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Articles

The Unsheathing of a Jurisdictional Sword: The Application of Article 2(c) to Reservists

Major Christopher T. Fredrikson
Professor, Criminal Law Department
The Judge Advocate General's Legal Center & School, U.S. Army
Charlottesville, Virginia

Introduction

> *[T]he rule is fairly clear: there is no jurisdiction over a reservist who commits an offense when not on active duty or inactive duty training* [1]

The "rule" *was* fairly clear, but it is not clear anymore. Last year, the Court of Appeals for the Armed Forces (CAAF) muddied the jurisdictional water with its decision in *United States v. Phillips*,[2] holding that jurisdiction extends to certain reservists even if they are not on active duty or inactive duty training. How did the court extend jurisdiction? It unsheathed a jurisdictional sword—Article 2(c), Uniform Code of Military Justice (UCMJ)[3]—used by the government to cure defective enlistments,[4] but never before used as a sole basis to establish jurisdiction over reservists.

This article primarily focuses on *Phillips* and the ramifications it has for jurisdiction over members of the reserve component. Other than *Phillips*, the jurisdictional front remained relatively quiet during the CAAF's 2003 Term.[5] Nevertheless, this article addresses two additional developments in the area of military jurisdiction: (1) a 2002 change to *Army Regulation (AR) 27-10*,[6] addressing the validity of post-preferral discharges; and (2) the CAAF's recent decision in *United States v. Henderson*,[7] finding a jurisdictional defect in the referral process of a capital offense.

Overview of Jurisdiction

This article discusses all three developments within the framework of Rule for Courts-Martial (RCM) 201(b), which essentially breaks down the requirements for court-martial jurisdiction into three categories.[8] First, the offense must be subject to court-martial, i.e., subject matter jurisdiction.[9] Second, the accused must be subject to court-martial jurisdiction, i.e., personal jurisdiction.[10] Finally, certain procedural requirements must be met: (1) the court-martial must be convened by a proper official; (2) the court-martial personnel must have the proper qualifications; and (3) the charges must be properly referred to the court-martial by a competent authority.[11]

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1. Major Tyler J. Harder, *Moving Towards the Apex: Recent Developments in Military Jurisdiction*, ARMY LAW., Apr./May 2003, at 15.

2. United States v. Phillips, 58 M.J. 217 (2003)

3. UCMJ art. 2(c) (2002).

4. Congress added Article 2(c) to Article 2 in the 1979, Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801, 93 Stat. 803, 811 (1979). It

> provides for jurisdiction based upon a constructive enlistment . . . [and] thus overrules [case law] which held that improper government participation in the enlistment process estops the government from asserting constructive enlistment. It also overrules [case law] which stated that an uncured regulatory enlistment disqualification, not amounting to a lack of capacity or voluntariness, prevented application of the doctrine of constructive enlistment.

See S. REP. NO. 96-197, at 122 (1979**)**.

5. Although the CAAF briefly discussed appellate jurisdiction in *United States v. Riley*, 58 M.J. 305, (2003), *Phillips* is the only case decided by the 2003 term of court that addresses court-martial jurisdiction.

6. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10].

7. United States v. Henderson, 59 M.J. 350 (2004).

8. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b) (2002) [hereinafter MCM].

9. *Id*. R.C.M. 201(b)(5).

10. *Id*. R.C.M. 201(b)(4).

11. *Id*. R.C.M. 201(b)(1)-(3).

The critical issue in determining court-martial jurisdiction is military status.[12] Both subject matter jurisdiction and personal jurisdiction depend on the military status of the accused. Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense.[13] Personal jurisdiction focuses solely on the accused's status at the time of trial.[14] If the military has both subject matter and personal jurisdiction, the case can proceed to court-martial, provided RCM 201's procedural requirements are also met.

Subject Matter Jurisdiction

Military Status of Reservists: United States v. Phillips

Until *Phillips*, determining subject matter jurisdiction over reservists' misconduct was somewhat simple: If a reservist was not on active duty status or inactive duty training at the time of the offense, the military did not have subject matter jurisdiction.[15] The basis for this rule is Article 2, UCMJ, which provides a list of all persons subject to the UCMJ. Article 2(a)(1) and Article 2(a)(3) specifically address jurisdiction over reservists:

> (1) Members of a regular component of the armed forces, including. . .other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the of the call or order to obey it. . . .
> (3) Members of a reserve component while on inactive duty training. . . . [16]

Article 2(a)(1) and Article 2(a)(3), therefore, apply to reservists serving on active duty (AD), active duty training (ADT), annual training (AT) and inactive-duty training.[17]

These two specific clauses are straightforward and determinative in their application to reservists. Article 2(a)(1) establishes military status based on the orders' required starting (reporting) and ending dates.[18] Article 2(a)(3), on the other hand, requires reservists to be "on inactive-duty training" for court-martial jurisdiction to vest.[19] The military, therefore, only has jurisdiction over offenses committed by reservists while on active duty status or during inactive duty training. The CAAF, however, recently stretched Article 2 to also apply to certain reservists about to enter active duty. It unsheathed a seldom-used sword, Article 2(c), the constructive enlistment clause,[20] to establish military status of reservists.

In *Phillips*, the CAAF affirmed the Air Force Court of Criminal Appeal's (AFCCA) expansion of jurisdiction over reservists to misconduct occurring outside the strict parameters (reporting and ending dates) of the orders requiring reservists to perform duty.[21] Lieutenant Colonel (LTC) Phillips, an Air Force reserve nurse, was ordered to perform her two-week annual training at Wright-Patterson Air Force Base (W-PAFB) from 12-23 July 1999.[22] Her orders authorized her one travel day (11 July) to get to her duty station.[23] On 11 July 1999, she left her home in Pittsburgh, Pennsylvania and traveled to W-PAFB. That evening, after checking into the base government visiting officers' quarters (VOQ), LTC Phillips ate some marijuana brownies she brought with her from home.[24]

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12. United States v. Phillips, 58 M.J. 217 (2003) ("Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the [UCMJ].") (quoting United States v. Ernest, 32 M.J. 135, 139 (C.M.A. 1991)). Article 2, UCMJ establishes who has military status and is, therefore, subject to the UCMJ. *Id.*

13. *See* Solorio v. United States, 483 U.S. 435 (1987) (finding that subject matter jurisdiction is satisfied if the offense is chargeable under the UCMJ and the accused has military status at the time the offense is committed); *see also* MCM, *supra* note 8, R.C.M. 203, discussion, analysis.

14. *See* MCM, *supra* note 8, R.C.M. 202(a), discussion (explaining that the government can court-martial an accused provided the accused has military status at the time of trial).

15. *See generally* Harder, *supra* note 1, at 15.

16. UCMJ art. 2(a) (2002)

17. *Id*. *See also* MCM, *supra* note 8, R.C.M. 103 discussion.

18. United States v. Cline, 29 M.J. 83 (C.M.A. 1989).

19. UCMJ art. 2(a)(3) (2002).

20. UCMJ art. 2(c). The CAAF acknowledged that Article 2(c) was "primarily enacted to ensure the court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct." United States v. Phillips, 58 M.J. 217, 219 (2003). Nevertheless, the CAAF held that Article 2(c) applies to circumstances not involving defective enlistments. *Id.*

21. *Phillips*, 58 M.J. at 219.

22. *Id*. at 218.

23. *Id*.

On 16 July 1999, LTC Phillips was selected for a random urinalysis test.[25] While in the bathroom, she asked a second lieutenant to provide a urine sample for her. The lieutenant, however, refused to comply with LTC Phillips' request, and LTC Phillips provided her own urine sample.[26]

Lieutenant Colonel Phillips' urine sample tested positive for marijuana, prompting Air Force Office of Special Investigations (AFOSI) special agents to question her two months later during her next reserve tour, a two-day inactive duty training tour.[27] After making a false official statement to AFOSI, she confessed to purchasing marijuana in Pittsburgh, making a batch of marijuana brownies at her home, bringing the brownies with her to W-PAFB, and eating them the night of 11 July in her VOQ.[28]

A military judge convicted LTC Phillips, pursuant to her pleas, of wrongfully using marijuana, conduct unbecoming an officer by wrongfully and dishonorably soliciting a junior officer to provide a urine sample on her behalf, and making a false official statement.[29] The approved sentence included forty-five days confinement and a dismissal.[30] On appeal, LTC Phillips argued that the court-martial lacked jurisdiction over the offense of wrongfully using marijuana, because the use occurred when she was not in a military status—the use occurred the day before her two-week active duty period began.[31] Both the AFCCA and the CAAF disagreed.

The AFCCA held that jurisdiction existed over LTC Phillips primarily under Art 2(a)(1), UCMJ.[32] The service court found LTC Phillips was subject to UCMJ jurisdiction under the language of Article 2(a)(1) on 11 July, "because she was a person 'lawfully called or ordered into. . . duty in or for training. . . from the dates when [she was] required by the terms of the call or order to obey it.'"[33] Although LTC Phillips' orders specifically required her to report for duty on 12 July, the orders also provided her a choice to travel and, therefore, "be called to duty on 11 July."[34] The service court, therefore, held that by choosing to travel on 11 July as authorized by her orders, LTC Phillips was required by the terms of those orders to obey them. Consequently, the court found that there was subject matter jurisdiction under Article 2(a)(1) over LTC Phillips' wrongful use of marijuana on 11 July, her authorized travel day.[35]

Furthermore, the service court held that jurisdiction over LTC Phillips' marijuana use also existed under Article 2(c), UCMJ.[36] Article 2(c), UCMJ, extends jurisdiction to:

> a person serving with an armed force who—
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competence and minimum age qualifications . . . at the time of voluntary submission to military authority;

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24. *Id*. at 219.

25. United States v. Phillips, 56 M.J. 843, 845 (A.F. Ct. Crim. App. 2002).

26. *Id*.

27. *Id*.

28. *Id*.

29. *Phillips*, 58 M.J. at 218.

30. *Id*.

31. *Phillips*, 56 M.J. at 845. Jurisdiction over the other two of the offenses, conduct unbecoming an officer and false official statement, was not an issue on appeal. First, she was serving on active duty in accordance with her orders when she solicited the second lieutenant to provide a urine sample. Second, she was performing inactive duty training when she made the false official statement to AFSOI. *Id.*

32. *Id*.

33. *Id*.

34. *Id*. The service court stated:

> But, her orders provided her a choice. She could have been called to duty on the date she was required to start her training, 12 July, or she could have exercised her option to take a day of travel and be called to duty on 11 July. The appellant chose the latter option.

Id.

35. *Id*.

36. *Id*.

(3) received military pay or allowances; and

(4) performed military duties.[37]

The service court held that on 11 July, LTC Phillips: (1) voluntarily submitted to military authority by "accepting the authorized travel day" and filing for and receiving pay and allowances for that travel day;[38] (2) met the military's mental competence and minimum age requirements; (3) received pay and allowances, including base pay, basic allowance for subsistence, lodging and travel reimbursements, and a retirement point for the travel day; and (4) performed military duties by voluntarily undertaking her "duty to travel from home to Wright–Patterson AFB."[39]

According to the AFCCA,

> [b]y applying the language of Article 2(a)(1) and the four criteria of Article 2(c) in a common sense and straightforward manner, consistent with plainly stated congressional intent to subject reservists to UCMJ jurisdiction to the same extent as active duty members, the appellant's status made her subject to the UCMJ on 11 July 1999.[40]

As in preceding years,[41] the AFFCA stretched the boundaries and once again found jurisdiction over misconduct occurring outside the stated parameters of a reservist's orders—this time finding jurisdiction exists over reservists traveling on travel days.[42] Although the AFCCA gave the legal practitioner a clear–cut rule, the CAAF was not as willing to stretch boundaries.

In affirming the AFCCA's decision, the CAAF held that jurisdiction existed over LTC Phillips on 11 July under Article 2(c), UCMJ.[43] The court, however, did not address the service court's primary rationale and, thus, avoided deciding whether Article 2(a) extends jurisdiction over all reservists traveling on authorized travel days. The CAAF also applied Article 2(c) slightly differently than the service court, adding a critical step to the analysis.

The CAAF held that, before applying the four criteria of Art 2(c), it must first determine whether LTC Phillips was "serving with" an armed force at the time of the offense.[44] This determination being "dependent upon a case–specific analysis of the facts and circumstances of the individual's particular relationship with the military . . . . "[45] Accordingly, the CAAF did not surmise that LTC Phillips was a person serving with an armed force because she was traveling on an authorized travel day. Rather, the CAAF found that six uncontested facts established LTC Phillips' status as a person serving with an armed force on 11 July:

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37. UCMJ art. 2(c).

38. *Phillips*, 56 M.J. at 846. Note, however, in establishing that LTC Phillips voluntarily submitted to military authority, the service court contradicts its Article 2(a)(1) analysis by emphasizing that "[t]he orders specifically authorized, *but did not require*, a travel day. . . . " *Id.*

39. *Id*. at 846-47.

40. *Id*. at 847.

41. *See* United States v. Morse, No. 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim App. Oct. 4, 2000) (unpublished). In *Morse*, the accused was convicted of attempted larceny and filing false travel vouchers for active duty tours and inactive duty training. At trial he stipulated that "the offenses, if they occurred, were committed while the accused was either on active duty or inactive duty for training." On appeal, however, he claimed that he actually signed the travel vouchers two days after he was released from active duty. Therefore, he argued, the court-martial lacked subject matter jurisdiction. Despite an apparent inconsistency between the dates on the travel vouchers and the parties' stipulations at trial, the AFCCA found the evidence demonstrated that LTC Morse signed the travel vouchers before he was released from active duty and departed the military installation. The AFCCA then made a bold assertion in dicta:

> Finally, even if we were to ignore the overwhelming evidence of subject matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that the appellant signed these forms in his official capacity as a reserve officer in the United States Air Force. It was part of his duty incident to these reserve tours or training to complete these forms with truthful information and that duty was not complete until the forms were signed, regardless or whether or not he completed travel pursuant to his orders. See Cline. Therefore, it is immaterial if the appellant did not sign these forms until after completing his travel. He did so in duty status.

Id. at *19.

42. *See generally* Harder, *supra* note 1; Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, Army Law., Apr. 2002.

43. United States v. Phillips, 58 M.J. 217, 220 (2003).

44. *Id*.

45. *Id*.

> (1) on that day, she was a member of a reserve component of the armed forces; (2) she traveled to a military base on that day pursuant to military orders, and she was reimbursed for her travel expenses by the armed forces; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent offense in those quarters; (5) she received military service credit in the form of a retirement point for her service on that date; and (6) she received military base pay and allowances for that date.[46]

After finding LTC Phillips was a person serving with an armed force on 11 July, the CAAF applied the four criteria of Article 2(c). The court, having concluded the four criteria were met, found that the military had subject matter jurisdiction over LTC Phillips' wrongful use of marijuana on 11 July, her authorized travel day.[47]

What does *Phillips* mean to the judge advocate in the field? First, *Phillips* does not stand for the proposition that a travel day equals jurisdiction. Unlike the AFCCA, the CAAF did not stretch the boundaries by establishing an easy to follow, bright–line rule extending Article 2(a) status to reservists traveling on authorized travel days.[48] *Phillips* does mean, however, that the government can draw the Article 2(c) sword to establish subject matter jurisdiction over instances of reservist misconduct occurring outside the timeframe specified in reservists' orders.[49]

How lethal this jurisdictional sword is remains to be seen since the CAAF did not give any guidance for applying Article 2(c) to situations that are not as clear-cut as the *Phillips* case. By failing to weigh or prioritize the various factors it considered, the CAAF left many questions unanswered, thus providing the defense with a possible shield to this jurisdictional sword. For instance, the court considered that LTC Phillips "was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent offense in those quarters"[50] as one of the six "uncontested facts" establishing LTC Phillips as a person serving with an armed force.[51] What if LTC Phillips committed the offense in route to the duty station? What if she checked into the VOQ and thereafter went off-post to engage in misconduct? What if she stayed in a local off–base hotel the night before reporting for duty? Finally, what if she stayed on base the night after her two-weeks of annual training ended and committed the offense on 24 July? The courts' answers to these questions will determine the lethality of the Article 2(c) jurisdictional sword.

Personal Jurisdiction

Changes to AR 27–10 *Affecting Termination of Military Status*

For active duty personnel, the question of military status at the time of the offense (subject matter jurisdiction) seldom requires much analysis.[52] The determination, however, of whether military status terminated by the time of trial (personal jurisdiction) is frequently litigated. Military status generally terminates upon (1) the delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) undergoing a clearing process as required under appropriate service regulations.[53]

In *Smith v. Vanderbush*,[54] the accused was arraigned and his case set for trial; however, the command never "flagged" the accused and personnel officials separated the accused on his expiration of term of service.[55] The CAAF held that personal jurisdiction over the accused terminated since the accused received his discharge certificate (DD Form 214),[56] cleared his unit, and received a final accounting of pay.[57] The CAAF suggested, however, that the Secretary of the Army amend Army

46. *Id*.

47. *Id*.

48. By failing to address the bright–line rule, however, this theory of jurisdiction may be left to be tested at a later day.

49. Trial counsel should note that, although *Phillips* involved active duty training under Article 2(a)(1), the CAAF's Article 2(c) analysis may be applicable to questionable periods of inactive-duty training under Article 2(a)(3).

50. *Id*.

51. *Id*.

52. Harder, *supra* note 1, at 11.

53. United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

54. Smith v. Vanderbush, 47 M.J. 56 (1997).

55. *Id*. at 57.

56. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988).

regulations to prevent similar scenarios from occurring in the future.[58]

In September 2002, five years after the *Vanderbush* decision, the Secretary of the Army followed the CAAF's advice and amended *AR 27-10. Army Regulation 27–10*, para. 5–15b, now provides that after any charge is preferred, the DD Form 458 (Charge Sheet) automatically suspends all favorable personnel action and any discharge certificate issued thereafter is void until the charge is dismissed or the convening authority takes action on the case.[59] Administrative oversights—forgetting to flag a soldier—will no longer result in a valid discharge terminating court-martial jurisdiction, as was the case in *Vanderbush.*

A Special Court-Martial's Limited Jurisdiction

United States v. Henderson

In addition to personal and subject matter jurisdiction, RCM 201 sets forth three procedural requirements for court-martial jurisdiction: (1) the court-martial must be convened by an official empowered to convene it;[60] (2) the court-martial must be composed in accordance with the RCM with respect to the number and the qualifications of its personnel,[61] and (3) each charge before the court-martial must be referred to it by competent authority.[62] Although RCM 201 states that these requisites must be met for a court-martial to have jurisdiction,[63] the CAAF has historically found defects in meeting these requirements as procedural rather than jurisdictional.[64]

57. *Vanderbush*, 47 M.J. at 59.

58. *Id.* at 61. The CAAF noted:

> [t]o the extent this case suggests a need to clarify the responsibility of convening authorities and other officials to flag records or to withhold discharge authority from certain officials other than convening authorities, the responsibility for amending AR 635-200 or taking other appropriate, corrective actions rests with the Secretary of the Army.

Id.

59. AR 27-10, *supra* note 6, para. 5-15b.

> After any charge is preferred, the DD Form 458 will automatically act to suspend all favorable personnel actions including discharge, promotion, and reenlistment. Filing of a DA Form 268 (Suspension of Favorable Personnel Action) and other related personnel actions are still required. Failure to file DD Form 268 does not affect the suspension accomplished by the DD Form 458, or give rise to any rights to the soldier. See AR 600-8-2 (Suspension of Favorable Personnel Actions (FLAGS)). After preferral of a charge, regardless of any action purporting to discharge or separate a soldier, any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case in accordance with R.C.M. 1107; all other favorable personnel actions taken under such circumstances are voidable . . . .

Id.

60. MCM, *supra* note 8, R.C.M. 201(b)(1).

61. *Id*. R.C.M. 201(b)(2).

62. *Id*. R.C.M. 201(b)(3).

63. *Id*. R.C.M. 201(b).

64. *See* United States v. Henderson, 59 M.J. 350, 355 (2004) (Crawford, C.J., dissenting). In her dissent, Chief Judge Crawford summarizes this trend:

> "It is well established that a defective referral. . .does not constitute jurisdictional error." United States v. King, 28 M.J. 397, 399 (C.M.A. 1989). Indeed, this Court has repeatedly opined that errors in the referral process are not jurisdictional. In King, we held that the trial of an accused by a court-martial panel other than the one to which the case had been referred was nonjurisdictional error. Id. In United States v. Kohut, 44 M.J. 245, 250 (C.A.A.F. 1996), this Court found nonjurisdictional error in the trial of a case by court-martial without approval of the Judge Advocate General after the same case had been previously tried by the state. In United States v. Hayward, 47 M.J. 381, 383 (C.A.A.F. 1998), we held that the post-arraignment referral of a second charge was nonjurisdictional error. Finally, this Court found nonjurisdictional error in the convening authority's failure to forward charges against the accused to the next higher level of command when that convening authority was an accuser, and therefore prohibited from convening the court-martial. United States v. Jeter, 35 M.J. 442, 446 (C.M.A. 1992); *see* United States v. Tittel, 53 M.J. 313, 314 (C.A.A.F. 2000); United States v. Shiner, 40 M.J. 155, 157 (C.M.A. 1994).

Id. *See also generally* Harder, *supra* note 1, at 5.

