion on Appellant's credibility during the interrogation. . . . Under those circumstances, detailed guidance was essential to ensure that the members clearly understood both the limited purpose for which the evidence might have been considered and the prohibition against using such evidence to weigh the credibility of Appellant . . . . Although as a general matter instructions on limited use are provided upon request under M.R.E. 105, the rule does not preclude a military judge from offering such instructions on his or her own motion, . . . and failure to do so in an appropriate case will constitute plain error.

Id.; *see* MCM, *supra* note 13, MIL. R. EVID. 105.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. 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 non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorney's Course 5F-F10

Class Number—155th 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, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2003 - September 2005)

Course Title	Dates	ATTRS No.
	GENERAL	
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 8 October 04 (Phase I - Ft. Lee) 8 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 28 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)

15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
183d Senior Officers Legal Orientation Course	13 - 17 September 04	(5F-F1)
184th Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185th Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186th Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187th Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)
188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)

2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)
15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOC	25 October - 10 November 04	
5th 27D ANCOC	10 - 28 January 05	
6th 27D ANCOC	25 April - 13 May 05	
7th 27D ANCOC	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)
55th Legal Assistance Course	27 September - 1 October 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2004 USAREUR Administrative Law CLE	13 - 17 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 16 September 05	(5F-F24E)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2005 PACOM Income Tax CLE	3 - 7 January 05	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

1st Operational Contracting Course	28 February - 4 March 05	
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)

5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2004 Government Contract Law Symposium	7 - 10 December 04	(5F-F11)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	2 - 4 June 04	(5F-F101)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	

CRIMINAL LAW

10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24th Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)
28th Criminal Law New Developments Course	15 - 18 November 04	(5F-F35)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL LAW

4th Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
1st Basic Intelligence Law Course (TJAGSA)	28 - 29 June 04	(5F-F41)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)

1st Advanced Intellgience Law (National Ground Intelligence Center)	30 June - 2 July 04	(5F-F43)
2d Advanced Intellgience Law	29 June - 1 July 04	(5F-F43)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84th Law of War Course	11 - 15 July 05	(5F-F42)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44th Operational Law Course	8 - 19 August 05	(5F-F47)
2005 USAREUR Operational Law CLE	10 - 14 January 05	(5F-F47E)

3. Civilian-Sponsored CLE Courses

For further information, see the March 2004 issue of *The Army Lawyer*.

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2004***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2005 ("2005 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2005 JAOAC will be held in January 2005, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2004). If the student receives notice of the need to re-do any examination or exercise after 1 October 2004, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2004 will not be cleared to attend the 2005 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. 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	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially

Georgia	31 January annually
Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually Minimum credits must be completed by last day of birth month each year
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	31 October annually
Washington	31 January triennially
West Virginia	31 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2003 issue of *The Army Lawyer.*

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2004 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the March 2004 issue of *The Army Lawyer*.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2004 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does

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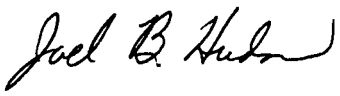

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