In *United States v. Henderson*,[65] however, the CAAF found jurisdictional error when a charge before a court-martial was not referred by competent authority. Specifically, a special court-martial convening authority (SPCMCA), without authorization, referred a capital offense to a special court-martial (SPCM).[66]

Article 19, UCMJ,[67] states "special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses."[68] Through RCM 201(f)(2)(C)(i), the President prescribed that "[a] capital offense for which there is prescribed a mandatory punishment [spying, premeditated murder, and felony murder] beyond the punitive power of a special court-martial shall not be referred to such a court-martial."[69] For all other capital offenses—those not requiring a mandatory sentence—a general court–martial convening authority (GCMCA) may permit, or the Secretary concerned may authorize by regulation, SPCMCAs to refer such capital offenses to SPCMs.[70]

In *United States v. Henderson*, the accused, Damage Controlman Fireman Apprentice (DCFA) Henderson was stationed aboard the U.S.S. *Tarawa*.[71] According to DCFA Henderson, he intended to commit suicide by detonating an improvised explosive device (IED) onboard the ship.[72] He created the IED out of "urine sample tubes, crushed flare powder, electrical wires, oil, and washers"[73] and stored it in the fan room onboard ship. Fortunately, the IED was found before DCFA Henderson attempted to detonate the device.[74]

Damage Controlman Fireman Apprentice Henderson was charged with willfully hazarding a vessel in violation of Article 110, UCMJ, a capital offense.[75] The SPCMCA, the commanding officer of the U.S.S. *Tarawa*, referred the charge to a SPCM without receiving authorization to refer a capital offense to a SPCM.[76] The SPCMCA, however, subsequently entered into a pretrial agreement allowing DCFA Henderson to plead guilty to the lesser included offense of negligent hazarding of a vessel, a non–capital offense.[77] Damage Controlman Fireman Apprentice Henderson was convicted, pursuant to his pleas, by a military judge alone at a SPCM.[78]

On appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) questioned whether the referral of a capital offense was error, resulting in a lack of jurisdiction over the offense.[79] In an unpublished opinion, the NMCCA held that the SPCMCA erroneously referred the original charge without proper authorization under the provisions of RCM 201(f)(2)(C).[80] Nevertheless, the court found that "[b]y entering into this pretrial agreement, the [SPCMCA], in effect, amended his decision regarding the referral of the original charge and substituted the lesser included offense."[81] The NMCCA, therefore, held that the "erroneous referral of the

65. *Henderson*, 59 M.J. at 350.

66. *Id*.

67. UCMJ art. 19 (2002).

68. *Id*.

69. MCM, *supra* note 8, R.C.M. 201(f)(2)(C)(i).

70. *Id*. R.C.M. 201(f)(2)(C)(i)-(ii).

71. *Henderson*, 59 M.J. at 351.

72. *Id*.

73. *Id*.

74. *Id*.

75. *Id*. Article 110(a), UCMJ states: "Any person subject to this chapter who willfully or wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such punishment as a court-martial may direct." UCMJ art. 110(a) (2002).

76. *Henderson*, 59 M.J. at 351.

77. *Id*.

78. *Id*.

79. United States v. Henderson, 2003 CCA LEXIS 48 (N-M.C.C.A. Feb. 27, 2003) (unpublished). The case was submitted to the NMCCA on its merits (without assignment of errors). *Id*. at *2.

80. *Id*. at *6.

81. *Id*. at *5.

original charge to a SPCM was not jurisdictional and was corrected in a timely manner by the [SPCMCA]."[82]

The CAAF reversed the NMCCA's decision and set aside the finding of guilty to the charge of negligent hazarding of a vessel.[83] The CAAF rejected all of the government's arguments: (1) that if the referral was erroneous, it was a nonjurisdictional, procedural error; (2) that the SPCMCA "functionally" referred the non–capital charge upon entering the pretrial agreement; and (3) that the SPCMCA implicitly referred the lesser included offense when he referred the capital charge.[84]

Instead of following its recent trend of characterizing defective referrals as procedural, nonjurisdictional error,[85] the CAAF reaffirmed its holding from a half century ago in *United States v. Bancroft*,[86] a case from the Korean War. In Bancroft, the accused was convicted at a SPCM of the capital offense of sleeping at his post during time of war.[87] As in *Henderson*, the original charge was referred to a SPCM without the required authorization.[88] Because the facts of *Bancroft* and *Henderson* are "strikingly similar"[89] and unlike any in the trend of cases holding referral defects as nonjurisdictional, procedural error, the CAAF found "that 'evolution' does not extend so far as to alter the logic and holding in Bancroft."[90]

Next, the CAAF rejected the government's remaining two arguments that the SPCMCA either "implicitly referred" the lesser included, non-capital charge when he referred the capital charge or "functionally referred" the lesser-included, non–capital charge when he entered into the pretrial agreement with DCFA Henderson.[91] The CAAF held "[s]ince the lesser-included charge of negligently hazarding a vessel was never formally referred . . . it was dependent on the greater charge and was fatally tainted by the lack of jurisdiction [over the original charge]."[92] The court-martial, therefore, lacked jurisdiction "ab initio" to try either the capital offense or the lesser-included, noncapital offense to which the accused plead guilty because the SPCMCA never received authorization to refer the capital offense to a SPCM.

What does *Henderson* mean for government counsel? Most importantly, the CAAF strictly interpreted Article 19 and RCM 201(f)(2)(C) and found that violations of RCM 201(f)(2)(C) constitute fatal jurisdictional error.[93] Therefore, if such a violation is discovered before findings are announced, the prudent chief of justice should advise the SPCMCA or the GCMCA to avail themselves to RCM 604[94] and withdraw the charges from the SPCM. After withdrawing the charges, the convening authority can either forward the charges to a superior authority;[95] amend the charges and refer the lesser included, noncapital charge anew;[96] or dismiss the charges without prejudice and start the preferral process over again.[97]

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82. *Id*. at *6.

83. *Henderson*, 59 M.J. at 354.

84. *Id*. at 352.

85. *See supra* note 64.

86. United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953).

87. *Id*.

> Any sentinel or lookout who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court–martial may direct, but if the offense is at any other time, by such punishment other than death as a court–martial may direct.

UCMJ art. 113 (2002).

88. Unlike Henderson, however, Bancroft was convicted of the capital offense at the SPCM. Henderson was only convicted of the lesser included, non–capital offense.

89. *Henderson*, 59 M.J. at 353.

90. *Id*.

91. *Id*. at 353-54.

92. *Id*. at 354.

93. *Id*.

94. MCM, *supra* note 8, R.C.M. 604(a).

95. *Id*. R.C.M. 404(c).

Conclusion

Although the CAAF's 2003 term was relatively quiet in the area of jurisdiction, its decision in *Phillips*, is the most important development in subject matter jurisdiction in the new millennium. By applying Article 2(c) to reservists, the CAAF armed the government with a new jurisdictional sword, enabling it to strike at misconduct occurring outside the parameters specified in a reservist's orders. By failing to give detailed guidance for applying Article 2(c), however, the CAAF also provided the defense with a possible shield. It will be interesting to watch how this battle will be fought with the growing number of reservists serving in support of the global war on terrorism during a period of everincreasing military operations.

96. *Id*. R.C.M. 603.

97. *Id*. R.C.M. 404(a).

Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, *Voir Dire* and Challenges, and Pleas and Pretrial Agreements

Lieutenant Colonel Patricia A. Ham
Professor, Criminal Law
The Judge Advocate General's Legal Center and School

Introduction

The last couple of years witnessed much discussion concerning whether the military justice system should undergo, or was undergoing, a revolution.[1] Particular matters under this revolution microscope in the area of pretrial procedures include the role of the convening authority in the selection of panel members, as well as the role of the military judge.[2] Last year's opinions, in contrast, herald a return to the basics, with exceptions in two areas: challenges for cause based on the implied bias of panel members and the authority of the military judge. As to the first, the Court of Appeals for the Armed Forces (CAAF) continued to expansively interpret the doctrine of implied bias. This trend is perhaps a result of, or in reaction to, the failure to revolutionize the current system of panel member selection, which continues to rest with the convening authority, who also refers the case to trial and acts on the findings and sentence.[3] As to the second, the authority of the military judge, the CAAF rejected a government appeal challenging the Army Court of Criminal Appeals' (ACCA) expansive view of the post-trial power of the military judge. In addition, the Navy-Marine Court of Criminal Appeals (NMCCA) reminded military judges that they retain authority post-trial to correct errors that arise after trial that "substantially affect[] the legal sufficiency of any finding of guilty or the sentence."[4]

In matters other than implied bias and the authority of the military judge, many of last year's opinions from both the CAAF and the service courts involving the subjects of this article reflected and bemoaned an alarming lack of attention to detail by participants in the military justice process, especially the military judge and the trial counsel. This lack of attention to detail manifests itself most obviously in the arena of pleas and pretrial agreements. Military judges continue to fail to cover the elements of offenses during the providence inquiry, or to define them sufficiently. The CAAF dealt with this shortfall last term in *United States v. Redlinski*,[5] but it continues unabated, in both published and unpublished service court opinions. In addition, military judges skipped other portions of the so-called "script" for guilty plea inquiries contained in the *Military Judge's Benchbook*,[6] including advice concerning the rights waived by a guilty plea. This specific issue arose outside of the military justice system as well, and the U.S. Supreme Court issued an opinion on the matter in 2002. In *United States v. Hansen*,[7] the CAAF rejected the Supreme Court's view, and declined to shift responsibility to the defense counsel for ensuring the accused is properly advised of the rights he foregoes by pleading guilty. Instead, the CAAF continued to rest this responsibility squarely upon the shoulders of the military judge.

Court-Martial Personnel

This year saw new developments in several areas concerning court-martial personnel. The CAAF issued a decision concerning errors in "triggering mechanisms," which continued the trend of expanding the waiver doctrine for nonjurisdictional procedural defects in panel composition and the referral stage,

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1. *See* Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

2. *Id.*; *see also* NATIONAL INSTITUTE OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE, May 2001, *available at* http://www.badc.org/html/militarylaw_cox.html.

3. *See* UCMJ art. 25 (2002); *see also generally* Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998); Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1102(b)(2) (2002) [hereinafter MCM].

5. 58 M.J. 117 (2003).

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

7. 59 M.J. 410 (2004).

as well as a decision on the limits of the special court-martial convening authority's (SPCMCA) referral power, which bucked the waiver trend. Meanwhile, the ACCA weighed in on a long time Army practice regarding referral to a special court-martial "empowered to adjudge a bad-conduct discharge."

In two additional courts-martial personnel cases, the CAAF strongly affirmed the fundamental right to counsel. One instance involved the right to civilian counsel; the other, the right to conflict-free counsel. While affirming the right to counsel in both cases, the CAAF set aside the findings and sentence in both due to a denial of that right.

Both the CAAF and a service court issued opinions affirming the expansive post-trial powers of the military judge. Finally, the Supreme Court issued two opinions that may be applicable to military practice: one concerns recusal of the judge; the other concerns the advice constitutionally required for a defendant who desires to proceed *pro se* in a guilty plea.

Convening Authority

When the convening authority selects the members of a court-martial panel under the provisions of Article 25, Uniform Code of Military Justice (UCMJ),[8] instructions accompanying the selection of the primary and alternate members often provide automatic provisions that take effect when, for example, the accused chooses a panel of at least one-third enlisted members versus a panel of all officer members. These automatic instructions may be contained on the convening order, in the Staff Judge Advocate's (SJA) instructional memorandum concerning panel selection which is adopted by the convening authority, or both. The automatic trigger would be activated after an accused requests a panel of one-third enlisted members. Under such a circumstance, officer members are relieved for duty and enlisted members are automatically detailed in their place.

In its last term, the CAAF faced the issue of potential errors in these automatic "triggering mechanisms" or "bump-up provisions." In *United States v. Mack*,[9] a memorandum by the SJA, approved by the convening authority, concerning operation of a convening order, provided that when the accused requested a panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members . . . falls below one-third plus two."[10] The convening order initially listed six officer and six enlisted members.[11] Three members were excused (one enlisted and two officers), leaving four officer and five enlisted members. After the military judge called the court-martial to order, the trial counsel announced eleven names of persons detailed to the court-martial, which included two enlisted members from the convening order's list of alternates. The appointment of the two additional enlisted members appeared inconsistent with the triggering mechanism because the number of enlisted members was not below "one-third plus two" without them, however the defense did not object or "make any inquiries regarding the presence of [the two additional enlisted members] or the excusal of the other members."[12]

The ACCA remanded on its own for a *Dubay*[13] hearing concerning the presence of the additional two enlisted members. The hearing revealed that "no documentary evidence could be located concerning the excusal of the three original members or" the addition of the two enlisted members.[14] The ACCA concluded that "it was the Government's burden to demonstrate that the court-martial was properly composed and that the Government had not met its burden in this case . . . the military judge concluded that the court-martial lacked jurisdiction."[15] The ACCA nonetheless affirmed Specialist Mack's conviction in a *per curiam* opinion, ruling that although "there is no clear explanation as to how either [additional enlisted member] came to sit on appellant's court-martial . . . [t]heir presence as members does not constitute jurisdictional error."[16]

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8. UCMJ art. 25. The convening authority personally selects the panel members applying the criteria set forth in Article 25: age, education, training, experience, length of service, and judicial temperament. *Id.*

9. 58 M.J. 413 (2003).

10. *Id*. at 415.

11. *Id.*

12. *Id.*

13. United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

14. Mack, 58 M.J. at 415.

15. *Id.* at 416.

16. *Id*. at 416 (citing United States v. Mack, Army No. 9900146, slip op. at 2 n.* (Army Ct. Crim. App. May 16, 2002) (unpublished)).

The CAAF affirmed and held the following:

> When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error.[17]

The CAAF found no error at all.[18] "Excusal of one officer and one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of whom were officers and five of whom were enlisted."[19] This triggered the one-third plus two triggering event. Even if there was an error in the triggering event, so long as the members were listed on the convening order and the panel met the one-third requirement, "any error in the operation of the triggering mechanism was administrative, not jurisdictional," and the appellant suffered no prejudice.[20]

In *Mack*, the CAAF continued the long-standing trend of placing substance over form when reviewing non-jurisdictional procedural defects in panel composition and referral.[21] The root of this trend is, as Judge Sullivan once stated, "Fairness and common sense, not technicalities, should rule the law."[22] The CAAF bucked the trend in *United States v. Henderson*,[23] and set aside the findings and sentence due to a defective referral. In *Henderson*, the SPCMCA referred an allegation of willfully hazarding a vessel in violation of Article 110(a), UCMJ,[24] a nonmandatory capital offense. This referral was in violation of Article 19, UCMJ, which provides that a SPCMCA may in general only refer noncapital offenses.[25] An exception to this general rule is that the SPCMCA can refer nonmandatory capital offenses as noncapital "under such regulations as the President may prescribe."[26] The President, in Rule for Court-Martial (RCM) 201(f)(2)(c), authorized the SPCMCA to refer a nonmandatory capital offense in two instances: (1) when permitted by the General Court-Martial Convening Authority (GCMCA); or (2) when authorized by regulations of the Secretary concerned.[27] Permission from the GCMCA was neither sought nor granted in this case, and there was no service regulation that purported to grant the authority for the referral in this case.[28] The Navy-Marine Court of Criminal Appeals (NMCCA) held that the error was non-jurisdictional, as the appellant ultimately entered into a pretrial agreement and pled guilty to a noncapital lesser-included offense of negligently hazarding a vessel.[29] The NMCCA reasoned that by accepting the pretrial agreement, the SPMCA in effect amended his original referral decision and substituted a referral to the lesser-included offense.[30]

The CAAF reversed, holding the referral was a jurisdictional error that necessitated setting aside the findings and sentence in the case.[31] Applying a *de novo* standard of review,[32] the CAAF rejected three government arguments: first, that the error was a

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17. *Id*. at 417 (citing United States v. Cook, 48 M.J. 434, 436 (1998) (stating that any error in SJA excusing more than one-third of members detailed in violation of MCM, RCM 505(c)(1)(B)(ii) was waived and did not amount to plain error)).

18. *Id*. at 417.

19. *Id*.

20. *Id*. at 418.

21. *See, e.g*., cases cited *infra* note 43.

22. United States v. Townes, 52 M.J. 275, 277 (1999) (Sullivan, J., concurring), *cert. denied*, 531 U.S. 821 (2000).

23. 59 M.J. 350 (2004).

24. UCMJ art. 110(a) (2002). It states, in pertinent part: "Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct." *Id*.

25. *Id*. art. 19. Article 19 states, in pertinent part: "Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses." *Id*.

26. *Id*.

27. *Henderson*, 59 M.J. at 352; MCM, *supra*, note 4, R.C.M. 201.

28. *Henderson*, 59 M.J. at 352.

29. United States v. Henderson, No. 200101752, 2003 CCA LEXIS 48, *5-6 (N-M Ct. Crim. App. Feb. 27, 2003) (unpublished).

30. *Id*. at *6 (citing United States v. Wilkins, 29 M.J. 421, 424 (C.M.A. 1990)).

31. *Henderson*, 59 M.J. at 353.

nonjurisdictional procedural defect, and that the so-called "evolution" in the law applicable to jurisdictional defects extends to this situation;[33] second, that the pretrial agreement was a functional equivalent of a referral of a noncapital lesser-included offense;[34] and third, that the referral of the nonmandatory capital offense was also an implicit referral of the noncapital lesser-included offense.[35]

As to the evolution argument, the court found that even if there were "some form of 'evolution' in the law applicable to jurisdictional defects in the referral process, that evolution did not extend so far as to alter the logic and holding in [*United States v.*] *Bancroft*,"[36] which the court found dispositive. In *Bancroft*, the CAAF's predecessor, the Court of Military Appeals (CMA), set aside the appellant's findings and sentence at a special court-martial for a violation of Article 113, UCMJ, for sleeping at his post. Although the offense is punishable by death during time of war, the charges were referred to a special court-martial during wartime in violation of Article 19.[37] The NMCCA distinguished *Bancroft* because in that case, the accused was found guilty of the capital offense, whereas in *Henderson* the accused pled guilty and was found guilty of a noncapital lesser-included offense.[38] The CAAF did not discuss this arguably crucial difference, and relied instead on the "strikingly similar" commonalities between the two cases.[39] "As in *Bancroft*, the officer making the referral here exercised only special court-martial jurisdiction and referred a capital charge to a special court-martial without the authorization to do so."[40] The court, therefore, lacked jurisdiction over the offense.[41]

Chief Judge Crawford dissented, arguing "the convening authority's derivatively defective referral of the lesser-included charge constituted waivable, nonjurisdictional error, which not only failed to prejudice the accused, but actually benefited him."[42] Chief Judge Crawford relied on a laundry list of cases characterizing defective referrals as nonjurisdictional errors, as well as case law finding these errors waived when not raised at trial.[43] The Chief Judge declined to follow *Bancroft* for two reasons: first, "the more recent trend by this Court . . . is to treat referral defects as waivable, nonjurisdictional error";[44] and two, in *Bancroft*, the accused was convicted of the referred capital offense, but in *Henderson*, the accused was convicted of a noncapital lesser-included offense, albeit by a "derivatively defective referral."[45] In light of the trend convincingly recounted by Chief Judge Crawford, and manifested once again in *Mack*, it is hard to argue with the dissent's logic.

In the service courts, one additional case is worth mentioning in the area of the convening authority's referral decision. *United States v. Scott*[46] examined the long-time Army practice of annotating the back of a charge sheet upon referral to indicate that a special court-martial is "empowered to adjudge a bad-conduct discharge." This annotation distinguishes those spe-

32. *Id*. at 351-52.

33. *Id*. at 352-53.

34. *Id*. at 353-54.

35. *Id*. at 354.

36. *Id*. at 353 (citing United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953)).

37. *Bancroft*, 11 C.M.R. at 3.

38. United States v. Henderson, No. 200101752, 2003 CCA LEXIS 48, *3-4 (N.M. Ct. Crim. App. Feb. 27, 2003) (unpublished).

39. *Henderson*, 59 M.J. at 353.

40. *Id*.

41. *Id*.

42. *Id*. at 355 (Crawford, C.J., dissenting).

43. *Id.* (Crawford, C.J., dissenting) (citing United States v. King, 28 M.J. 397, 399 (C.M.A. 1989) ("It is well established that a defective referral . . . does not constitute jurisdictional error."); United States v. Kohut, 44 M.J., 245, 250 (1996) (providing nonjurisdictional error when case was referred following trial in state court without approval of The Judge Advocate General); United States v. Hayward, 47 M.J. 381, 383 (1998) (stating that post-arraignment referral of additional charge is nonjurisdictional error); United States v. Jeter, 35 M.J. 442, 446 (C.M.A. 1992) (stating that convening authority who is accuser and prohibited from referring charges who nonetheless referred charges is nonjurisdictional defect); United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981) (stating that nonjurisdictional errors including defective referrals are waived unless raised at trial); United States v. Lopez, 200 C.M.A. 76, 78, 42 C.M.R. 268, 270 (A.C.M.R. 1970) (stating that guilty plea "waives all nonjurisdictional defects in all earlier stages of the proceedings against an accused")).

44. *Id.* at 356 (Crawford, C.J., dissenting).

45. *Id*. (Crawford, C.J., dissenting).

46. 59 M.J. 718 (Army Ct. Crim. App.), *petion denied*, _ M.J. _ (2004) (CAAF LEXIS 468 (2004).

cial courts-martial that may adjudge a bad-conduct discharge (BCD) as part of the sentence from those that may not. The latter special court-martial has historically been referred to as a "straight special," while the former has historically been referred to as a "BCD Special."

In *Scott*, the GCMCA signed a memorandum that referred the charges and specifications to a special court-martial "empowered to adjudge a bad-conduct discharge."[47] The instructions on the charge sheet reflecting the referral, however, stated only that the case was "[r]eferred for trial to the special court-martial," and did not include the traditional annotation "empowered to adjudge a bad-conduct discharge."[48] While no objection was raised at trial, appellate defense counsel asserted that because the charge sheet lacked the traditional language that the special court-martial was "empowered to adjudge a bad-conduct discharge," the court lacked the authority to impose one.[49]

The ACCA wisely rejected this assertion. Based on the discussion following RCM 601(e)(1), the ACCA determined that additional words in the convening authority's referral or on the charge sheet are "surplusage."[50]

> We hold that all Army SPCMs are empowered to adjudge a BCD unless the convening authority expressly states that a particular SPCM is not so empowered. The convening authority should expressly state such a limitation in the referral signed by the convening authority, in special instructions on the charge sheet, or both.[51]

Scott provides practitioners with answers to two remaining issues following the 2002 amendment to *Army Regulation 27-10* that removed a service-specific limit on the SPCMCA's authority to refer a special court-martial empowered to adjudge a BCD.[52] Before the amendment, the Secretary of the Army did not permit the SPCMCA to refer a special court-martial empowered to adjudge a BCD. Following the amendment, a question arose as to whether the straight special court-martial still existed. After *Scott*, Army practitioners know that the straight special still exists and that the default referral is a special court-martial empowered to adjudge a BCD, unless that authority is specifically limited by the convening authority.

Counsel

The CAAF decided two cases so far this term concerning the right to counsel. In both, the CAAF found a denial of the right and set aside the findings and sentence. In the first, *United States v. Wiest*,[53] the CAAF held that the military judge abused his discretion in denying a defense request for delay to obtain civilian counsel.[54] Cadet Wiest, a student at the Air Force Academy, was charged under Article 134, UCMJ, for unlawfully damaging a computer.[55] "[C]ontrary to United States Air Force Academy (USAFA) rules, Appellant attempted to use his computer to access internet chat rooms. To prevent such communications, USAFA had previously developed a firewall as part of the USAFA network."[56]

On the originally scheduled trial date, 2 February, defense counsel moved for a new pretrial investigation under Article 32, UCMJ, "arguing that the Government mistakenly told defense counsel that logs describing individuals at USAFA who had entered and exited the firewall did not exist."[57] In discuss-

47. *Id*. at 719.

48. *Id*.

49. *Id*.

50. *Id*. at 720. The discussion to RCM 601(e)(1) states:

> The convening authority should acknowledge by an instruction that a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged when the prerequisites under Article 19 will not be met. See R.C.M. 201(f)(2)(B)(ii). For example, this instruction may be given when a court reporter is not detailed.

Id. at 719 (quoting MCM, *supra* note 4, R.C.M. 601(e)(1) (Discussion)).

51. *Id*. at 720.

52. U.S. DEPT' OF ARMY, REG. 27-10, LEGAL SERVICES, MILITARY JUSTICE para. 5-27b (6 Sept. 2002); *see* Huestis, *Revolution*, *supra* note 1, at 21.

53. 59 M.J. 276 (2004).

54. *Id*. at 276.

55. *Id*.

56. *Id*. at 277.

57. *Id*.

ing the motion with the defense counsel, the military judge "made several comments questioning the competency of the defense counsel for relying on the Government's assertion that these logs did not exist, and for not independently investigating the existence of the logs."[58] Incredibly, the military judge told the defense counsel that he "should have assumed the records were always present" and that the government, contrary to its representation, had "misinformed" the defense otherwise.[59] When defense counsel responded "that they assumed the government was telling the truth," the judge replied, "[A] competent advocate assumes nothing."[60]

Following the military judge's comments, Cadet Wiest "requested new defense counsel."[61] The military judge attempted to dissuade the accused, stating he "misunderstood" his prior remarks; however, Cadet Wiest "insisted on new counsel" and the military judge relented.[62] The military judge emphasized that new counsel must be prepared for trial by a newly scheduled trial date, thirty-four days later—8 March.[63] The accused's requested and approved Individual Military Counsel was not available on the scheduled trial date. The military judge stated, "The trial will proceed without him."[64] Approximately one week after the hearing on the motion for a new article 32 investigation, the accused hired a civilian defense counsel, who entered an appearance and requested a trial delay until 19 April—an additional six weeks beyond the 8 March trial date. The military judge denied the request.[65]

The accused requested new military defense counsel on the day of the trial, 8 March, who represented him throughout the trial.[66] The civilian counsel was not ready to begin due to other commitments.[67] The appellant was convicted and sentenced to a dismissal and total forfeitures; the convening authority approved the dismissal and partial forfeitures and the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence.[68]

The CAAF reversed. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel."[69] Applying the factors set forth in *United States v. Miller*,[70] including surprise, the timeliness of the request, other continuance requests, the good faith of the moving party, and prior notice, the court found the trial judge's "inelastic attitude in rescheduling" the trial was an abuse of discretion particularly when the "request was predicated on the judge's negative comments about Appellant's original military counsel and Appellant's subsequent selection of a new civilian counsel."[71]

In one sense, the CAAF's decision in *Wiest* should come as no surprise. In *Miller*, the 1997 case chiefly relied upon by the CAAF in *Wiest*, the court also found that the military judge abused his discretion by failing to grant a continuance

58. *Id*.

59. *Id*.

60. *Id*. While not cited or commented upon in the court's opinion, the judge's comments to the defense run afoul of the Supreme Court's recent statements in *Banks v. Dretke*, 124 S. Ct. 1256, 1275, 1276 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process . . . It was not incumbent on Banks to prove [the prosecutor's] representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful."). Although *Banks* dealt with the state's failure to provide exculpatory information, which is not alleged in *Wiest*, the basic point is beyond dispute: when the government represents that certain evidence does not exist, the defense is entitled to rely on that representation; it is not incumbent upon the defense to disprove the government's representation. Further, although the *Banks* decision was released after Cadet Wiest's trial, the Supreme Court's sentiments are not new or novel. *See* Strickler v. Greene, 527 U.S. 263 (1999). The Court has also underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Id.* at 281; *accord*, Kyles v. Whitley, 514 U.S. 419, 439-440 (1995); United States v. Bagley, 473 U.S. 667, 675 n.6 (1985); Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

61. *Wiest*, 59 M.J. at 277.

62. *Id*. at 278.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*. at 276.

69. *Id*. at 278.

70. 47 M.J. 352 (1997).

71. *Wiest*, 59 M.J. at 278-79.

requested by civilian counsel retained by the accused.[72] *Miller*, relied upon older, established case law holding that, "Although the right to civilian counsel 'is not absolute, . . . an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel."'[73] Chief Judge Crawford delivered the opinions in both *Miller* and *Wiest.* In addition, in between *Miller* and *Wiest* the CAAF decided *United States v. Weisbeck*.[74] *Weisbeck* is another case in which the court found the military judge abused his discretion by failing to grant a delay to obtain expert testimony. Similar to the facts in *Wiest*, the requested delay in *Weisbeck* was for approximately six weeks.[75]

Judge Erdmann dissented in *Wiest*, however, pointing out that the military judge granted Cadet Wiest a delay of thirty-four days to find counsel of his choice—the period from the initial decision to replace his original military counsel on 2 February until the newly scheduled trial date of 8 March. In Judge Erdmann's view, the case came down to this: "A defendant's qualified right to counsel does not extend to an inflexible insistence on a specific attorney who cannot comply with the court's reasonable schedule."[76] Moreover, because Cadet Wiest had two able military attorneys defending him, there was no prejudice by the military judge's denial of a continuance to obtain his civilian counsel of choice.[77]

Under other circumstances, Judge Erdmann's dissent might prevail; however, clearly the majority was bothered by the military judge's pejorative comments toward the original defense counsel. Those comments resulted in the request for new counsel and led to retaining of civilian counsel, who requested the delay at issue. In addition, the government demonstrated no prejudice from the requested delay and also did not demonstrate that the defense was merely trying to "vex" the government.[78] In fact, the government could hardly complain, as it was the government's "misinformation" to the defense concerning the lack of firewall logs that caused the situation in the first place. This confluence of circumstances may limit *Wiest* to its specific facts.

Another case that may be limited to its specific facts is the second case thus far this term concerning the right to counsel, *United States v. Cain*,[79] wherein the CAAF, as in *Wiest*, set aside the findings and sentence. Following his guilty plea and sentencing for two specifications of indecent assault,[80] Sergeant Cain's parents alleged that his lead trial defense counsel "had pressured the Appellant for sexual favors." [81] One day after being informed of the allegations, the defense counsel committed suicide.[82] The appellant's co-counsel disqualified himself from further representation of the appellant and new counsel was detailed to represent him post-trial.[83]

The newly detailed defense counsel submitted numerous requests, all of which were denied, seeking information about the trial representation of the appellant and the lead counsel's subsequent suicide.[84] In her post-trial matters, the defense continued to object "to the Government's refusal to release information regarding the events surrounding [the lead defense counsel's] suicide. In addition, the defense contended that appellant had not received effective assistance of counsel and that the deficiencies in representation rendered the guilty pleas improvident."[85] The defense requested a new trial and pro-

72. *Miller*, 47 M.J. at 359.

73. *Id*. at 358 (quoting United States v. Thomas, 22 M.J. 57, 59 (C.M.A. 1986) (internal quotation marks omitted) (quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575 (1964))).

74. 50 M.J. 461 (1999).

75. *Id*. at 465.

76. *Wiest*, 59 M.J. at 282 (Erdmann, J., dissenting).

77. *Id*. at 283 (Erdmann, J., dissenting).

78. *Id*. at 279.

79. 59 M.J. 285 (2004).

80. 10 U.S.C. § 934 (2000). Sergeant (SGT) Cain was originally charged with three specifications of forcible sodomy. Pursuant to his pleas, SGT Cain agreed to plead guilty to two specifications of indecent assault in exchange for a twenty-four month confinement cap. The military judge sentenced SGT Cain, *inter alia*, to five years confinement and a dishonorable discharge. *Cain*, 59 M.J. at 285-86.

81. *Id*. at 288.

82. *Id*.

83. *Id*.

84. *Id*. Defense counsel submitted a request for discovery, or in the alternative, for an in camera inspection of relevant evidence by the military judge. Both were denied. *Id*. Next, defense counsel requested the convening authority to order a post-trial session under Article 39(a), UCMJ. Following the SJA's recommendation, the convening authority denied the request. *Id*.

posed various alternative remedies, which the convening authority denied.[86] One of the lessons of *Cain* is that the blind refusal of the SJA and the convening authority to hold a hearing was singularly unhelpful in resolving the issues surrounding the appellant's representation. As the old adage goes, "Bad news does not get better with time."

Two years after the convening authority's action, the ACCA ordered a further evidentiary hearing into the matter pursuant to *United States v. Dubay*.[87] At the *Dubay* hearing, the military judge found that SGT Cain and his lead defense counsel engaged in a consensual sexual relationship throughout the period of the defense counsel's representation. The military judge concluded that the relationship "played no role in Appellant's decision to enter guilty pleas, and that it did not create a conflict of interest."[88] The ACCA affirmed the findings and sentence, and found further that SGT Cain waived any conflict of interest when he declined to follow the advice of two civilian attorneys, who both counseled him to sever the attorney-client relationship with his lead defense counsel.[89]

The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses"[90] resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a *per se* conflict of interest in counsel's representation of the Appellant."[91] Finding ineffective assistance of counsel under the Sixth Amendment, the court set aside the findings and sentence.[92]

It is difficult to imagine that the peculiar facts and circumstances in *Cain* will be repeated. As the court described it:

> [W]e confront a course of conduct involving an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial. All of this is left unexplained due to the attorneys' untimely death.[93]

Accordingly, *Cain's* precedential value, and in particular the CAAF's finding of an inherently prejudicial *per se* conflict of interest, is most likely limited to its facts.

Military Judge

There are two recent decisions, including one from the Supreme Court, that discuss the issue of recusal of a trial judge. In addition, two new cases discuss the post-trial authority of the military judge—one sounding a warning concerning "Bridge-the-Gap" sessions, the post-trial "after action report" that a military judge may engage in with counsel from both sides.

A military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."[94] "This subsection is, except for changes in terminology, identical to" its federal counterpart, 28 U.S.C. § 455(a).[95] In a *per curiam* decision in *Sao Paulo v. American Tobacco Co., Inc.*,[96] the Supreme Court held that a trial judge was not disqualified under 28 U.S.C. § 455(a) when that judge's name appeared on a motion to file an *amicus* brief in a similar suit against some of the same companies. The Court reversed the lower court's opinion as inconsistent with *Liljeberg v. Health Services Acquisition Corps.*,[97] which held that §455(a) (and RCM 902(a)) requires recusal only when "a

85. *Id*. at 289.

86. *Id.* The defense suggested three alternative remedies: issuance of an administrative discharge in lieu of approval of the findings and sentence; a post-trial session under Article 39(a), UCMJ; and a request for clemency by approval of time served. *Id.*

87. 37 C.M.R. 411 (C.M.A. 1967); *see Cain*, 59 M.J. at 289.

88. *Cain*, 59 M.J. at 292.

89. *Id*.

90. *Id*. at 295.

91. *Id*.

92. *Id*. at 296.

93. *Id.* at 295.

94. MCM, *supra* note 4, R.C.M. 902(a).

95. *Id*. R.C.M. 902(a) analysis at A21-51.

96. 535 U.S. 229 (2002).

97. 486 U.S. 847 (1988).

reasonable person, knowing all the circumstances, would have expected that the judge would have actual knowledge of his interest or bias in the case."[98] The lower court did not consider "all the circumstances," specifically that the judge's name was apparently added to the brief in error and that he played no part in its preparation. As such, the Supreme Court reversed and remanded for further proceedings consistent with its opinion.

The CAAF faced a related situation two terms ago in *United States v. Jones*.[99] In *Jones*, the court faced the issue of whether an appellate judge on the NMCCA who formerly served as the Director of the Navy-Marine Appellate Government Division should have recused himself from appellate review of the appellant's case.[100] During his tenure as Director, the Navy-Marine Appellate Government Division opposed two defense requests for additional time to file its brief before the service court.[101] As in *Sao Paulo*, the judge in *Jones* had no actual prior involvement in the case in question.[102] The government's opposition to the defense motions was "perfunctory and mechanical."[103] Accordingly, the CAAF held that the judge's role did "not create a reasonable question about [his] lack of impartiality."[104] Despite finding no reason for recusal under the facts presented, the CAAF advised that in the future, such issues could be avoided if "judges appointed to the lower courts after prior appellate division service would recuse themselves from all cases that were pending during their tenure in the division."[105]

This year, the AFCCA once again faced a recurring recusal issue: should the military judge recuse herself when the accused withdraws his guilty plea after a full providency inquiry? Further, does the failure to recuse herself mean that the accused is denied his right to select trial by military judge alone? In *United States v. Dodge*,[106] the court answered both questions in the negative.

After a 248-page providency inquiry but before the military judge's acceptance of the accused's guilty plea, Captain Dodge withdrew his pleas.[107] After a sixty-day delay, the defense notified the military judge that the accused would enter a guilty plea to some of the charged offenses and then challenged the judge for bias due to her prior participation in the guilty plea.[108] The defense also alleged that due to the military judge's exposure to the providence inquiry, the accused could no longer choose trial by military judge alone and, therefore, selected trial by members for the contested portions of the trial.[109] The military judge denied the defense challenge and refused to recuse herself.[110] Thereafter, the accused entered substantially the same pleas as he originally entered, albeit without a stipulation of fact and in the absence of a pretrial agreement.[111] The accused also acknowledged that his pleas of guilty waived the recusal issue as to those pleas.[112] Following a trial on the contested charges, the accused was convicted and sentenced to fifteen years confinement, a dismissal, and total forfeitures.[113] The initial pretrial agreement in the case limited confinement to five years.[114]

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98. *See* United States v. Mitchell, 39 M.J. 131, 143 (C.M.A.), *cert. denied*, 513 U.S. 874 (1994) (stating that the test for determining whether recusal is necessary under 28 U.S.C. § 455(a) is "whether a reasonable person *who knew all the facts* might question these appellate military judges' impartiality").

99. 55 M.J. 317 (2001). *See also* United States v. Lynn, 54 M.J. 202 (2000) (holding recusal not required in similar case involving same appellate judge).

100. *Id.* at 318.

101. *Id.*

102. *Id.* at 320.

103. *Id.*

104. *Id.*

105. *Id.* at 321.

106. 59 M.J. 821 (A.F. Ct. Crim. App. 2004).

107. *Id.* at 823.

108. *Id.* at 824.

109. *Id.*

110. *Id.*

111. *Id.* at 825.

112. *Id.* at 824.

113. *Id.* at 822.

114. *Id.*

According to the AFCCA, "The gravamen of the appellant's argument at trial was the assertion that the military judge's continued participation denied him his right of forum selection. He averred that, but for her refusal to recuse herself, he would have selected trial before military judge alone."[115] Dispensing with this allegation, the AFCCA ruled that because the appellant never made a request for trial by military judge alone, the military judge could not have abused her discretion in failing to grant it.[116] Moreover, the AFCCA rejected the accused's allegation that the military judge should have disqualified herself due to her participation in the first providence inquiry for two reasons: first, the issue was waived on the record; and second, unlike a case in which pleas are rejected after the accused incriminates himself and then proceeds to trial, here the accused

> ultimately entered pleas of guilty that were substantially the same as his initial pleas. We simply fail too see any compelling logic in the assertion that, having heard the appellant explain in court his criminal conduct, the military judge was disqualified from hearing him explain it to her a second time.[117]

The AFCCA's opinion is consistent with CAAF case law in this area, which has long held that a military judge is not *per se* disqualified from continuing to preside over a case in which the accused's guilty plea is either rejected or withdrawn prior to findings.[118] The Army, however, "has expressed a preference for recusal in such cases, and if the accused elects to continue before the same trial judge, the military judge should obtain a waiver from the accused."[119] In *Dodge*, the AFCCA continued to expressly reject the Army's approach.[120]

Sao Paulo and *Dodge* remind practitioners that, although a judge should recuse himself when circumstances warrant, the courts will examine *all* the facts to determine whether the military judge has abused his or her discretion by failing to do so. The courts will uphold the military judge's decision not to recuse absent an abuse of discretion based on the circumstances.

In the area of the military judge's authority, the ACCA's opinion in *United States v. Chisholm*,[121] affirmed by the CAAF this term in the face of a government appeal, could signal an era of vastly increased judicial involvement in the post-trial process. Certainly, the opinion gives military judges the green light to do so. *Chisholm* appeared to initially involve yet another instance of dilatory post-trial processing[122]—in this case, sixteen months from adjournment to convening authority action to prepare an 848-page record.[123] The ACCA went beyond awarding relief for the delay by subtracting three-months confinement off of a four-year sentence.[124] Finding that "[m]ilitary judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings,"[125] the court set forth a four-part recipe for oversight.[126]

"After adjournment, but prior to authentication of the record of trial, the military judge must ensure that the government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused's case."[127] "In most cases, if a military judge has not received a record of trial within 90-120 days after adjournment, he should *sua sponte* make documented inquires [sic] as to the progress of the record preparation and the projected completion thereof."[128] If at that point, or at any other

115. *Id*. at 825.

116. *Id*.

117. *Id*. at 826.

118. *See* United States v. Winter, 35 M.J. 93, 95 (C.M.A. 1992) (recognizing that "even though a judge is not *per se* disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of a particular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused") (citation omitted); *see also* United States v. Bray, 49 M.J. 300 (1998).

119. United States v. Rhule, 53 M.J. 647, 654 (Army Ct. Crim. App. 2000) (citing United States v. Cockrell, 49 C.M.R. 567 (A.C.M.R. 1974)).

120. *Dodge*, 59 M.J. at 825, n.9 (citing United States v. Melton, 1 M.J. 528, 51 C.M.R. 176 (A.F.C.M.R. 1975)).

121. 58 M.J. 733 (Army Ct. Crim. App.), *aff'd*, 59 M.J. 151 (2003).

122. *See* United States v. Garman, 59 M.J. 677, 683 (Army Ct. Crim. App. 2004) and cases cited therein in Appendix A.

123. *Chisholm*, 58 M.J. at 735, 736.

124. *Id*. at 739.

125. *Id*. at 737.

126. *Id*. at 737-38.

127. *Id*. at 738.

point prior to authentication of the record of trial, "the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from the intermediate appellate court."[129]

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.[130]

The government certified the ACCA's decision to CAAF, alleging that, *inter alia*, the remedial actions described constituted an advisory opinion.[131] The government "focus[ed] solely on that portion of the opinion below concerning alternative means of addressing post-trial delays, with particular emphasis on the role of the military judge in post-trial processing."[132] The CAAF rejected the government's assertion, holding that the ACCA had jurisdiction to review the case, and "was presented with a concrete dispute between adverse parties . . . regarding the appropriateness of the sentence in light of unreasonable post-trial delay."[133] The CAAF, however, noted parenthetically that "[t]he parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta."[134]

Dicta, constitutes the majority of the ACCA's opinion– "expressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent."[135] As Groucho Marx once famously stated, "A child of five could understand this. Get me a child of five."[136] Whether or not the ACCA's comments are *dicta* is arguably beside the point. A published opinion of the Army court acknowledged that it expects military judges to manage the post-trial process. The court also provided several options for the military judge to pursue when the government's post-trial processing of a case is dilatory, up to and including release of the accused from confinement and, in extraordinary cases, setting aside the findings and sentence.[137] United States Army SJAs are on clear notice of the court's thinking in this area, and ignore *Chisholm's dicta* at their peril.

In *United States v. Lepage*,[138] the NMCCA also faced the issue of the military judge's post-trial authority, but in an entirely different context. Like the ACCA in *Chisholm*, however, the NMCCA in *LePage* subscribed to an expansive view of the military judge's authority in the interim period from adjournment to authentication of the record of trial. In *Lepage*, the military judge erroneously admitted a record of a prior proceeding under Article 15, UCMJ into evidence during the presentencing proceeding.[139] In a post-trial session held under the provisions of Article 39(a), UCMJ, the military judge determined that admitting the exhibit was erroneous and that the court considered the erroneously admitted exhibit in arriving at a sentence, including the adjudged BCD, to the prejudice of the accused.[140] Relying on RCM 1009(a), however, which limits reconsideration of a sentence to "any time such sentence is announced in open session of the court,"[141] the military judge failed to take corrective action during that hearing.[142] Instead, the military judge recommended the convening authority disapprove the adjudged BCD. The convening authority declined to follow the military judge's recommendation.

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128. *Id*. at 737-38.

129. *Id*. at 738.

130. *Id*. at 738-39 (citation and footnotes omitted).

131. United States v. Chisholm, 59 M.J. 151, 152 (2003).

132. *Id*.

133. *Id.*

134. *Id*. (citing United States v. Campbell, 52 M.J. 386, 387 (2000)).

135. Black's Law Dictionary 454 (6th ed.1990).

136. Working Humor.com, Humorous Quotes Attributed to Grouch Marx, *available at* http://www.workinghumor.com/quotes/groucho_marx.shtml (last visited Apr. 9, 2004).

137. United States v. Chisholm, 58 M.J. 733, 738-39 (Army Ct. Crim. App. 2003).

138. 59 M.J. 659 (N-M. Ct. Crim. App. 2003).

The NMCCA held that "[t]his case should not even be before us for review . . . . [T]he military judge had the authority under RCM 1102(b)(2) to take corrective action."[143] Rule for Court-Martial 1102(b)(2) authorizes a military judge to resolve any matter which arises after trial and substantially affects the legal sufficiency of any findings of guilty or the sentence.[144] The specificity of that section, stated the NMCCA, takes precedence over the more general language of the reconsideration provisions of RCM 1009.[145] Finding that "[p]lain error leaps from the pages of this record,"[146] and after chastising the convening authority for failing to follow the military judge's recommendation to set aside the BCD, the NMCCA did not approve the discharge.[147]

Finally, the ACCA faced yet another issue arising from the military judge's post-trial authority in *United States v. McNutt*.[148] During a Bridge-the-Gap session, the military judge allegedly informed the parties that his adjudged sentence to seventy-days confinement was framed to take into account the amount of good time credit the Soldier would receive (five days per month), and to ensure that the Soldier would only serve sixty-days confinement.[149] The ACCA determined that there was no basis for impeaching the accused's sentence as this type of extraneous information was "within the general and common knowledge a military judge brings to deliberations" and therefore was not improperly before the military judge.[150]

The court went on to comment that discussions during Bridge-the-Gap sessions are "expected, and usually beneficial";[151] however,

> the core of the deliberative process remains privileged, and military judges should refrain from disclosing information . . . concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them . . . Military judges should therefore allow their findings and sentences to speak for themselves during "Bridge the Gap" sessions, and re-focus these sessions upon the conduct of counsel rather than the deliberations of the military judge.[152]

As in *Chisholm*, the ACCA's comments quoted above are clearly *dicta*. Although not binding, these comments signal the court's thinking and military judges, at least those in the Army, are wise to heed the court's comments.

Accused

In *Faretta v. California*,[153] the Supreme Court held that there is a constitutional right to self-representation at trial, provided there is a knowing and intelligent waiver of the right to counsel.[154] "An accused, desiring to proceed without counsel,

139. *Id*. at 660. The Article 15 was erroneously admitted because it predated by more than two years the offense for which the accused was on trial, in violation of naval regulations. *Id*.

140. *Id*.

141. MCM, *supra* note 4, R.C.M. 1009(a).

142. *Lepage*, 59 M.J. at 660.

143. *Id*. at 661. In the absence of the BCD, because the rest of the adjudged sentence included only fifteen-days confinement, forfeiture of $737 pay per month for one month, and reduction of E-1, the NMCCA would not have jurisdiction to review the case. *See* UCMJ, art. 66 (2002).

144. MCM, *supra* note 4, R.C.M. 1102(b)(2).

145. *LePage*, 59 M.J. at 661.

146. *Id*.

147. *Id*.

148. 59 M.J. 629 (Army Ct. Crim. App. 2003).

149. *Id*. at 630.

150. *Id*. at 632-33.

151. *Id*. at 633.

152. *Id*. (citations and footnotes omitted).

153. 422 U.S. 806 (1975).

154. *Id.* In contrast, there is no right under the Sixth Amendment to self-representation on direct appeal. Martinez v. Court of Appeal, 528 U.S. 152 (2000).

'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."'[155] Rule for Court-Martial 506(d) applies *Faretta* to the military.[156] The CMA in *United States v. Mix*, suggested a procedure that would satisfy the "knowing and intelligent" and "eyes wide open" language of *Faretta*.[157] The current colloquy in the *Military Judge's Benchbook* largely adopted the policy the CMA suggested in *Mix*.[158]

In *Iowa v. Tovar*,[159] the Supreme Court limited *Faretta's* application in cases in which a defendant proceeds *pro se* at a guilty plea instead of a contested trial. Prior to proceeding *pro se* at a guilty plea, the Court held that the Sixth Amendment to the U.S. Constitution is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."[160] Further warnings, not required by the Sixth Amendment, include the following:

> (1) advis[ing] the defendant that waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.[161]

Before allowing an accused to proceed *pro se*, RCM 506(d) requires the military judge to find that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.[162] While RCM 506(d) is based on *Faretta*,[163] its requirements are not limited to contested cases.[164] Accordingly, because the President currently provides service members with protections above those required by the Sixth Amendment, the Court's holding in *Tovar* does not apply to military practice.[165]

Voir Dire and Challenges

This past year was active in the area of *voir dire* and challenges at all judicial levels, including the Supreme Court, federal circuit courts, the CAAF, and service courts. In particular, the CAAF continued its expansive view of the implied bias doctrine and the federal circuits weighed in on an open issue: whether a peremptory challenge based on religion is prohibited based on the rationale of *Batson v. Kentucky*[166] and its progeny.

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155. United States v. Mix, 35 M.J. 283, 285 (C.M.A. 1992) (citing *Faretta*, 422 U.S. at 835).

156. MCM, *supra* note 4, R.C.M. 506(d).

> *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

Id.

157. *Mix*, 35 M.J at 289-90.

158. BENCHBOOK, *supra*, note 6, at 109.

159. 124 S. Ct. 1379 (2004).

160. *Id*. at 1382.

161. *Id*. at 1383.

162. MCM, *supra*, note 4, R.C.M. 506(d); *see supra* note 156.

163. MCM, *supra*, note 4, analysis at A21-30.

164. *Id*. R.C.M. 506(a) (describing the right to counsel "before a general or special court-martial") *see also* UCMJ art. 27 (2002).

165. *See, e.g.*, United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (explaining the hierarchical source of rights in the military justice system).

> These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law . . . . Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual.

Id.

Challenges for Cause

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[167] One way this right is enforced is through the *voir dire* process, including the removal of unqualified members through the exercise of challenges for cause, as well as the peremptory challenge. Rule for Court-Martial 912 sets forth several bases to challenge a member for cause, including "whenever it appears that the member . . . should not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[168] While both prosecution and defense are entitled to unlimited challenges for cause, each side is limited to one peremptory challenge.[169] "In light of the manner in which members are selected to serve on courts-martial, including the single peremptory challenge afforded counsel under the UCMJ, [the CAAF] has determined that military judges must *liberally grant* challenges for cause."[170]

A challenge for cause can be based on either actual or implied bias, both of which are encompassed in RCM 912(f)(1)(N).[171] "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[172] A challenge for cause based on actual bias is a subjective determination based on the credibility of the member; accordingly, the military judge's decision is given great deference because of his or her opportunity to observe the demeanor of court members and assess their credibility during *voir dire*.[173] Implied bias, however, is reviewed under an objective standard, viewed through the eyes of the public.[174] "[A]t its core, implied bias addresses the perception or appearance of fairness of the military justice system."[175] Reflecting this difference in focus, the military judge's ruling on challenges for cause based on actual bias are reviewed for an abuse of discretion; "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[176]

Over the last few terms, the CAAF has arguably expanded the doctrine of implied bias, a trend that continued this past term. Cases illustrating this trend include *United States v. Armstrong*,[177] *United States v. Wiesen*, [178] and *United States v. Miles*.[179]

In *Miles*, the accused pled guilty to wrongful use of cocaine.[180] The CAAF set aside the sentence finding that the military judge abused his discretion by failing to grant a defense challenge for cause based on implied bias. During *voir dire*, one of the members revealed his ten year-old nephew died as a result of his mother's pre-natal use of cocaine.[181] The member described the tragedy in an article in the base newspaper scheduled for publication four days later, and he remarked that the charges against the accused "triggered memories of his nephew's illness and death."[182] Moreover, the trial counsel commented during individual *voir dire* of the member that the event "evidently" was "a very traumatic experience" for him

166. 476 U.S. 79 (1986).

167. United States v. Downing, 56 M.J. 419, 421 (2002) (citation omitted).

168. MCM, *supra* note 4, R.C.M. 912(f)(1)(N).

169. UCMJ, art. 41(a)(1).

170. *Downing*, 56 M.J. at 422 (citation omitted).

171. *See* United States v. Daulton, 45 M.J. 212, 216 (1996).

172. United States v. Wiesen, 56 M.J. 172, 174 (2001), *recons. denied*, 57 M.J. 48 (2002).

173. *Daulton*, 45 M.J. at 217.

174. *Id*.

175. *Downing*, 56 M.J. at 422.

176. *Id*. (citation omitted).

177. 54 M.J. 51 (2000) (affirming the lower court's setting aside of the contested findings of guilty and sentence based on implied bias); *see* Lieutenant Colonel John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, ARMY LAW., Apr. 2001, at 25-28.

178. 56 M.J. 172, 174 (2001), *recons. denied*, 57 M.J. 48 (2002) (setting aside findings and sentence when brigade commander and subordinates he commanded, rated, or supervised made up two-thirds majority necessary to convict).

179. 58 M.J. 192 (2003). *But see Downing*, 56 M.J. at 419 (affirming military judge's denial of challenge for cause based on implied bias when member was friends with the prosecutor, had worked with him, bought a car from him, and had been to his beach house).

180. *Miles*, 58 M.J. at 193.

181. *Id*.

and his family.[183] The military judge denied the defense challenge for cause, finding no actual or implied bias. The defense preserved the challenge for appeal by using its peremptory challenge to remove the member, stating that but for the judge's ruling, the defense would have exercised its peremptory challenge against another member.[184]

The CAAF found the military judge abused his "limited discretion" in the area of implied bias.[185] "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system."[186] The lesson of *Miles* is clear: although the court reiterated that "[a] member is not per se disqualified if he or she or a close relative has been a victim or a similar crime, [w]here a particularly traumatic similar crime was involved,"[187] the military judge's denial of a challenge for cause violates the liberal-grant mandate.[188]

Chief Judge Crawford dissented, expressing the view that "[e]ven though the military judge abused his discretion by denying a defense challenge for cause, the error was rendered harmless by the defense's use of his peremptory challenge to remove the same member."[189] In the Chief Judge's view, "R.C.M. 912(f)(4) does not create a *per se* rule of reversal . . ."[190] By exercising a peremptory challenge against that member, *and not identifying another member* he would have challenged, the appellant secured a fair and impartial panel. Accordingly, in the Chief Judge's view, the military judge's error in denying the defense challenge for cause was harmless.[191]

Chief Judge Crawford advocated that the military adopt the Supreme Court's view of denied causal challenges—the denied challenge is rendered harmless when the defense exercises a peremptory challenge to remove the same member.[192] The rationale of the Court is that the Sixth Amendment guarantees a fair and impartial jury; however, because there is no constitutional right to a peremptory challenge, there is no violation of the right to a fair and impartial jury if the defense is forced to use its peremptory challenge.[193] Notwithstanding the Supreme Court's pronouncements in this area, a majority of the CAAF has repeatedly refused to apply this rationale to the military.[194]

Challenges During and After Trial

Although challenges to court members are normally made prior to the presentation of evidence, RCM 912(f)(2)(B) per-

182. *Id*.

183. *Id*. at 194.

184. *Id*.; *see* MCM, *supra* note 4, R.C.M. 912(f)(4).

185. *Miles*, 58 M.J. at 195.

186. *Id*.

187. *Id*.

188. *Id.*; *see also* United States v. White, No. 2001132 (Army Ct. Crim. App. Dec. 8, 2003). (unpublished). The appellant was charged with attempted murder of his wife, and convicted of assault with intent to inflict grievous bodily harm as well as other offenses. The ACCA held that the military judge abused his discretion by denying a defense challenge for cause against a member whose wife was a victim of domestic abuse by her first husband. Individual *voir dire* revealed that the member's wife suffered a broken neck from the abuse; the member stated, "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While the ACCA found no abuse of discretion as to actual bias, the court found error as to implied bias. "On these facts, an objective observer would likely question the fairness of the military justice system." The contested findings and sentence were set aside. *Id.*

189. *Id*. at 195-96 (Crawford, C.J., dissenting).

190. *Id*. at 196.

191. *Id.* at 198.

192. Ross v. Oklahoma, 487 U.S. 81 (1988) (stating that such a practice does not violate the Sixth Amendment right to a jury trial); *see also* United States v. Martinez-Salazar, 528 U.S. 304 (2000) (stating that such a practice does not violate the due process clause of the Fifth Amendment).

193. *Ross*, 487 U.S. at 86, 88, *quoted in* Miles, 58 M.J. at 196 (Crawford, J., dissenting).

194. United States v. Armstrong, 54 M.J. 51, 54 (2000) (rejecting harmless error analysis when denial of challenge for cause results in use of peremptory challenge to excuse member); *see also* United States v. Wiesen, 56 M.J. 172, 177 (2001), *recons denied*, 57 M.J. 48 (2002); *see also generally* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990) (explaining rationale of RCM 912(f)(4)). In the face of the CAAF's clear rulings on this issue, the AFCCA has nonetheless held that the erroneous denial of a challenge for cause was harmless. *See* United States v. Williams, No. 33771, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. May 20, 2003) (unpublished) (stating that although the military judge abused his discretion in granting the trial counsel's challenge for cause against a disabled member over defense counsel's objection, the error was harmless). "An erroneous ruling on a challenge for cause does not automatically violate the right to an impartial jury . . . . If the court members who heard the case were impartial, the right is not violated." *Id.* at *18.

mits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist."[195] Peremptory challenges may not, however, be made after the presentation of evidence begins.[196] Two service court cases from the last year faced the issue of challenges arising after the panel is assembled but prior to findings. Two CAAF cases address potential challenges that arise after adjournment of the court-martial.

During a lunch break in the proceedings in *United States v. Camacho*,[197] which occurred after completion of the government's case on the merits and rebuttal, the president of the panel was overheard stating to a government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger."[198] After hearing evidence and initially denying a defense challenge for cause against the member, the military judge heard additional evidence and granted the challenge.[199] Following the challenge, only two members remained. Consequently, the panel was below the three members required for a quorum in a special court-martial.[200] The convening authority detailed four new members, two of whom remained after *voir dire* and challenges.[201] Without defense objection and in the absence of the remaining original members, the newly empaneled members were read all the arguments and testimony, before resuming the proceedings.[202] This procedure is in accordance with RCM 805(d).[203] The NMCCA affirmed this process despite an appellate allegation that RCM 805(d)(1) is unconstitutional.[204]

> The gist of appellant's constitutional argument is that, in effect, two different panels received the evidence in very different ways, the old panel of two members having had the opportunity to observe the demeanor of all the witnesses with the new panel of two members not having that opportunity. Thus under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, the appellant was deprived of her right to have the finders of fact evaluate the demeanor of each of the witnesses.[205]

The NMCCA did not directly decide the constitutional challenge, instead finding the defense engaged in a *de facto* waiver of its rights under the Confrontation Clause.[206] "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . . ."[207]

In *United States v. Bridges*,[208] the Coast Guard Court of Criminal Appeals (CGCCA) addressed a separate issue involving *voir dire* after the court is empaneled. In *Bridges*, the defense counsel moved to impeach the court's findings after they were announced due to alleged unlawful command influence.[209] The defense discovered an electronic mail (e-mail) from the SJA discussing a child sex abuse case—the appellant was also tried and convicted of sexually abusing a child.[210] The e-mail was sent approximately six weeks prior to the court con-

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195. MCM, *supra* note 4, R.C.M. 912(F)(2)(B).

196. *Id*. R.C.M. 912(g)(2).

197. 58 M.J. 624 (N-M. Ct. Crim. App.), *petition denied*, 59 M.J. 144 (2003).

198. *Id*. at 631.

199. *Id*. at 631-32.

200. *Id.* at 632 (citing UCMJ art. 16 (2002)).

201. *Id.*

202. *Id.*

203. MCM, *supra* note 4, R.C.M. 805(d)(1).

> When after presentation of evidence on the merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

Id. The discussion to the rule states, "When the court-martial has been reduced below a quorum, a mistrial may be appropriate." *Id.* Discussion.

204. United States v. Camacho, 58 M.J. 624, 632-33 (N-M. Ct. Crim. App.), *petition denied*, 59 M.J. 144 (2003).

205. *Id*.

206. *Id*. at 633; *see also* U.S. CONST. amend. VI.

207. *Camacho*, 58 M.J. at 633.

208. 58 M.J. 540 (C.G. Ct. Crim. App. 2003).

vening in *Bridges*, and included a summary of the facts of a recent appellate decision involving sex abuse. The e-mail was intended "to let people know that, even among our Coast Guard ranks, we have people who hurt children," and listed suggested actions that might be appropriate if one of the recipients of the message received a report of similar misconduct.[211]

The defense counsel claimed that, had she known of the e-mail, she would have questioned the members about it during *voir dire* and "might have elicited some information as to bias."[212] "Trial defense counsel did not challenge any member for cause after learning of the SJA's e-mail or specifically ask the military judge to permit additional *voir dire* on that issue."[213] The CGCCA held that the e-mail on its own was not "an apparent ground for challenge for cause" and ruled that the military judge did not abuse his discretion by failing to *sua sponte* reopen *voir dire*.[214]

As stated previously, two recent CAAF cases discuss issues concerning *voir dire* that arose after the court-martial is adjourned. In the first of these cases, *United States v. Humpherys*,[215] the defense submitted a post-trial motion for a new trial because two of the members were in the same rating chain, although both answered the military judge's question on that issue during group *voir dire* in the negative.[216] The military judge held a post-trial session under the provisions of Article 39(a), UCMJ, and questioned the involved members. Both responded that they did not remember the military judge asking the question and that their answers were not an effort to conceal the rating chain relationship.[217] The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship.[218] Accordingly, the military judge denied the defense motion for a new trial.[219]

The CAAF affirmed, reiterating the two-part showing a party must satisfy in order to merit a new trial for information not disclosed during *voir dire*. First, the party "must demonstrate that the panel member failed to answer honestly a material question on voir dire."[220] Second, the party must demonstrate "that a correct response would have provided a valid basis for a challenge for cause."[221] The CAAF stated that "an evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries" and the appellate court's role in the process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions."[222] The CAAF concluded the military judge did not abuse his discretion after he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."[223]

In contrast to the military judge's astute actions in *Humpherys*, the military judge in *United States v. Dugan* refused to grant a post-trial Article 39(a), UCMJ, session to *voir dire* members concerning alleged unlawful command influence that occurred during the panel's deliberations.[224] One of the members asserted that during deliberations, the panel discussed a recent "commander's call" wherein the commander spoke of

209. *Id.* at 550.

210. *Id.* at 542.

211. *Id.* at 550.

212. *Id.*

213. *Id.* at 551.

214. *Id.*

215. 57 M.J. 83 (2002).

216. *Id.* at 95.

217. *Id.*

218. *Id.*

219. *Id.* at 97.

220. *Id.* at 96.

221. *Id.*

222. *Id.*

223. *Id.* at 97.

224. United States v. Dugan, 58 M.J. 253, 255 (2003).

the "increasing problem of ecstasy use." The appellant was convicted, *inter alia*, of wrongful use of ecstasy.[225]

The CAAF remanded for a *Dubay* hearing. "[D]eliberations of court-martial members ordinarily are not subject to disclosure,"[226] however,

> under Military Rule of Evidence 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: "(1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred."[227]

The members' comments about the commander's call raised the issue of whether unlawful command influence has occurred and merited an additional fact-finding hearing.[228]

At the hearing, the court ruled that Military Rule of Evidence 606(b) permitted questioning of the members concerning the unlawful command influence issue. The Rule "permits voir dire of the members regarding what was said during deliberations about [the alleged unlawful command influence comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."[229] Expect additional appellate litigation in *Dugan* following the *Dubay* hearing's completion.

Batson *Challenges (Peremptory Challenges)*

It has been almost twenty years since the Supreme Court's landmark decision in *Batson v. Kentucky*, which prohibited race-based peremptory challenges.[230] The Court extended *Batson* to gender-based challenges shortly thereafter.[231] In order to prove a "*Batson* violation," the party alleging improper use of a peremptory challenge must satisfy a three-part test:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[232]

The CMA applied *Batson*, including the three-part test, to the military through the Fifth Amendment due process clause.[233] Because military practitioners are permitted only one peremptory challenge, however, the first part of the three-part test, establishing a prima facie case of discrimination, is *per se* satisfied when a peremptory challenge is lodged against a minority or female.[234] Another distinction between military and

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225. *Id*. at 254.

226. *Id*. at 256 (quoting MCM, *supra* note 4, R.C.M. 923 (Discussion)).

227. *Id*. (citation omitted). Military Rule of Evidence 606(b) states:

> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

MCM, *supra* note 4, MIL. R. EVID. 606(b).

228. *Dugan*, 58 M.J. at 259.

229. *Id*. at 260.

230. Batson v. Kentucky, 476 U.S. 79 (1986).

231. J. E. B. v. Alabama *ex rel*. T. B, 511 U.S. 127 (1994).

232. Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citing *Batson*, 476 U.S. at 97-98).

233. United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988); *see also* United States v. Green, 36 M.J. 274, 278, n.2 (C.M.A. 1993) (setting forth the three-part test).

234. United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989).

Supreme Court case law concerns the sufficiency of the rationale provided to rebut a prima facie case—part two of the three-part test. In *Purkett v. Elem*,[235] the Supreme Court held that

> the second step of this process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.[236]

In other words, the Supreme Court focused on the genuineness of the rationale provided, rather than its reasonableness. In contrast, in *United States v. Tulloch*,[237] the CAAF held that in order to rebut a prima facie case of discrimination, the challenged party's proferred rationale must not be "unreasonable, implausible, or [one] that otherwise makes no sense."[238]

Last term, in *Miller-el v. Cockrell*,[239] the Supreme Court commented on the third part of the *Batson* test—whether the party lodging the challenge has carried his burden of proving purposeful discrimination. In so doing, the Court may have signaled a move closer to the military's standard of reasonableness set forth in *Tulloch*, although the Court would not apply that standard until the third part of the *Batson* test. In an 8-1 opinion by Justice Kennedy, the Court reversed a lower court decision and remanded a death penalty case for further proceedings based on allegations that the prosecution systematically exercised its peremptory challenges to exclude African-American jurors.[240]

In *Miller-el*, after challenges for cause were exercised, Dallas County prosecutors peremptorily challenged ten of eleven remaining African-American venire members.[241] The prosecution was allotted and used fourteen peremptory challenges in total.[242] The Court discussed some of the evidence of discriminatory *voir dire* practices presented by the defense throughout direct and collateral appeals of the case: the prosecution questioned African American prospective jurors differently than white jurors; the prosecution engaged in a practice known as "jury shuffling," which tended to exclude black jurors; and, finally, evidence of a "systematic policy of excluding African-Americans from juries."[243] This latter evidence was adduced from former prosecutors in the Dallas County office and actual policy documents available to prosecutors at the time of petitioner's trial, including a circular that read, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[244]

Applying the three-step *Batson* test, the state conceded the petitioner satisified step one: demonstrating a prima-facie claim of discrimination; and the petitioner acknowledged the state proceeded through step two by offering race-neutral explanations for strikes.[245] What remained to be determined, according to the Court, was whether the petitioner established step three: proving purposeful discrimination.[246] Crucial to this determination is the "persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[247] The Court determined that the issue came down to "whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."[248] It is here that the lower courts' rationale fell short, as those courts merely accepted the state court's finding of credibility of the prosecutor's proferred

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235. 514 U.S. 765 (1995).

236. *Id.* at 768 (internal quotation and citation omitted).

237. 47 M.J. 283 (1997).

238. *Id*. at 287.

239. 537 U.S. 322 (2003).

240. *Id*. at 348.

241. *Id*. at 331.

242. *Id*. at 342.

243. *Id*. at 332-34.

244. *Id*. at 334-35.

245. *Id*. at 338.

246. *Id.*

247. *Id*. at 338-39 (citation and internal quotation omitted).

rationale, and did not consider that credibility in light of all the other evidence of purposeful discrimination.

Although *Tulloch* focused on the second-part of the *Batson* test and on reasonableness, rather than the genuineness of the proffered rationale for the strike, *Miller-el* nonetheless offers guidance to military practitioners. The factors the Supreme Court set forth provide some basis to determine whether the proferred rationale is one that is reasonable, plausible, and otherwise makes sense. In addition, the factors the Court listed in *Miller-el* apply to the third part of the *Batson* test as applied to the military.

The CAAF examined whether a specific rationale satisfied the *Tulloch* standard in *United States v. Hurn*.[249] The defense counsel objected after the trial counsel exercised the government's peremptory challenge against the panel's only non-Caucasian officer.[250] The trial counsel responded that his basis "was to protect the panel for quorum."[251] The CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.[252] That did not end the court's inquiry, however, and two and one-half years after the trial, the trial counsel filed an affidavit setting forth additional reasons for challenging the member in question. Based on the affidavit, the CAAF remanded the case for an additional fact-finding hearing.[253]

The CAAF examined *Hurn* once again this past term following completion of the fact-finding hearing.[254] At the hearing, the trial counsel testified that he also removed the member because the member had expressed concern about his "pressing workload."[255] The military judge determined that this challenge was race-neutral and the CAAF affirmed, finding no "clear error."[256]

How do the military judge's findings and the CAAF's holding in *Hurn* square with *United States v. Greene*,[257] which held that a "mixed motive" peremptory challenge, that is a challenge that includes one motive for striking that is impermissible and one motive that is permissible, is a violation of *Batson*? One way might be that, while the original rationale provided in *Hurn* did not satisfy *Tulloch's* requirement of reasonableness and plausibility, that rationale was not overtly discriminatory, as was the offending secondary rationale in *Green*.[258]

The NMCCA examined a second rationale in *United States v. Allen*.[259] In *Allen*, the government challenged an officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law."[260] The military judge denied the challenge for cause and the government exercised its peremptory challenge against the same member.[261] The defense made a *Batson* objection and the government proffered the same rationale previously provided to justify the challenge for cause.[262] The NMCCA held that the government's rationale articulated a race neutral, reasonable, plausible reason for challenge that otherwise made sense, and further, the fact that the proffered rationale for the peremptory challenge mirrored the rationale for the

248. *Id*. at 339.

249. 55 M.J. 446, *recons. denied*, 56 M.J. 252 (2001).

250. *Id*. at 447-48.

251. *Id*. at 448.

252. *Id*.

253. *Id*. at 448-49.

254. United States v. Hurn, 58 M.J. 199 (CAAF), *recons. denied* 58 M.J. 293, *cert. denied*, _ U.S. _, 124 S.Ct. 416 (2003).

255. *Id*. at 200.

256. *Id*. at 201.

257. 36 M.J. 274 (C.M.A. 1993).

258. *Id*. at 277 (stating that the prohibited rationale was, as stated by the trial counsel, that the member possessed a "Latin macho type of attitude which I think a lot of the males in Panama still have; what we would call 'a macho type of attitude,' and that spills over into the sexual arena." The non-discriminatory rationale proferred was that the member would hold against the trial counsel the fact that the military judge had to instruct him on keeping an open mind with regard to sentencing).

259. 59 M.J. 515 (N-M Ct. Crim. App. 2003), *aff'd*, 59 M.J. 478 (2004).

260. *Id*. at 529.

261. *Id*.

262. *Id*.

denied challenge for cause added to the credibility of the peremptory rationale.[263] Finally, the court noted that the government could have used its peremptory challenge to remove a second member whose challenge for cause was also denied. This, however, did not make its exercised challenge an impermissible one.[264]

The Supreme Court has not ruled on whether *Batson's* rationale extends any further than race and gender discrimination. Because part of the focus of *Batson* and its progeny is protecting the equal protection right of jurors or panel members to serve, *Batson's* protections could arguably extend to other groups protected under the equal protection clause. For example, the equal protection clause prohibits discrimination based on religion. The CMA noted that "the Supreme Court has not extended *Batson* to challenges based on religion,"[265] however, like the Supreme Court, the CAAF has also never squarely faced the issue of whether *Batson* extends to religion-based peremptory challenges.

Two federal circuits, however, faced this issue during the past year. Both concluded that *Batson's* protections extend to religion-based peremptory challenges, but distinguished between strikes motivated by religious beliefs or heightened religious activities, and strikes motivated by religious affiliation. The Third Circuit is the first federal circuit to directly address *Batson's* applicability to religious-based challenges. In *United States v. DeJesus*, the court drew a distinction between a permissible strike motivated by "heightened religious involvement" and one motivated by "a specific religious affiliation."[266] In *DeJesus*, the government peremptorily struck two jurors.[267] One juror stated the following in his questionnaire: (a) his hobbies involve civic activities with his church; (b) he reads the Christian Book Dispatcher; (c) he holds several biblical degrees; (d) he is a deacon and Sunday School teacher in the local church; and, (e) he sings in a couple of church choirs.[268]

The second challenged juror revealed that "(a) he is an officer and trustee in his church; (b) he reads the Bible and related literature; and (c) his hobbies are church activities."[269] The defense posed a *Batson* challenge based on race, because both of the challenged jurors were African-American. The government responded that the strike against the first juror "was based [*inter alia*] on the juror's high degree of religious involvement," and the strike against the second juror was because his "fairly strong religious beliefs might prevent him from rendering judgment against another human being."[270] The defense stated that *Batson* prohibits strikes based on religion and urged the court to deny the government's peremptory challenges.[271] The district court denied the defense's *Batson* challenge, stating, "[i]ts understanding that the defendant's challenge was not a challenge based on some denomination of religion, but it is a challenge based upon how the jurors chose to spend their time, reading the bible."[272] In so doing, the "District Court assumed that the categorical striking of a juror based upon denomination affiliation . . . would be constitutionally offensive to the guarantee of free religious affiliation."[273] The district court found, however, that the government's proferred rationale did not rest on religious affiliation; rather, the rationale related to concerns manifested by the jurors' "unusual degree of involvement in church activities and religious readings, but not directly associated with a specific religion, that may affect the jurors' judgment of others."[274]

On appeal from his conviction, DeJesus alleged that "*Batson* extends to peremptory strikes based on religious affiliation and that the government impermissibly struck [the two jurors] on the basis of their Christian affiliation.[275] Further, DeJesus main-

263. *Id*. at 530.

264. *Id*. at 529-30.

265. United States v. Williams, 44 M.J. 482, 485 (1996) (holding that *Batson* did not prohibit challenge based on a member's fraternal organization—the Masons; the record was "devoid of any information as to [the challenged member's] religious affiliation or beliefs").

266. 347 F.3d 500, 502 (3d Cir. 2003), *cert. denied*, _ U.S. _, 124 S.Ct. 2811 (2004).

267. *Id*. at 502.

268. *Id*.

269. *Id*.

270. *Id*. at 503 (internal quotations and citation omitted).

271. *Id*.

272. *Id.* (internal quotation and citation omitted).

273. *Id*. at 509.

274. *Id*.

275. *Id.* at 505.

tained that the jurors' religious affiliations—Christian—"were made apparent by their responses to the questionnaires."[276] The government responded "that the strikes were based only on the jurors' beliefs and that strikes based on beliefs, even if religiously-inspired, are permissible."[277]

The court noted that there was "no clear consensus among the other [federal] Circuits on this issue"[278] and that there are varying approaches by the state courts.[279] Because the court affirmed the trial court's "finding that the government's strikes were based on the jurors' heightened religious involvement rather than their religious affiliation, [it did not] reach the issue of whether a peremptory strike based solely on religious affiliations would be unconstitutional."[280] The court added that even if it assumed "the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not."[281] Accordingly, the trial court's "finding that the government struck [the jurors] out of concern that their heightened religiosity would render them unable or unwilling to convict was not erroneous."[282]

Following the Third Circuit's opinion in *DeJesus*, the Second Circuit faced the same issue in *United States v. Brown*.[283] In *Brown*, the prosecutor peremptorily challenged a juror in part because of the juror's "avid participation in church affairs."[284] The defense posed a race-based *Batson* challenge, but did not allege a religion-based challenge. As a result, the Second Circuit reviewed the appellate claim of a religious-based challenge for plain error.[285] To establish plain error in federal court:

> [T]here must be (1) error, (2) that is plain, and (3) that affects substantial rights . . . . If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[286]

Remarkably, despite a lack of precedent from the Supreme Court, the *Brown* court found that "if a prosecutor, when challenged said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain."[287] The court explained:

> Exercising peremptory strikes simply because a venire member affiliates herself with a certain religion is therefore a form of state-sponsored group stereotype rooted in, and reflective of, historical prejudice. Such strikes, like those based on race and gender, cause harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. That harm flows directly from the government's participation in the perpetuation of these invidious group stereotypes and the inevitable loss of confidence in our judi-

276. *Id*. at 510.

277. *Id*.

278. *Id.*

279. *Id.* (citing and *comparing* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding that exclusion of jurors based on religious affiliation would violate the state constitution's Equal Protection Clause), State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory strikes based upon religious affiliation or membership), *and* Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998) (holding that state constitutional and statutory law prohibit the exercise of peremptory challenges based solely on a person's religion), *with* Casarez v. State, 913 S.W.2d 468, 496 (Texas Crim. App.1994) (*en banc*) (holding that "interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries . . . on the basis of their religious affiliation."), *and* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes on the basis of religious affiliation)).

280. *Id*.

281. *Id*.

282. *Id*. at 511.

283. 352 F.3d 654 (2d Cir. 2003).

284. *Id*. at 658.

285. *Id*. at 663.

286. *Id*. (internal quotations and citations omitted). *Compare id.*, *with United States v. Powell*, 49 M.J. 460 (1998) (holding that, due to UCMJ, art. 59(a), to merit relief for plain error in the military, there must be error; the error must be plain, that is clear or obvious, and the error must materially affect the appellant's substantial rights).

287. *Id.* at 669.

> cial system that state-sanctioned discrimination in the courtroom engenders.[288]

The prosecution's rationale in *Brown*, focusing on the juror's activities in church groups, is not as simple.[289] This differentiation "on the basis of [] activities does not plainly implicate the same unconstitutional proxies as distinctions based solely on religious identity."[290] While the court admitted that "[t]his may be a dubious inference . . . that does not make it an unconstitutional one."[291] Accordingly, any error in granting the challenge did not amount to plain error under the facts of the case.

The discussion of whether *Batson* applies to religion-based challenges and the distinction between religious activities and religious affiliation is an interesting, and perhaps critical issue for constitutional purposes. Because neither the CAAF nor the Supreme Court have ruled on the issue, trial practitioners, in particular trial counsel, are wise to avoid peremptory challenges based solely on religious affiliation. In the absence of a definitive decision from the CAAF in particular, a peremptory challenge based on religious affiliation may engender a conviction now but a reversal down the road.

Pleas and Pretrial Agreements

Introduction

In order to ensure that a guilty plea is truly knowing and voluntary, the CMA established the "*Care*" inquiry, named after the 1969 seminal case of the same name.[292] The *Care* inquiry is based on Federal Rule of Criminal Procedure 11, which governs plea procedures in federal criminal guilty pleas, Supreme Court case law interpreting the Constitution, and Article 45, UCMJ, and is now largely codified in RCM 910. The *Military Judge's Benchbook* provides a detailed script for the military judge to follow to ensure the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed.[293]

Despite the long-standing requirements of *Care* and its progeny, the hallmark of this past year's decisions concerns a lack of attention to detail and a resulting failure to comply with *Care's* mandate. From the beginning to the end of the plea inquiry, military judges are neglecting to follow the *Benchbook* script and are leaving out crucial requirements necessary to ensure a knowing and voluntary plea. Instead of speaking up to correct the military judge, trial counsel are remaining silent. Due to this dual neglect, the appellate courts are setting aside findings of guilt and, when appropriate, sentences.

Case law in the pretrial agreement area continues the trend of expansive permissible bargaining. This expansion, however, is not without limits, as a case from the Navy-Marine court reminds practitioners. Finally, three cases this past year discuss a recurring issue with regard to conditional guilty pleas and all three caution both the government and the military judge on the use and effect of those pleas.

Advice Concerning Rights Waived by Plea

Following Supreme Court case law of the same year, *Care* mandated a crucial and constitutionally required ingredient to a knowing and voluntary plea:

> the record must [] demonstrate the military trial judge . . . personally addressed the accused, [and] advise[] him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him, and that he waives such rights by his plea.[294]

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288. *Id.* (citations and internal quotations omitted).

289. *Id.*

290. *Id.*

291. *Id. See also* United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998) (focusing on the distinction between religious affiliation and religious belief).

> It is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief. It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing; suppose for example that his religion taught that crimes should be left entirely to the justice of God. In between and most difficult to evaluate from the standpoint of *Batson* is a religious outlook that might make the prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant. That appears to be this case.

Id. at 1114. The Seventh Circuit did not decide the issue as it found no plain error. *Id.*

292. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

293. *See* BENCHBOOK, *supra* note 6.

294. *Id.* at 541. *See* Boykin v. Alabama, 395 U.S. 238 (1969); *see also* MCM, *supra* note 4, R.C.M. 910(c).

In *United States v. Hansen*,[295] the CAAF addressed the effect of a military judge's failure to inform the accused of any of the three rights waived by his plea. While the court denoted these rights "central to the American perception of criminal justice,"[296] and "fundamental to the military justice system,"[297] the court nonetheless declined to adopt a per se rule that a failure to fully advise an accused of these rights mandates reversal. The court stated, "What is important, in our view, is that the accused is aware of the substance of his rights and voluntarily waives them."[298] This determination is based, according to the court, not on whether there is "exemplary compliance" with *Care*, but rather "whether the combination of all the circumstances leads the court to conclude that the accused's plea was informed and voluntary."[299]

Applying this analysis, the court determined the military judge's statements, when combined, adequately apprised Hansen that, by pleading guilty, he gave up the right to a trial of the facts by the court.[300] The court was not satisfied, however, that the same was true as to the right of confrontation and the right against self-incrimination. "The combination of all the circumstances surrounding the judge's statements regarding those particular rights falls short of demonstrating that Appellant's guilty plea and waiver of the rights was informed and voluntary . . . ."[301] The court concluded:

> Pretrial agreements are mortar and brick in the military justice system. The knowing and intelligent waiver of constitutional rights is the foundation upon which they rest. This Court does not require incantation of constitutional formulas. However, we do require a record of confidence that an individual accused had his rights explained to him, understood his rights, and knowingly and intelligently waived them. Because the relinquishment of these bedrock constitutional rights is the essence of the plea bargain, we will not presume or imply that a military accused understood them and waived them, absent a demonstrable showing in the record that he did in fact do so.[302]

What is most interesting about the *Hansen* decision is that, without even citing to it, the court's opinion completely rejects Supreme Court precedent in this area. In *United States v. Vonn*,[303] the Court addressed the issue of a trial judge's failure to inform a defendant entering a guilty plea that, in accordance with Federal Rule of Criminal Procedure 11 (upon which RCM 910 is based), he had a constitutional right to the assistance of counsel should he plead not guilty and proceed to trial. The Court made two findings: first, that by failing to object to the judge's omission, Vonn waived the issue for appeal absent plain error. Therefore, on appeal it was the defense's burden to prove error—plain and obvious error—that affected Vonn's substantial rights.[304] Second, in determining whether there is plain error in a guilty plea advisement, the court may look beyond the plea colloquy to other parts of the official record to see whether the defendant's substantial rights were affected.[305]

Chief Judge Crawford, in her dissent in *Hansen*, advocated adopting *Vonn's* plain error requirement when the accused fails to object to the judge's failure to advise of the rights waived by a plea.[306] The majority soundly rejected *Vonn* and the rationale underlying the Supreme Court's opinion—that *the defense* bears some responsibility for ensuring the accused understands the rights he foregoes by pleading guilty, and that, on appeal, a failure to object to lack of advisement of those rights waives

295. 59 M.J. 410 (2004).

296. *Id*. at 411.

297. *Id*.

298. *Id*. at 412.

299. *Id*. (internal quotations and citations omitted).

300. *Id*. at 413.

301. *Id.*

302. *Id*. at 413-14.

303. 535 U.S. 55 (2002).

304. The Court later expounded on what showing is necessary to demonstrate an affect on one's substantial rights. In *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004), the Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea."

305. *Vonn*, 535 U.S. at 61. Because the Circuit Court of Appeals considered only the plea colloquy, the Supreme Court reversed and remanded for further consideration in light of its opinion. On remand, the Circuit Court affirmed the conviction. United States v. Vonn, 294 F.3d 1093 (9th Cir. 2003).

306. United States v. Hansen, 59 M.J. 410, 415 (Crawford, C.J., dissenting).

them absent plain error—by simply affirming that, "After all, *the military judge* is required to ensure that the accused personally understands the rights he is about to waive." [307] After *Hansen*, it is clear that in the military justice system, the defense bears no such burden.

Factual Basis for Plea

A critical area of the plea inquiry involves ensuring the plea has a sufficient factual predicate. To establish a sufficient factual predicate, the military judge must fully explain the elements of the offenses to which the accused is pleading guilty. As stated in *Care*,

> [T]he record of trial . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which his is pleading guilty.[308]

The CAAF and the service courts continue to confront military judges' failure to comply with this mandate to sufficiently explain the elements of the offenses. In *United States v. Redlinski*,[309] the CAAF set aside an improvident plea and the resulting sentence because the military judge failed to adequately explain the elements of attempted distribution of marijuana. The military judge advised the accused of the elements of the completed offense of distribution and put the word "attempted" in front of those elements.[310] In doing so, the military judge failed to advise the appellant of the four elements of attempt: (1) an overt act; (2) done with specific intent to commit an offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.[311]

The court reiterated that, in order for a plea to be knowing and voluntary, *Care* requires the record of trial to "reflect" that the elements of each offense charged have been explained to the accused by the military judge.[312] "If the military judge fails to do so, he commits reversible error unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty."[313] The court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially."[314] By describing attempt as a "complex, inchoate offense," in contradiction to a more simple military offense, and finding no evidence that the accused understood the four elements of attempt "either explicitly or inferentially," the court concluded that the plea to attempted distribution of marijuana was improvident.[315]

As in *Redlinski*, a military judge's failure to explain the elements of the offense rendered the pleas improvident in two additional service court opinions. In the first case, *United States v. Martens*, the AFCCA determined insufficient the military judge's explanation of the elements of transporting child pornography by computer in foreign commerce in violation of 18 U.S.C. § 2252A.[316] In particular, the military judge failed to define the term "foreign commerce," which, under the statutory provision at issue, is defined as "commerce between the United States and another nation."[317] The military judge's failure, in conjunction with the inaccurate suggestion in the stipulation of fact that the term "foreign commerce" meant commerce between any two countries,[318] and the failure of the appellant to state that the images in question traveled to, from, or through the United States rendered the plea improvident. [319] The AFCCA, however, affirmed a finding of guilty to the lesser-

307. *Id.* at 413 (emphasis added).

308. United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969) (citations omitted). *See also* MCM, *supra* note 4, R.C.M. 910(c) and (e).

309. 58 M.J. 117 (2003).

310. *Id.* at 118.

311. *Id.* at 119.

312. *Id.*

313. *Id.* (citation omitted).

314. *Id.* (citations omitted).

315. *Id.*

316. 59 M.J. 501, 503 (A.F. Ct. Crim. App.), *petition granted*, 59 M.J. 30 (2003) (quoting 18 U.S.C. § 2252(a)(2)(A) (2000), which punishes, in pertinent part, "Any person who . . . knowingly receives or distributes-any child pornography that has been mailed, or shipped or transported in interstate of foreign commerce by any means, including by computer . . . .").

317. *Id.* at 506, 514 (citing 18 U.S.C. § 10; Gibbons v. Ogden, 22 U.S. 1, 193 (1824)).

included offense of service discrediting conduct under Article 134, UCMJ, and affirmed the sentence.[320]

The second of the two service court cases rendered improvident by a failure to adequately explain the elements of the offense is *United States v. Burris*.[321] In *Burris*, the CGCCA set aside as improvident a plea to dishonorable failure to pay a just debt due to the military judge's failure to define the term "dishonorable."[322] The CGCCA followed the CAAF's lead in *Redlinski* and the CAAF's 2002 opinion in *United States v. Bullman*,[323] another case in which the military judge failed to define the same term for the same offense as in *Burris*. The government attempted to distinguish *Bullman* by arguing that the military judge's failure to define dishonorable did not render Burris' plea improvident because he "admitted facts necessary to establish the charges, expressed a belief in his own guilt, and did not cause facts to remain in the record that are inconsistent with the guilty pleas."[324] The CGCCA disagreed, citing among other factors, Burris' statements that were "inconsistent with dishonorable conduct."[325] The record of trial did not establish, "either explicitly or inferentially, that the Appellant otherwise understood this critical distinction between a dishonorable failure and a negligent failure to pay a debt,"[326] thus rendering the plea improvident. Notwithstanding the appellant's improvident plea to the dishonorable failure to pay a just debt, the CGCCA affirmed the remaining findings of guilty and the sentence.[327]

In contrast to the results of *Redlinski*, *Martens*, and *Burris*, the ACCA faced the military judge's failure to explain the elements of the more simple offenses of wrongful appropriation and forgery in *United States v. Morris*.[328] During the plea colloquy concerning wrongful appropriation, the military judge "failed to follow the usual practice of Army military judges in that he did not read to appellant applicable definitions from the [*Military Judge's Benchbook*]," including the definitions of the terms "possession," "owner," "belongs," and "took."[329] As for the colloquy concerning the forgery offense, the military judge likewise failed to provide any definitions from the *Benchbook*, including those for the terms, "falsely made or altered" and "intent to defraud."[330] Unlike the CAAF's result in *Redlinski*, the ACCA nonetheless affirmed the findings and sentence.[331] Like the CAAF in *Redlinski*, the ACCA based its decision on the distinction between complex offenses and more simple offenses. "For the most complex offenses, such as conspiracy or accessory after the fact, failure to explain the elements will generally result in reversal."[332] For other offenses, however, failure to explain the elements is error, but not necessarily reversible error "if the accused admits facts which establish that all the elements were true."[333] Although the military judge's failure reflects a "lack of attention to detail," the "three most critical requirements for a provident guilty plea were met. Appellant admitted the facts necessary to establish the charges, he expressed a belief in his own guilt, and there were no inconsistencies between the facts and the pleas."[334]

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318. *Id*.

319. *Id*.

320. *Id*. at 507.

321. 59 M.J. 700 (C.G. Ct. Crim. App. 2004).

322. *Id*. at 701. In the context of the offense of dishonorably failing to pay a just debt, the element of dishonor means that "[m]ore than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations." *Id*. at 702 (quoting MCM, *supra* note 4, pt. IV, para. 71(c)).

323. 56 M.J. 377, *aff'd on recons.*, 57 M.J. 478 (2002).

324. *Burris*, 59 M.J. at 703.

325. *Id*. The accused stated: "he simply could not pay his debts as they were due, and alluded to severe pay problems that left him unable to pay for basics, such as car insurance and his children's needs at school." *Id*.

326. *Id*.

327. *Id*. at 704.

328. 58 M.J. 739 (Army Ct. Crim. App.), *petition denied* 59 M.J. 163 (2003).

329. *Id*. at 740-41.

330. *Id*. at 741.

331. *Id.* at 743.

332. *Id*. at 742 (citation omitted).

333. *Id*.

What should practitioners make of *Redlinski*, *Martens*, *Burris*, and *Morris*? Obviously, military judges should scrupulously apprise the accused of the elements of any offenses to which he is pleading guilty, as well as the correct definitions of terms found in their elements. Trial counsel should pay close attention to the military judge's advice to the accused during the plea inquiry and should speak up when the military judge's advice is inadequate. The Army Court of Military Review recognized this dual responsibility long ago:

> While the military judge bears the ultimate responsibility for the [guilty plea] inquiry, the trial counsel is not a mere bystander. We have recently commented on the need for trial counsel's involvement in procedural matters . . . . It is even more important in a guilty plea case that trial counsel play an active role in the proceedings. The prudent prosecutor will diligently assure that a providence inquiry is conducted in full compliance with the dictates of R.C.M. 910 and *Care*.[335]

Permissible/Impermissible Terms of Pretrial Agreements

Pretrial agreements may not contain terms that violate appellate case law, public policy, or the military judge's notion of fairness.[336] "Pretrial agreement provisions are contrary to 'public policy' if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process."[337] Permissible pretrial agreement terms include the following: a promise to enter into a stipulation of fact, a promise to testify as a witness in the trial of another person, a promise to pay restitution, a promise to conform the accused's conduct to certain conditions, a promise to waive the Article 32 investigation, the right to a trial by members, or the right to the personal appearance of witnesses at sentencing proceedings.[338] Impermissible terms include an agreement to deprive the accused of "the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights."[339]

This past year, the CAAF and service courts continued their expansive view of the limits of permissible bargaining in pretrial negotiations, with one exception. In *United States v. Edwards*, the appellant, as part of his pretrial agreement agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during the Air Force Office of Special Investigations' interrogation of him, which took place after his defense counsel was detailed.[340] Recognizing that this provision "might involve public policy considerations,"[341] the military judge conducted a detailed inquiry into the provision and the voluntariness of the appellant's waiver of his right to discuss the interrogation in his unsworn statement.[342] On appeal, the appellant challenged the provision as void against public policy. A provision contrary to public policy cannot be waived; however, if the provision is not contrary to public policy and is not otherwise prohibited, the accused may knowingly and voluntarily waive the right involved.[343] The CAAF determined the provision did not violate public policy. In particular, the court determined the provision did not violate RCM 705's proscription against terms that deprive one of a complete sentencing proceeding because the information did not constitute extenuation, mitigation, or rebuttal to prosecution matters.[344]

In *United States v. Henthorn*, the NMCCA approved a pretrial agreement term in which the accused agreed to forfeit his laptop computer.[345] The appellant was convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. On

334. *Id.* at 743.

335. United States v. Harris, 26 M.J. 729, 734 (A.C.M.R. 1988).

336. United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976).

337. United States v. Cassity, 36 M.J. 759, 762 (N-M.C.M.R. 1992) (citing United States v. Mitchell, 15 M.J. 238, 240-241 (C.M.A. 1983); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976); United States v. Foust, 25 M.J. 647, 649 (A.C.M.R. 1987); United States v. Jones, 20 M.J. 853, 855 (A.C.M.R. 1985), *aff'd*, 23 M.J. 305 (C.M.A. 1987); United States v. Callahan, 22 C.M.R. 443, 448 (A.B.R. 1956)).

338. MCM, *supra* note 4, R.C.M. 705(c)(2).

339. *Id.* R.C.M. 705(c)(1)(B).

340. 58 M.J. 49, 51 (2003).

341. *Id.*

342. *Id.*

343. *Id.* at 52.

344. *Id.* at 53. Following *Edwards*, the AFCCA approved a term in a pretrial agreement wherein the accused agreed not to provide comparative sentencing information in his unsworn statement. United States v. Oaks, No. 34676, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpublished).

appeal, he challenged a provision in his pretrial agreement that required him to "forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 2253 . . . . The assets to be forfeited specifically include the following: One . . . Laptop Computer . . . ."[346] The appellant argued that the provision "constituted an unauthorized forfeiture of fine and therefore an excessive or harsh punishment not permitted by the UCMJ."[347] The NMCCA disagreed, finding that the provision was not against public policy and was not punishment.[348] "Rather, it is an agreement designed to achieve broad remedial aims. Such a provision removes from circulation computer equipment that has been used to store and further the dissemination of child pornography."[349] Declaring that the provision "encompasses acceptable public policy aims," the court dryly noted that "if the appellant found his agreement too onerous, he could have withdrawn from it."[350]

Despite the expansive bargaining generally permitted this past year, there are limits to acceptable pretrial agreement terms. One of those limits was delineated by the NMCCA in *United States v. Sunzeri*.[351] The pretrial agreement term at issue in *Sunzeri*, which originated with the accused, prohibited the defense from presenting the testimony of witnesses located outside of Hawaii, where the trial occurred—either in person, by telephone, letter, or affidavit.[352] In the absence of the provision, the accused would have presented in person the testimony of two witnesses whose presence the military judge previously ordered.[353] On appeal, the accused alleged that the term violated public policy. The NMCCA agreed, stating the provision deprived the appellant of a complete sentencing proceeding in violation of RCM 705.[354]

In support of its decision, the NMCCA set forth a three-part rationale. First, the court relied on the plain meaning of RCM 705, which prohibits pretrial agreement terms that deprive the accused of a complete sentencing proceeding.[355]

> To find that the appellant had been afforded a complete sentencing hearing, when he was unable to present any evidence from individuals who did not live on the island of Oahu, would simply ignore the plain meaning of "complete sentencing proceeding," particularly so where the appellant told the military judge that but for the provision he would have presented more evidence.[356]

Second, RCM 705 permits a provision in which the accused waives the right to the personal appearance of witnesses for sentencing.[357] "In providing for the waiver of the right to personal witnesses in sentencing proceedings, it seems clear that the President authorized that as the sole limitation to the general rule that the accused is entitled to 'complete sentencing proceedings.'"[358] Third, although the court recognized the "move toward approving pretrial agreement provisions that originate

345. 58 M.J. 556 (N-M. Ct. Crim. App. 2003).

346. *Id*. at 557.

347. *Id*. (citation omitted).

348. *Id*. at 558.

349. *Id*.

350. *Id*. (internal quotation and citation omitted).

351. 59 M.J. 758 (N-M. Ct. Crim. App. 2004).

352. *Id*. at 760. The specific wording of the provision is as follows:

> That, as consideration for this agreement, the government and I agree not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including but not limited to, Article 32 testimony, affidavits or letters will not be permitted or considered when formulating an appropriate sentence in this case.

Id. In a second provision, the accused agreed that the government was not required "to provide for the personal appearance of witnesses who reside off the island of Oahu to testify during the sentencing phase of the court-martial." *Id*. at 759.

353. *Id*. at 760.

354. *Id*. at 761.

355. MCM, *supra* note 4, R.C.M. 705(c)(1)(B).

356. *Sunzeri*, 59 M.J. at 761.

357. MCM, *supra* note 4, R.C.M. 705(c)(2)(E).

358. *Sunzeri*, 59 M.J. at 761.

with the appellant,"[359] they could not find case law that approves of terms specifically prohibited by RCM 705. "That rule," concluded the court, "narrowly proscribes the area in which the President has determined a pretrial agreement may not be used to restrict the rights of the accused. The proposal before us did just that, in violation of that rule—in violation of public policy."[360]

Edwards, *Henthorn*, and *Sunzeri*, and the cases and other sources upon which those decisions rely, provide an excellent template of how to evaluate a pretrial agreement term to determine whether or not it violates public policy. In this era of expansive bargaining, practitioners should review and consider all three cases any time either side proposes a novel term for inclusion in a pretrial agreement.

Conditional Pleas

In general, a guilty plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made."[361] There are only two ways to preserve issues that are otherwise waived by a guilty plea: to plead not guilty; or to enter into a conditional plea, which requires the consent of the government and the approval of the military judge. If an appellate court finds that the military judge's ruling on the preserved issue was erroneous, the accused may then withdraw his plea.[362] A trio of cases this past year remind practitioners of the specific issues the parties must address when a conditional plea is considered. In two of those cases, due to a lack of attention to details and potential ramifications of the particular conditional pleas at issue, the appellant was permitted to withdraw his entire guilty plea, even though the issue preserved by the conditional plea did not affect the entire plea.

In *United States v. Mapes*, the appellant was convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow Soldier with a fatal dose of heroin.[363] The appellant entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to RCM 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions."[364] At trial, the appellant moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*.[365] Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, the appellant was permitted to withdraw his plea to the remaining offenses which were *not* directly tainted by the violation because the violation caused or played a substantial role in the GCM referral of those offenses.[366] The court permitted evidence of the remaining offenses to be submitted to a different convening authority.[367] In so doing, the CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive,

> the Analysis of the Military Rules of Evidence advises cautious use of the conditional plea when the decision on appeal will not dispose of the case . . . . Where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or as to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal.[368]

Although the military judge initiated a discussion with the accused concerning the issue, the court found his inquiry inadequate.[369]

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359. *Id*. at 762.

360. *Id*.

361. MCM, *supra* note 4, R.C.M. 910(j). It is not clear if an unconditional guilty plea waives a motion to dismiss for violation of Article 10, UCMJ's statutory right to a speedy trial. *See* United States v. Birge, 52 M.J. 209 (1999) (deciding on other grounds and failing to reach this issue, despite the fact that appellate counsel presented it); *see also* United States v. Gutierrez, 57 M.J. 148, 149 (2002) (deciding the case on other grounds). *But see* United States v. Benavides, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002).

362. MCM, *supra* note 4, R.C.M. 910(a)(2).

363. 59 M.J. 60 (2003).

364. *Id*. at 64.

365. *Id.*; *see* Kastiger v. United States, 406 U.S. 441 (1972).

366. *Mapes*, 59 M.J. at 72.

367. *Id*.

368. *Id*. n. 2.

Similarly, in *United States v. Proctor*,[370] the AFCCA had occasion to warn practitioners of the same concerns raised by the CAAF in *Mapes*. In *Proctor*, the appellant spent 161 days in pretrial confinement, including 107 days prior to preferral of charges against her.[371] The appellant entered a conditional plea of guilty, preserving the speedy trial issues for appeal.[372] The AFCCA reversed the trial judge's ruling and dismissed several charges and specifications with prejudice due to a violation of the 120-day provision in RCM 707, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offense discovered after the imposition of pretrial confinement.[373] The speedy trial clock began to run on the date of preferral of charges for those offenses discovered after pretrial confinement was imposed, rather than the date of imposition of restraint.[374] The AFCCA noted that because of the

> all-or-nothing effect of RCM 910, allowing an appellant who enters a conditional plea to withdraw the plea if he prevails on appeal, staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case dispositive . . . . In this case, appellant's speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the appellant was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the appellant to withdraw his pleas.[375]

Finally, in *United States v. Shelton*,[376] the ACCA faced a conditional plea issue similar to the issue addressed in both *Mapes* and *Proctor*. Withdrawal from the plea in *Shelton*, however, was not authorized because the appellant did not prevail on any preserved issue on appeal. Shelton's pretrial agreement preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [appellant's] court-martial."[377] The defense made a motion to suppress based on the clergy privilege and also made a discovery motion for the CID Agent Activity Summaries.[378] "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and staff judge advocate, and the parties at trial, may not all have been aware that appellant's conditional guilty plea preserved the discovery motion."[379] Additionally, the military judge mentioned that only the clergy privilege motion was preserved by the plea.[380] Citing *Mapes*, and in particular the CAAF's requirement that when a conditional plea is not dispositive the military judge address "the understanding of the accused and the parties as to the result of the accused prevailing on appeal,"[381] the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact."[382] Accordingly, the court found both motions were preserved for appeal.[383] The ACCA addressed both motions, but found the military judge ruled correctly as to the clergy penitent issues, and that any error flowing from his ruling as to the discovery issue did not amount to an abuse of discretion.[384] The ACCA held that the appellant was not entitled to any relief.

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369. *Id*.

370. 58 M.J. 792 (A.F. Ct. Crim. App. 2003), *petition denied*, _ M.J. _, 2004 (CAAF LEXIS 558 (2004).

371. *Id*. at 794.

372. *Id.*

373. *Id*. at 798.

374. *Id*. at 797.

375. *Id*. at 798 (citation omitted).

376. 59 M.J. 727 (Army Ct. Crim. App. 2004).

377. *Id*. at 728.

378. *Id*. at 728-29.

379. *Id*. at 729.

380. *Id*.

381. *Id*. (citing United States v. Mapes, 59 M.J. 60, 72 n.2 (2003)).

382. *Id*.

383. *Id.*

384. *Id*. at 732, 735.

Conclusion

1

This past year was an active one for the CAAF and the service courts in the areas of court-martial personnel, *voir dire* and challenges, and pleas and pretrial agreements. The upcoming year promises to be a busy and interesting one as well. As the UCMJ is employed abroad in hostile environments for a sustained period of time, its basic tenets are being tested. The next year may see the first of the cases tried in those hostile environments making their way through appellate review. The issues raised may fundamentally impact the military justice system, or they may reaffirm its resilience.

In the meantime, less system-shattering matters occupied the court this past year. The recurring theme to the issues of this past year reflects a lack of attention to detail by the parties, in particular the military judge and trial counsel. The courts' opinions indicate that they will set aside findings or sentences or both as required when lack of attention to detail materially prejudices a substantial right of a service member. The next couple of years will demonstrate if the courts' admonitions are translated into practice.

Search and Seizure in 2003-04

Major Ernest Harper, USMC
Professor, Criminal Law Department
The Judge Advocate General's School, U.S. Army

The last revolutionary case in search and seizure was *Katz v. United States*,[1] a 1967 case in which the U.S. Supreme Court redefined the concept of reasonable expectation of privacy. The most recent Supreme Court case to fundamentally alter the search and seizure landscape was *Illinois v. Gates*,[2] wherein the Court adopted the "totality-of-the circumstances" as the standard for probable cause.[3] In the decades since the Court decided these cases, courts at all levels have refined these constitutional concepts.[4] In the past year, the Court decided four such refining cases. These four cases are important to note and to understand, but none is revolutionary nor even fundamental; instead, they are restatements of existing law, which should make future application of the rules clearer. This article addresses each of these cases as well as several cases from the Court of Appeals for the Armed Forces (CAAF), and from the various service courts.

Warrant and Probable Cause Requirement—Not Usefully Reducible, or "There is one way to find out if a man is honest—ask him. If he says yes, you know he's crooked."[5]

The Fourth Amendment is a succinct and clear statement,[6] and the Court's interpretation and precedents have created a distinct body of law. That body rests on the term *reasonable*, which is subject to varying interpretations. Therefore, the Court has provided flexible guidance which contemplates the various facts and circumstances as experienced by the reasonable officer on the scene. The Court's decisions also address reasonableness and constitutional violations. However, the remedy for a Fourth Amendment violation, the exclusion of evidence at trial, is designed to deter government agent misconduct, not to place unreasonable, restrictive, and unduly taxing requirements on the intellect, education, training, and instincts of police officers. Reasonableness is the key. Consequently, *Gates*' totality of the circumstances test, as experienced by a reasonable officer on the scene, remains the standard by which probable cause determinations are made.

The Court's case law is replete with precedents which assist in these determinations. "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion."[7] "[P]robable cause is a fluid concept–turning on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules."[8] The probable cause determination deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

1. 389 U.S. 347 (1967).

2. 462 U.S. 213 (1983).

3. *Id.* at 238. In *Gates*, the Court returned to the earlier, simplified version of probable cause determination.

> [W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . [concluding]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires . . . .

Id. at 238-89 (citations omitted).

4. U.S. CONST. amend. IV.

5. Creative Quotations, *Groucho Marx, available at* http://www.creativequotations.com/cgi-bin/sql_search3.cgi?keyword=Groucho+Marx+&boolean=and&frank=all&field=all&database=all (last visited May 7, 2004).

6. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

7. Locke v. United States, 11 U.S. 339, 348 (1813). *Locke* was a civil case, but the opinion written by Chief Justice John Marshall is one of the earliest helpful definitions of the term in American jurisprudence.

technicians, act."[9] "'The substance of all the definitions' [of probable cause] . . . is a reasonable ground for belief of guilt."[10]

In *Maryland v. Pringle*,[11] a unanimous Court refined probable cause with respect to individualized suspicion. In this case, the Court went a long way towards answering the question: *How many people can a cop arrest based on one bag of dope?* The holding is neatly summed up:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[12]

"The facts of the case are these."[13] A Baltimore police officer stopped a Nissan Maxima for speeding at 3:16 a.m. on 7 August 1999. Donte Partlow was driving the car, Otis Smith was in the back seat and Joseph Pringle was in the front passenger seat. When Mr. Partlow retrieved his registration from the glove compartment—at the officer's request—the officer noticed a large roll of bills. Again at the request of the officer, Mr. Partlow consented to a search of his vehicle. The officer found cocaine packaged for distribution behind the armrest of the back seat. The officer then questioned all three men about the drugs and told them that if no one explained the presence of the drugs, he would arrest all three. None of the three offered any information regarding the drugs and the officer arrested all three. Later, Mr. Pringle waived his rights and admitted ownership of the cocaine, explaining they were headed to a party and he intended to sell the cocaine, or trade it for sex. He stated that the others did not know of the drugs.[14]

At trial, Mr. Pringle's counsel moved to suppress the admission as the fruit of an illegal arrest, claiming the officer did not have probable cause to arrest Mr. Pringle. The defense claimed that the officer had no evidence of Mr. Pringle's ownership, and thus lacked sufficient individualized suspicion to establish probable cause *vis-à-vis* Mr. Pringle. The trial judge denied the motion, the jury convicted Mr. Pringle, and the Court of Special Appeals of Maryland affirmed. However, the state's highest court, the Court of Appeals of Maryland, overturned, ruling that the mere presence of cocaine in the back seat of a car driven by Mr. Partlow was not enough to establish probable cause.[15] The State of Maryland appealed and a unanimous Court reversed the Court of Appeals of Maryland, and upheld the conviction.[16]

The dispositive issue was whether the arresting officer "had probable cause to believe that Pringle committed the crime."[17] The Court stressed the fluid nature of the probable cause determination, emphasizing its precedents, and concluded that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause."[18] The Court then found that it was "reasonable for the officer to infer a common enterprise among the three men."[19] Consequently, the probable cause standard was met, and the arrest of all three men, including Mr. Pringle, did not violate the Fourth Amendment.[20]

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8. *Gates*, 462 U.S. at 232.

9. Brinegar v. U.S., 338 U.S. 160, 175 (1949).

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Id.

10. *Id*. (quoting McCarthy v. De Armitt, 99 Pa. 63, 69 (1881)).

11. 124 S. Ct. 795 (2003).

12. *Id*. at 800-01.

13. A FEW GOOD MEN (Columbia Pictures 1991). The prosecutor in the referenced movie, portrayed by actor Kevin Bacon, began his opening statement with this line.

14. *Pringle*, 124 S. Ct. at 798.

15. Pringle v. State, 370 Md. 525 (2002).

16. *Pringle*, 124 S. Ct. at 797.

17. *Id*. at 799.

18. *Id*. at 800 (citations omitted).

19. *Id*. at 801.

The Court distinguished this situation from that in *Ybarra v. Illinois*,[21] which was cited by the defense. In *Ybarra*, police executing a search warrant at a tavern patted down every patron of the tavern for weapons. The Court found that improper, stating:

> a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.[22]

Here, the officer had a reasonable belief that Mr. Pringle was the owner, or co-owner, of the cocaine. Under these facts, that was sufficient particularization. This case does not answer the earlier "how many people" question with *three*. Rather, given these facts and under the totality of the circumstances, it was reasonable for the officer to believe that all three occupants of the vehicle were guilty. This is, of course, instructive in similar future situations.

The Court offered an important practice tip in its concluding footnote. The Court of Appeals of Maryland had earlier "dismissed" the large roll of bills "from the glove compartment as a factor in the probable cause determination, stating that '[m]oney, without more, is innocuous.'"[23] In response, the Court pointed out that the lower "court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents."[24]

In another case, the Court examined the issue of exigent circumstances, one of several probable cause exceptions. In *United States v. Banks*,[25] the Court addressed the appropriate amount of time police should wait between announcing their presence and forcible entry when executing a search warrant. The unanimous Court ruled that "this case turn[ed] on the significance of exigency revealed by circumstances known to the officers . . . ."[26] In short, the circumstances of a warrant search can ripen into an exigency justifying immediate entry. The amount of time to wait between announcing and entry depends on the time of that ripening process. In *Banks*, the Court held that a fifteen to twenty second wait was appropriate, but that could easily vary depending on the circumstances.[27]

"The facts of the case are these."[28] Officers of the North Las Vegas Police Department, along with federal agents, were executing a validly obtained search warrant at the apartment of LaShawn Banks at 1400 on a Wednesday. They were seeking evidence of crack cocaine distribution. After knocking and announcing their presence, the police waited approximately fifteen to twenty seconds and then broke down the front door to the apartment with a battering ram. They found Mr. Banks emerging from the shower, literally dripping wet and toweling off. The subsequent search revealed weapons and crack cocaine.

At trial, the defense sought to suppress the guns and drugs, on the ground that the officers violated the Fourth Amendment when they failed to wait a reasonable amount of time before breaking down the door. The judge denied the motion, and the defense entered a conditional plea. A divided panel of the Ninth Circuit Court of Appeals reversed and ordered suppression of the contested evidence.[29] The court offered a long list of factors that an officer "reasonably should consider" when executing a warrant.[30] Moreover, to assist "in the resolution of the essential question of whether the entry made herein was reasonable under the circumstances," the Ninth Circuit defined four categories of intrusion.[31] Finally, the court decided that the intrusion was neither justified by exigent circumstances nor permissible.[32]

The Court disagreed with the Court of Appeals:

> Here . . . the Court of Appeals overlay of a categorical scheme on the general reasonableness analysis threatens to distort the

20. *Id*. at 802.

21. 444 U.S. 85 (1979).

22. *Id*. at 91 (citation omitted).

23. *Pringle*, 124 S. Ct. at 800 (citing Pringle v. State, 370 Md. 525, 546 (2002)). "There was $763 of rolled-up cash in the glove compartment directly in front of Pringle." *Id.*

24. *Id*.

25. 124 S. Ct. 521 (2003).

26. *Id*. at 526.

27. *Id*.

28. *See supra* note 13.

29. United States v. Banks, 282 F.3d 699 (9th Cir. 2002).

> "totality of the circumstances" principle, by replacing a stress on revealing facts with resort to pigeonholes. . . . Attention to crack cocaine rocks and pianos tells a lot more about the chances of their respective disposal and its bearing on reasonable time.[33]

The Court's comparison of crack cocaine with pianos is the key to the holding. The Court determined that the Ninth Circuit misplaced its focus in this case. The Ninth Circuit addressed the time it would take Banks to hear the police, stop what he is doing, travel through the dwelling, and answer the door. Instead, the Court focused on the amount of time it would take Mr. Banks to recognize his peril and begin disposing of the very evidence sought—the crack cocaine. "[T]he crucial fact in examining their actions is not the time to reach the door but the particular exigency claimed."[34] Since the "prudent [drug] dealer" keeps his stash by a sink or toilet, fifteen to twenty seconds would suffice to begin flushing the dope.[35] That is the relevant inquiry. If the police were seeking stolen pianos, as Justice Souter writing for the Court notes, then the police reasonably would have to delay longer than fifteen to twenty seconds, since the piano thief could not easily dispose of a piano.[36]

Banks does not announce that fifteen seconds is now the waiting period for a knock and announce warrant. Rather, it affirms that the probable cause test remains the *totality of the circumstances*, as perceived by the reasonable officer on the scene. In this case, the circumstances ripened into an exigency in about fifteen seconds, but that will not always be the case. In any case, the totality of the circumstances remains the standard, and cannot be replaced or restricted by pigeonholes or bright-line rules.

Related to probable cause is the concept of reasonable suspicion. In *United States v. Robinson*,[37] the CAAF addressed this concept, with several of the judges offering differing views. The resulting opinion is instructive.

"The facts of the case are these."[38] At approximately 0130 hours, while patrolling a high crime area in Florida, a civilian police officer observed a vehicle on three occasions, once parked outside of and twice traveling near a known drug house. The driver, Air Force (AF) Technical Sergeant (TSgt) Robinson made a sudden left turn into an alley without signaling, prompting the officer to stop him. The officer observed a disheveled passenger in the car, and detected alcohol on TSgt Robinson. While awaiting the results of a warrants check, the officer called for a canine unit. About eighteen minutes after the initial stop (ten minutes of which included TSgt Robinson searching for his license and registration), the drug dogs alerted on TSgt Robinson's car. During the ensuing search, the police found drugs. Technical Sergeant Robinson was charged with driving under the influence and possession of a controlled substance.[39]

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30. *Id.* at 704. A non-exclusive list of factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Id.

31. *Id.*

> Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. Section 3109: (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time. The action at bar falls into the final category because no exigent circumstances existed and the entry required destruction of property--i.e., the door to Banks' apartment.

Id. (citation omitted).

32. *Id*.

33. United States v. Banks, 124 S. Ct. 521, 528 (2003).

34. *Id*. at 527.

35. *Id*.

36. *Id*.

37. 58 M.J. 429 (2003).

38. *See supra* note 13.

The military judge upheld the search, finding probable cause to search based on the appearance of the passenger, the odor of alcohol and glazed-eyed appearance of TSgt Robinson, and the alert of the drug dogs. However, on appeal the Air Force Court of Criminal Appeals (AFCCA) discovered that it is not a legal requirement to signal before making a turn in Florida, if no other vehicles are affected by the turn.[40] Consequently, the officer did not validly stop TSgt Robinson on the basis of the illegal left turn. Moreover, absent the improper stop, the officer would not have been in a position to evaluate the appearance of the car's occupants or to utilize the drug dogs to develop the probable cause. Thus, the probable cause search was invalid, and the evidence inadmissible.

Despite this analysis, the AFCCA found that the facts related by the officer at trial amounted to reasonable suspicion, and upheld the military judge's ruling[41] though on a different basis. The AFCCA conceded that the traffic stop for failure to signal, which was the basis for the stop to which the officer testified at court-martial, was faulty, and could not support the later probable cause determination.[42] Nonetheless, the AFCCA determined that there were sufficient facts for the officer to determine that he had reasonable suspicion to stop TSgt Robinson.[43] The AFCCA cited the Supreme Court to support this brief investigative stop for vehicles. "These brief investigative stops may be used for persons in a moving vehicle."[44] That stop would have been valid, and thus the facts discovered during the ensuing investigation would be valid to support the probable cause determination. The AFCCA found it was irrelevant that the officer testified he executed the traffic stop based on the lack of a turn signal and not on reasonable suspicion of some illicit activity. Consequently, the court "conclude[d] that Officer Jennewein's stop of the appellant's vehicle was reasonable under the circumstances. The evidence derived from the subsequent searches of the appellant and his vehicle was properly seized and admitted into evidence."[45]

On appeal, the CAAF was fractured. Writing for the majority, Judge Gierke provided a detailed analysis of the law and the facts of the case then agreed that the facts amounted to reasonable suspicion.[46] Finding reasonable suspicion to make the stop, the CAAF had no trouble finding that probable cause developed thereafter. But not all of the judges agreed.

The dissents are equally compelling and informative regarding the reasonable suspicion determination. In his dissent, Judge Baker found that the facts did not raise reasonable suspicion.[47] Judge Erdmann also dissented, not only finding no reasonable suspicion, but also expressing concern that the appellate courts felt free to uphold the search on a basis that was never articulated by the officer.[48] "There is something troubling about a concept where the initial police action violates the Fourth Amendment but an appellate court later develops a theory which allows the admission of the evidence."[49]

Robinson is a useful case. The judges' varied application and analysis of law and facts are enlightening. The facts are fully developed in both the CAAF and the AFCCA opinions, and the individual judge's determinations of whether these facts amount to reasonable suspicion may be helpful in future determinations.

Reasonable Expectation of Privacy—Then Don't Show Everyone!

In two recent cases, the CAAF took the opportunity to address the reasonableness of privacy expectations. First, in *United States v. Springer*,[50] the CAAF affirmed the concept that there is no reasonable expectation of privacy in the information a person writes on the outside of an envelope and then mails. The CAAF also held that there is no reasonable expectation of

39. *Robinson*, 58 M.J. at 430-31.

40. United States v. Robinson, 56 M.J. 541 (A.F. Ct. Crim. App. 2001).

41. *Id*. at 548.

42. *Id*. at 544.

43. *Id*. at 547-48.

44. *Id*. at 546 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)) (stating "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion").

45. *Id*. at 548.

46. United States v. Robinson, 58 M.J 429, 433-34 (2003).

47. *Id*. at 437 (Baker, J., dissenting).

48. *Id*. at 439 (Erdmann, J., dissenting).

49. *Id*. at 442.

50. 58 M.J. 164 (2003).

privacy in the enclosed information, if it is clearly visible through the envelope.[51]

"The facts of the case are these."[52] Staff Sergeant (SSG) Springer was a member of a training cadre at a remote site. He mailed a letter to a former trainee, with his address as the return address, by dropping it at the front desk, along with trainee mail. Staff Sergeant Payne, another cadre member, checked to ensure all letters had postage and return addresses before mailing them. He recognized SSG Springer's letter by the return address. He also saw a heart picture drawn on the letter inside the envelope. Staff Sergeant Payne suspected an inappropriate relationship and reported the incident.[53] During an ensuing investigation, SSG Springer admitted writing an inappropriate letter to a former trainee. The command charged him with and he was convicted of violations of lawful orders[54] and maltreatment of several trainees.[55] At trial, the defense moved to suppress the contents of the letter and other statements derived from SSG Payne's initial examination of the letter.[56]

Writing for a unanimous court, Judge Baker first found that the address and return address were placed in open view and thus SSG Springer could not have had even a subjective expectation of privacy.[57] Next, the CAAF addressed the contents of the envelope. The court held that SSG Springer may have had a subjective expectation of privacy in the content of his letter despite the fact some of it could be seen through the envelope, but that was not objectively reasonable. "Appellant's expectation of privacy in the parts of his letter that were readily visible to the naked eye though the envelope was not one that society would recognize as reasonable."[58]

In the second case, the CAAF recently granted review of *United States v. Geter*,[59] an unpublished Navy-Marine Corps Court of Criminal Appeals (NMCCA) case involving privacy and government computers.[60] In this case, the NMCCA declared that Lance Corporal Geter did not have a reasonable expectation of privacy in the emails he sent over a government computer network system, with his government issued computer. The NMCCA declared that "when dealing solely with a U.S. Government owned and operated system, in which individual e-mail accounts are provided for official use only, there is no reasonable expectation of privacy."[61] Those e-mails eventually led to drug distribution charges [62] and the appellant's conviction.[63] The NMCCA found no evidence of a subjective expectation of privacy, nor was it prepared to recognize the reasonableness of an objective expectation in such a case.

> Appellant has failed to point to any evidence in the record introduced on his motion to suppress indicating he had a subjective expectation of privacy in his assigned e-mail account. He failed to put before the military judge evidence or testimony which would satisfy the necessary, subjective prong of Fourth Amendment analysis, thus, causing the military judge to find a failure by Appellant to satisfy his burden of persuasion. Even if he had made a showing of a subjective expectation of privacy, Appellant clearly failed to show that such an expectation was objectively reasonable.[64]

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51. *Id*.

52. *See supra* note 13.

53. *Springer*, 58 M.J. at 167.

54. UCMJ art. 92 (2002).

55. *Id.* art. 93.

56. *Springer*, 58 M.J. at 167.

57. *Id*. at 168 (citing Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan first articulated the two-prong test for the reasonable expectation of privacy in his concurrence in *Katz*. First, one must exhibit a subjective expectation of privacy, and then, second, that expectation must be one that society is willing to recognize as objectively reasonable. *Id*.

58. *Id.* at 169.

59. 59 M.J. 268 (2004).

60. No. 9901433, 2003 CCA LEXIS 134 (N-M. Ct. Crim. App. May 30, 2003) (unpublished), *pet. granted*, 59 M.J. 268 (2004).

61. *Id.* at *9 (citing United States v. Monroe, 50 M.J. 550, 558 (A.F. Ct. Crim. App. 1999), *aff'd*, 52 M.J. 326 (2000)).

62. UCMJ art. 112a (2002).

63. *Geter*, 2003 CCA LEXIS 134 at *1.

64. *Id.* at *11 (citations omitted).

The court's decision is still pending in a case in which the CAAF may finally address directly the expectation of privacy in government computer systems.

Scope of Search—How Far Can You Go?

In *United States v. Billings*,[65] the Army Court of Criminal Appeals (ACCA) incorporated extensive federal case law to determine that police could conduct a protective sweep of a structure, even if the suspect was arrested outside of it.[66] Here, the ACCA held that "the authority of police to conduct a protective sweep does not turn on whether the person apprehended may harm police, but instead on whether others may be present and pose a danger to the police."[67]

"The facts of the case are these."[68] Specialist (SPC) Billings was the leader of the Fort Hood and Killeen, Texas, chapter of the Chicago-based criminal organization known as the Gangster Disciples. Civilian police executed an arrest warrant for SPC Billings at her apartment, actually performing the arrest on the small front porch outside the apartment. Having reason to believe that a gangster cohort may have been in the apartment, the police executed a protective sweep search of the living room of the apartment. In doing so, they saw an application to join the Gangster Disciples laying face up on a table. They seized the form and used this and other information to obtain a search warrant for the entire apartment.[69]

Specialist Billings challenged the protective sweep as unnecessary, given she was arrested outside.[70] The military judge denied the defense motion to suppress, ruling the sweep was within the limits set by the Court in *Maryland v. Buie*.[71] The ACCA agreed with the military judge. The opinion discussed several Courts of Appeals opinions which recognize the need to allow officers who have articulable suspicion that a danger remains to search inside a dwelling, even if the arrest takes place outside.[72] Here, the police had information that other gangster disciples might be in the apartment. "Arresting officers need not wait for a warrant before ensuring their safety and minimizing the risk of an attack if articulable facts support their belief that danger lurks in the home."[73]

In another case meriting attention, the CAAF granted review of an unpublished ACCA decision in *United States v. Simmons*.[74] In *Simmons*, the ACCA found the trial court erred in admitting a letter and a videotaped confession. However, the ACCA found that admission of the letter, the videotape, and the potentially derivative court-martial testimony was harmless.[75]

"The facts of the case are these."[76] First Lieutenant (1LT) Simmons was convicted of multiple offenses, including conduct unbecoming an officer[77] and assault,[78] which related to his homosexual relationship with Private First Class (PFC) W, a member of the accused's company. After responding to a report of a fight in 1LT Simmons' apartment, a civilian police officer discovered PFC W "unconscious on the floor, lying in a pool of blood."[79] At the time of the assault, the victim was at the accused's apartment to "remove his personal belongings."[80]

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65. 58 M.J. 861 (Army Ct. Crim. App. 2003).

66. *Id*. at 865.

67. *Id*. at 863 (citing Maryland v. Buie, 494 U.S. 325, 334 (1990)).

68. *See supra* note 13.

69. *Billings*, 58 M.J. at 862-63.

70. *Id*. at 863.

71. *Id*. (citing *Buie*, 494 U.S. at 334).

72. *Id*. at 864 (citing United States v. Colbert, 76 F.3d 773, 776-77 (6th Cir. 1996); United States v. Biggs, 70 F.3d 913, 916 (6th Cir. 1995); United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995); United States v. Kimmons, 965 F.2d 1001, 1004, 1009-10 (11th Cir. 1992); United States v. Oguns, 921 F.2d 442, 446-47 (2d Cir. 1990); United States v. Tisdale, 921 F.2d 1095, 1097 (10th Cir. 1990)).

73. *Id*.

74. No. 20000153 (Army Ct. Crim. App. Mar. 31, 2003) (unpublished), *pet. granted*, 59 M.J. 136 (2003).

75. *Id*. at 9.

76. *See supra* note 13.

77. UCMJ art. 133 (2002).

78. *Id.* art. 128.

79. *Simmons*, No. 20000153 at 2.

Private First Class W "frequently stay[ed] at the apartment and kept personal belongings" in 1LT Simmons' guest bedroom.[81] During a search incident to 1LT Simmons' arrest for assault, civilian police found a handwritten letter that 1LT Simmons had given to PFC W several weeks earlier. The police seized the letter as evidence of 1LT Simmons' motive for the assault. First Lieutenant Simmons subsequently made a videotaped statement in which he confessed to the homosexual relationship with PFC W.[82] At the court-martial, the military judge denied the defense suppression motion and found that 1LT Simmons had no ownership interest in the letter, which had been given to the PFC. The military judge admitted both the letter and the derivative videotape.[83]

The ACCA concluded that the military judge erred in admitting the letter and tape.[84] The court ruled that the letter was illegally obtained by police, since the search exceeded a search incident to arrest. However, the ACCA determined that introduction of the letter, the tape, and even 1LT Simmons' in-court testimony was harmless error, given the other evidence arrayed against him.[85] While the CAAF will review the harmlessness of the error, the most important issue facing the CAAF will be whether the in-court testimony was derivative of the admissible evidence.

Consent? Sure, Search My _____ (fill in your choice of container), 'Cause I Don't Think You'll Find the _____ (fill in your choice of illegal material) I Have So Cleverly Hidden in the _____ (fill in your choice of stupid hiding places).

In *United States v. McMahon*,[86] the investigators executed a textbook search, which began with a consensual, administrative inspection and then evolved into a criminal search involving two separate search authorizations and several levels of scope. The appellant's initial consent gave the investigators the authority they needed to be in position to discover the contraband.

"The facts of the case are these."[87] Staff Sergeant McMahon occupied base quarters along with his wife, two children, and Aunt Billie. Aunt Billie, who was in ill health, died in her sleep early one morning. Though no foul play was suspected, the Criminal Investigation Command (CID) was called to investigate because the death occurred in government quarters. The CID agents asked for and received SSG McMahon's permission to perform their administrative investigation, including taking pictures and measurements, as well as looking for medications.[88] In performing this investigation, the agents came across many items that appeared to be government property, including field gear, computers, compact discs, an inflatable boat, and several ammunition cans. Concerned for everyone's safety, the lead investigator opened one of the ammunition cans and found TNT and other explosives.[89]

Based on this evidence, the investigators obtained search authorization from a military magistrate to look for explosives and associated hardware, as well as other items of government property. While searching for government property, an investigator observed some award certificates on SSG McMahon's computer printer. Also on the desk was a letter which indicated that SSG McMahon had not been awarded a Bronze Star.[90] The investigator then looked inside a three ring binder and found a certificate awarding a Bronze Star to SSG McMahon. Suspecting yet another crime, the investigators obtained a second search authorization from the military magistrate to look for items associated with awards and ribbons, including authority to search the computer itself.[91]

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80. *Id*.

81. *Id*. at 3.

82. *Id*.

83. *Id*.

84. *Id*. at 7. The military judge found the letter admissible on three bases. First, the accused had no reasonable expectation of privacy in it because he had given it to the PFC. *Id*. at 5. Second, it was found as part of a search incident to arrest. *Id*. at 5-6. Third it was in plain view, inside a closed medicine cabinet in the back bathroom. *Id*. 6-7. The military judge was clearly in error on all three bases he gave for admission of the evidence. *Id*. at 7.

85. *Id*. at 7. Nonetheless, because there was a potential constitutional violation, the law required the court to determine whether the error was harmlessness beyond reasonable doubt. *Id*. (citing Chapman v. California, 386 U.S. 18 (1967)).

86. 58 M.J. 362 (2003).

87. *See supra* note 13.

88. *McMahon*, 58 M.J. at 363-64.

89. *Id*. at 364, 365.

90. *Id*. at 365. Later that day, investigators advised SSG McMahon of his rights, which he waived and then admitted to falsifying his records to reflect the award of the Bronze Star. *Id*.

At trial, the defense moved to suppress the evidence. This motion was based on lack of consent for the initial search and the assertion that searching the computer exceeded the scope of both the initial consent and the subsequent search authorizations.[92] The military judge denied the motion. The ACCA affirmed.[93] Chief Judge Crawford delivered the opinion for the unanimous CAAF. The court determined that the initial consent was not mere acquiescence and was freely and voluntarily given, based on the testimony of the CID agents regarding SSG McMahon's words and demeanor, as well as his age, maturity, and experience.[94] Once the investigators uncovered evidence of criminal wrongdoing which exceeded the scope of the consent, they obtained two separate search authorizations from the military magistrate. Moreover, the CAAF held that the search authorization for government property authorized looking through the binder, since compact discs were among the alleged stolen property, and the binder could contain those items. Thus, the Bronze Star certificate was in plain view to the investigator who had the authority to look in the binder.[95]

In the first of two NMCCA cases, *United States v. Garcia*,[96] the NMCCA found that one cotenant's consent to search a home suffices. More pointedly, the court held that "an accused's presence and explicit refusal to consent is 'constitutionally insignificant,' so long as the consenting cotenant has equal access or control over the premises to be searched."[97]

"The facts of the case are these."[98] Staff Sergeant Garcia was suspected of possessing stolen cars and armed robbery, and was apprehended at his home. He consented to allow Naval Criminal Investigative Service agents in his home to talk, but declined to consent to a search of his home.[99] Meanwhile, civilian police arrested SSG Garcia's wife at her work site, and she consented to their search of the family home. Weapons and other evidence were discovered during the search.[100] Although not raised by the defense at trial, on appeal, SSG Garcia sought to suppress the weapons and stolen property. He claimed that his on-premises declination outweighed his wife's off-premises consent.[101]

The NMCCA reviewed for plain error, since the defense failed to raise the issue at trial.[102] The court noted military law recognizes that third party consent to a search is valid.[103] Regarding SSG Garcia's claim that his refusal was weightier than his wife's consent, the court found no military precedent, but then created some by citing considerable civilian case law[104] and holding that the accused's refusal was insignificant, so long as his wife shared equal access to the premises.[105] The CAAF granted review on several issues in *Garcia*, including this one.

In the second consent case, the NMCCA dealt with the voluntariness of consensual urinalysis searches in *United States v. Camacho*.[106] "The facts of the case are these."[107] Petty Officer First Class (PO1) Camacho tested positive on six separate urinalysis tests, and contested the voluntariness of the first four.[108]

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91. *Id*. at 365-67.

92. *Id*. at 366.

93. *Id*. at 363.

94. *Id*. at 366-67.

95. *Id*. at 367.

96. 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *pet. granted*, 59 M.J. 49 (2003).

97. *Id*. at 719-20.

98. *See supra* note 13.

99. *Garcia*, 57 M.J. at 718.

100. *Id.* at 718-19.

101. *Id.* at 719.

102. *Id.*

103. *Id.*

104. *Id*. at 720 (citing Charles v. Odum, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); *accord* United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977); People v. Haskett, 640 P.2d 776, 786 (Cal. 1982); People v. Sanders, 904 P.2d 1311, 1313 (Colo. 1995); *In re* Anthony F., 442 A.2d 975, 978-79 (Md. 1982); State v. Ramold, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); State v. Douglas, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); People v. Cosme, 397 N.E.2d 1319, 1322 (N.Y. 1979); State v. Frame, 609 P.2d 830, 833 (Or. Ct. App. 1980); Cranwell v. Mesec, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); Laramie v. Hysong, 808 P.2d 199, 203-04 (Wyo. 1991)).

105. *Id.*

The first sample was given on 24 February, following a traffic stop by a civilian police officer where she was suspected of being under the influence of methamphetamine. After signing a consent statement, PO1 Camacho provided a sample, which was discarded by Chief Petty Officer Crawford.[109] Petty Officer First Class Camacho subsequently gave a second sample. She claimed at trial that she was not allowed to leave the security office until she gave the second sample, and thus it was no longer consensual.[110] Petty Office First Class Camacho was asked to provide three more samples on 11 March, 13 and 21 April, each following brief periods of unauthorized absence. According to Chief Crawford, he asked her to provide a sample each time, to which she replied, "[S]ure, I have no problem with that."[111] No written consent form was executed. In each case, PO1 Camacho claimed she was prevented from taking care of some personal business until she provided a sample. On 7 May she was placed in pretrial confinement at Naval Air Station Miramar, and released on 14 May, though restricted to Naval Air Station North Island. She tested positive again on 24 June (she did not contest this urinalysis) and was ordered back in pretrial confinement. She again tested positive for methamphetamine on 26 June during brig in-processing. At trial, defense contested the consent for each of the first four urinalysis tests. The military judge denied each of the motions.[112]

The NMCCA affirmed, based in part upon the military judge's factual findings. The trial judge "made extensive findings of fact. Explicitly referencing the 'clear and convincing' standard and the 'totality of the circumstances' test, [the trial judge] found that the appellant" had knowledge of her right to refuse, was not coerced, and voluntarily provided samples on each occasion.[113] The military judge also found that PO1 Camacho remembered the contents of the consent form on each of the subsequent occasions, and factored this into the voluntariness decision.[114] The defense contested this on appeal, but the NMCCA found that, while each search must be individually examined, relevant information to all of the searches can certainly be considered taken as a whole. "While we certainly agree that each urinalysis must be evaluated independent of the others, we know of no rule that precludes the military judge or this court from considering evidence relevant to each of the urinalyses."[115] The most unique aspect of *Camacho* is this imputed knowledge of her rights, which the court relied upon to determine the voluntariness of PO1 Camacho's consent.

Official Search—The "Joking" Exception, or, Is It Even a Search at All?

In another case that is pending review by the CAAF, the NMCCA created what might be called the "joking exception" to the probable cause requirement. *United States v. Daniels*[116] presents the issue of whether a search is not official if the initiator does not honestly believe he is in an evidence-gathering mode.

"The facts of the case are these."[117] Electronics Technician Seaman Apprentice (ETSA) Daniels brought a vial of powdery substance into his barracks room and told his roommates it was cocaine. One of the roommates reported this to Chief Petty Officer (CPO) Wilt, who told the roommate to "go get" the drugs.[118] Chief Petty Officer Wilt testified, however, that he thought Daniels was joking about the powder, and just trying to irritate his roommate.[119] At trial, defense moved to suppress the drugs, as the result of an illegal search. The military judge denied the motion, basing his ruling on the roommate's actions,

106. 58 M.J. 624 (N-M. Ct. Crim. App. 2003).

107. *See supra*, note 13.

108. *Camacho*, 58 M.J. at 626.

109. *Id*. at 627. Petty Officer First Class Camacho provided her specimen for someone other than Chief Machinist's Mate (MMC) Crawford, the command urinalysis coordinator. When MMC Crawford arrived, he decided that sample was unusable and said another sample was necessary. *Id*.

110. *Id*.

111. *Id*.

112. *Id*. at 628.

113. *Id*. The NMCCA also based its conclusion on the credible testimony of the government witnesses, including Chief Crawford. *Id*.

114. *Id*.

115. *Id*.

116. 58 M.J. 599 (N-M. Ct. Crim. App. 2003).

117. *See supra* note 13.

118. *Id*. at 601.

119. *Id*. at 605. ("Chief Wilt's testimony clearly establishes his belief that Appellant had merely been playing a 'joke' on his roommates.").

and finding that CPO Wilt's participation was a "red herring" and not relevant to the case.[120]

On appeal, all parties agreed that ETSA Daniels had a reasonable expectation of privacy in the nightstand where he stored the cocaine. Moreover, the issue of CPO Wilt's authority to authorize a search was not raised. Instead, the NMCCA focused on the government action aspect of the case. The court upheld the results of the military judge's ruling, but found CPO Wilt's motives to be the key factor. "Indeed, the determining factor in whether or not the cocaine seizure was constitutional is what motivated Chief Wilt's directions to ETSA Voitlein."[121]

According to the court, because he did not honestly believe his order would result in retrieval of drugs, CPO Wilt did not initiate an official search.[122] "Given Chief Wilt's honest belief that ETSA Voitlein's expressed concerns about Appellant actually having illegal drugs in their room were unreasonable, we conclude that Chief Wilt's directions did not make ETSA Voitlein a Government agent on a quest for incriminating evidence."[123] The CAAF granted review on this issue.[124]

Roadblocks—Inspections, Searches, a Little of Both?

The Court used a roadblock case from Illinois to minimize the impact of its constitutionally significant decision in *Indianapolis v. Edmond*.[125] In that case, the Supreme Court found unconstitutional a general crime control roadblock conducted by the City of Indianapolis. In *Illinois v. Lidster*,[126] the Court distinguished the factual situation and the purpose of the roadblock, effectively saying that *Edmond* should not be read too broadly.

"The facts of the case are these."[127] On 23 August 1997, around midnight, a seventy-year-old bicyclist was struck and killed by a vehicle traveling along an eastbound local highway. One week later, in an effort to identify the hit and run perpetrator, the local police set up a traffic control point at about the same time of night along the same road, which coincided with a shift change at a local factory. Police stopped every eastbound car, handed out a flyer seeking assistance and briefly asked the occupants if they had any information regarding the previous week's incident. As Mr. Robert Lidster approached the roadblock, he swerved out of his lane and almost struck one of the officers. He was eventually arrested for drunk driving.[128]

At his trial, Mr. Lidster challenged the arrest, claiming the roadblock was unconstitutional. The trial judge rejected the challenge and Mr. Lidster was convicted.[129] On appeal, however, the state appellate court and the Illinois Supreme Court agreed with Mr. Lidster. The Illinois Supreme Court found that the Supreme Court's ruling in *Edmond* required it to find the stop unconstitutional, and thus overturn the conviction.[130] Other courts had found roadblocks similar to the one in Illinois constitutional,[131] so the Supreme Court granted *certiorari* to clarify the situation.[132]

In *Lidster*, the Court made two distinct findings. First, *Edmond* did not control this case. "The Illinois Supreme Court

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120. *Id*. at 604.

121. *Id*.

122. *Id*.

123. *Id*. at 605.

124. *Id*. at 600.

125. 531 U.S. 32 (2000).

126. 124 S. Ct. 885 (2004).

127. *See supra* note 13.

128. *Lidster*, 124 S. Ct. at 888.

129. People v. Lidster, 779 N.E. 2d 855, 856-57 (Ill. 2002).

130. *Id*. at 858-59.

131. *See, e.g.*, Burns v. Commonwealth, 541 S.E.2d 872 (2001), *cert. denied*, 534 U.S. 1043 (2001). In *Burns*, the Virginia Supreme Court found:

> The Virginia case involved a capital conviction for rape and murder, during the investigation of which a roadblock was erected. "According to Sheriff Green, the purpose of the roadblock was to 'canvas drivers who were passing through the area, to see whether they had seen anything or heard anything' during the time period when the crime had probably been committed the previous day."

Id. at 883.

132. *Lidster*, 124 S. Ct. at 888.

basically held that our decision in *Edmond* governs the outcome of this case. We do not agree."[133] Second, the roadblock in question did not violate the Fourth Amendment. Rather, the Court ruled that "brief, information seeking highway stops" do not do not require "an *Edmond*-type rule of automatic unconstitutionality."[134]

The key difference, of course, is that in *Edmond*, the Indianapolis police were seeking evidence of criminal misconduct from each and every driver they stopped. There was no probable cause and no individualized suspicion. Law enforcement had cast their net too broadly. In *Lidster*, the Illinois police were seeking information about a previously committed crime, not evidence of criminal misconduct by the drivers who were stopped. Mr. Lidster was simply caught in a net which was lawfully cast to catch someone else.

In *Edmond*, the Court found that "general interest in crime control" did not fit within the narrow definition it had created for the special needs exception to the Fourth Amendment requirements.[135] In *Lidster*, the Court did not even address that consideration, finding that the roadblock did not violate the Fourth Amendment in the first place.[136] There is a notable dissent, which agrees that *Edmond* is not controlling, but differs regarding the validity of the roadblock, and recommends remanding to Illinois "to address that issue in the first instance."[137]

Lidster illustrates that such determinations boil down to an analysis of the reasonableness of the official conduct, given the circumstances. "These considerations, taken together, convince us that an *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively constitutional. It simply means that we must judge its reasonableness, hence its constitutionality, on the basis of individual circumstances."[138]

The AFCCA heard a roadblock case in which the official conduct evaded the strictures of *Edmond* by utilizing the pretextual stop principle derived from *Whren v. United States*.[139] In *United States v. Johnson*,[140] Texas law enforcement agents were extremely clever in their incorporation of the Court case law into their drug interdiction roadblock operation.

"The facts of the case are these."[141] On 25 June 1999, law enforcement officers in Canton Texas, near Dallas, set up a sign that read "CAUTION BE PREPARED TO STOP, DRUG CHECKPOINT AHEAD" along the eastbound side of a major highway. The sign was positioned two miles past a major travelers' services exit, and one mile before a "farm-to-market" road, which had access to nothing other than farm fields.[142] There was not an actual drug control checkpoint—the sign was a ruse. The plan was to lure drug traffickers onto the seldom-used exit, which they would not use but for the sign.[143] It appears, however, that the Texas police were aware that they could not then simply stop the suspected smugglers,[144] since in cases like *United States v. Yousif*,[145] the courts had declared this was not sufficient particularized suspicion.[146]

Exhibiting a clear understanding of the pretextual stop, the Canton police chose the exit carefully as a place where a motorist would likely commit a traffic infraction. The speed limit

133. *Id.*

134. *Id.* at 889.

135. *Id.*

136. *Id.* "The Fourth Amendment does not treat a motorist's car as his castle." *Id.* (citations omitted).

137. *Id.* at 891 (Stevens, J., dissenting).

138. *Id.* at 890.

139. 517 U.S. 806 (1996). In *Whren*, "the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, [consequently,] the evidence thereby discovered [was] admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id.* at 819.

140. 59 M.J. 666 (2003).

141. *See supra* note 13.

142. *Johnson*, 59 M.J. at 668.

143. *Id.*

144. The Court's decision in *Edmond* limited the use of checkpoints and resulting suspicionless stops for the primary purpose of general crime control. *Id.* at 671 (citing Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

145. United States v. Yousif, 308 F.3d 820 (8th Cir. 2003).

146. *Id.*

dropped quickly from sixty-five miles per hour to twenty-five miles per hour, and the yellow line dividing the actual road extended far into the intersection.[147] Once a vehicle exceeded the speed limit or crossed the yellow divider line, probable cause to conduct a stop existed.

Staff Sergeant Johnson saw the sign, exited, crossed over the yellow line, and was stopped by police.[148] In response to a police request, he consented to a search of his vehicle. The officer found a heavily taped square box from which he detected—according to his later testimony—the strong odor of marijuana. He then opened the box and found three bricks of compressed marijuana, wrapped in cellophane, and then surrounded by coffee beans.[149] The police officer then searched the rest of the car, found small baggies and an electronic scale, and arrested SSG Johnson. Eventually, SSG Johnson was tried and convicted for drug offenses[150] at court-martial.[151]

On appeal, the AFCCA agreed with the military judge, and found the Texas police's scheme constitutionally permissible.

> The military judge ruled the initial stop of the appellant was based upon probable cause and the use of a ruse or deceptive drug checkpoint did not violate the Fourth Amendment protection against unreasonable searches and seizures. In reaching this conclusion, he correctly noted the critical consideration was "largely one of fact," specifically, whether the appellant committed a traffic violation upon exiting I-20 at Exit 530.[152]

Under *Whren*, if the traffic violation was legitimate, then the officers could permissibly stop SSG Johnson regardless of their true, drug seeking intentions.[153] Once they made contact with the driver, the officers were required to further develop the situation in order to eventually search the car. Here, SSG Johnson gave consent. Had he declined, the officers may not have been able to continue, since the only indicators they had were that SSG Johnson looked more nervous than the usual driver.[154] This case is distinguishable from both *Edmond* and *Yousif*. The car was stopped on the basis of a traffic violation, rather than just traveling through the designated area as in *Edmond*, or even exiting in a suspicious area following a dummy sign as in *Yousif*.

Principles from *Edmond* rear their head once again in *People v. Caballes*, an Illinois Supreme Court case on which the U.S. Supreme Court has granted *certiorari*.[155] In *Caballes*, the Supreme Court will address the propriety of using drug dogs at a routine traffic stop. The Illinois Supreme Court found that, following a traffic stop for speeding, "a canine sniff was performed without 'specific and articulable facts' to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation."[156] The Illinois Supreme Court applied a *Terry* analysis[157] to the traffic stop, and found that the officer did not have sufficient reason to conduct the dog sniff of the car, essentially the equivalent of a pat down.[158] Consequently, the officer expanded the scope of the traffic stop to a drug investigation, without proper reason to do so.[159]

However, in a strongly worded dissent, Justice Thomas of the Illinois Supreme Court, identified two grave errors in the opinion. First, the *Terry* analysis only applies to a search for weapons, not for other contraband.[160] More importantly, he

147. *Johnson*, 59 M.J. at 668.

148. *Id*. at 669.

149. *Id*. "According to testimony at trial, coffee beans are used to mask the smell of marijuana, which is sometimes compressed to facilitate its transportation and concealment in transit." *Id*. The super-olfactory police officer was able to detect the scent of marijuana despite the efforts taken to conceal the drugs.

150. UCMJ art. 112a (2002).

151. *Johnson*, 59 M.J. at 667.

152. *Id.* at 670.

153. *Id*. at 673 (citing Whren v. United States, 517 U.S. 806 (1996)).

154. *Id*.

155. 207 Ill. 2d 504 (Ill. 2004), *cert. granted*, 124 S. Ct. 1875 (2004).

156. *Id.* at 510.

157. Terry v. Ohio, 392 U.S. 1 (1968).

158. *Caballes*, 207 Ill. 2d at 508-09.

159. *Id*. at 510.

160. *Id*. at 512, 13 (Thomas, J., dissenting).

points to *Edmond* to reiterate the U.S. Supreme Court's view that a drug dog sniff is not a search, and there is no need to justify it with probable cause.[161] That being the case, there was no search, and thus no Fourth Amendment violation. The U.S. Supreme Court will resolve the case; Illinois Supreme Court Justice Thomas's dissent may be vindicated.

Seizure—Let's Not Forget the Second Part of S & S

Finally, the Court heard another case from Texas, this time dealing with arrest, also known as seizure. In *Kaupp v. Texas*,[162] the court reiterated "that a confession obtained by exploitation of an illegal arrest may not be used against a criminal defendant."[163] The Court found that under the facts there was an arrest.[164]

"The facts of the case are these."[165] Seventeen-year-old Robert Kaupp was suspected of being an accomplice to murder. On 27 January, without a warrant, Texas police officers bearing badges and weapons roused Mr. Kaupp from his bed at 0300. They said "we have got to talk" to which Mr. Kaupp replied "okay."[166] The officers handcuffed Mr. Kaupp and took him, shoeless and in his underwear, to the police station, stopping at the murder site for fifteen minutes. After being properly *Mirandized*,[167] Kaupp promptly confessed to helping his eighteen-year-old friend kill the friend's fourteen-year-old half sister (and sexual partner.)[168] In response to a defense motion to suppress the confession as the result of an illegal arrest, Texas prosecutors argued that Kaupp was never under arrest, thus had not been seized for Fourth Amendment purposes, and lack of probable cause was irrelevant. The trial court and both Texas appeals courts agreed with the government.[169]

The Supreme Court, in a *per curiam* decision, found that Mr. Kaupp was indeed arrested, and thus seized, for Fourth Amendment purposes.[170] The test for seizure, derived from *United States v. Mendenhall*,[171] emphasizes amongst its factors transport in a police vehicle from a private dwelling, as an indication of arrest.[172] Consequently, the court held that a reasonable person in Mr. Kaupp's circumstances would not feel he "was at liberty to ignore the police presence."[173] Accordingly, Mr. Kaupp's confession was suppressed.[174]

Conclusion

None of the cases discussed in this article radically alter practice within the search and seizure landscape. Instead, they refine the law in new and unique situations and extend civilian law into military case law terrain. This is not to say it has been an uneventful year; search and seizure has had more attention than in the recent past. Moreover, both the Supreme Court and the CAAF are set to rule on several interesting issues in the upcoming year. Nonetheless, the trend continues to be the refinement of existing law.

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161. *Id*. at 514. Justice Thomas appropriately noted that "under the Supreme Court cases, a canine sniff is not a search." *Id*. at 511 (citing Indianapolis v. Edmond, 531 U.S. 32 (2000); United States v. Place, 462 U.S. 296 (1983)).

162. 538 U.S. 626 (2003).

163. *Id*. at 627 (citing Brown v. Illinois, 422 U.S. 590 (1975)).

164. *Id*. at 630, 632.

165. *See supra* note 13.

166. *Kaupp*, 538 U.S. at 627.

167. Miranda v. Arizona, 384 U.S. 436 (1966).

168. *Kaupp*, 538 U.S. at 628-29.

169. *Id*. at 629.

170. *Id*. at 627 (citing Brown v. Illinois, 422 U.S. 590, 601-03 (1975)).

171. 446 U.S. 544 (1980).

172. *Id*. at 553. "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *Id*. A recent case from the Sixth Circuit Court of Appeals, which cites *Kaupp*, reiterates the factors to consider in determining whether an arrest occurred. *See* United States v. David Lopez-Arias and Antonio Egues, 344 F.3d 623 (6th Cir. 2003).

173. *Kaupp*, 538 U.S. at 629 (citing Florida v. Bostick, 501 U.S. 429 (1988)).

174. *Id*. at 633 (citing principles established in *Brown v. Illinois*, 422 U.S. 590 (1975)).

2003 Developments in the Sixth Amendment: Black Cats on Strolls

Major Robert Wm. Best
Professor, Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

"A black cat crossing your path signifies that the animal is going somewhere."[1]

Introduction

In this space last year, Major Christina Ekman[2] discussed new developments in the area of discovery.[3] Similar to last year,[4] development in this area has been slow.[5] As a change of pace, therefore, this article focuses on the Sixth Amendment's rights to confrontation[6] and the effective assistance of counsel.[7] Readers will notice some discussion of cases after 2003, but that is because of the newer cases' relative importance. While two cases represent change, the majority clarify fairly clear law. These new cases are like "black cats." The lesson from these cases is that, on whatever side the practitioner is on, a black cat may be crossing the path, but the practitioner should not read too much into it. The proper approach in reading these cases is to realize that the cat's color does not necessarily portend ill tidings. The cat may be just on a stroll.

On the issue of confrontation, the Court of Appeals for the Armed Forces (CAAF), spoke only once in *United States v. McCollum*,[8] but the case represents a center of gravity in the area of remote child testimony.[9] The case is especially significant because it represents the CAAF's first review of the validity of Military Rule of Evidence (MRE) 611(d)(3),[10] promulgated after the court's decision in *United States v. Anderson*.[11] The CAAF's decision must be understood in context; therefore, a brief discussion of the roots of remote testimony will precede commentary on the case. Also regarding confrontation, the U.S. Supreme Court recently issued the landmark decision of *Crawford v. Washington*.[12] Although the Court's ruling came down on 8 March 2004, the decision's importance requires immediate discussion. Perhaps by next year, some of the opinion's ramifications will have been fleshed-out; the reader may safely expect a reprise of *Crawford*.[13]

With respect to the effective assistance of counsel, the Court, the CAAF, and the service courts have spoken a number of times on a number of nuances. In pretrial investigation and trial

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1. BrainyQuote, Groucho Marx Quotes, *available at* http://www.brainyquote.com/quotes/quotes/g/grouchomar137213.html (last visited June 2, 2004).

2. Former Professor, Criminal Law Department, The Judge Advocate General's School, Charlottesville, Virginia.

3. Major Christina E. Ekman, *New Developments in the Law of Discovery*, ARMY LAW., Apr./May 2003, at 103.

4. *Id*. (noting that there were no "earth-shattering new developments").

5. The following is a brief recitation of the new discovery cases: United States v. Mahoney, 58 M.J. 346 (2003) (holding that the government's failure to disclose a letter critical of an government expert witness in urinalysis violated the appellant's constitutional right to due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963)); United States v. Ruiz, 536 U.S. 622 (2002) (holding that the government is not required to disclose impeachment evidence before an accused's entry into a plea agreement); United States v. Vanderbilt, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that, notwithstanding a defense request for all pretrial statements made by a witness to his attorney, an immunized witness does not waive his attorney-client privilege when giving testimony under a grant of immunity); United States v. Rodriguez, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *review granted*, 59 M.J. 117 (2003) (holding that the appellant failed to demonstrate that the requested evidence was both necessary and relevant, therefore, he was not entitled to compulsory process under Rule for Courts-Martial (RCM) 703(a)).

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

7. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

8. 58 M.J. 323 (2003).

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(3) (2003) [hereinafter MCM].

10. *Id*.

11. 51 M.J. 145 (1999) (approving the use of a screen and the repositioning of child witnesses after the military judge made a finding of necessity under *Maryland v. Craig*, 497 U.S. 836 (1990)).

12. 124 S. Ct. 1354 (2004).

13. That is unless the incumbent professor in this area, MAJ Mike Holley (a graduate of the 52d Judge Advocate Officer Graduate Course) decides otherwise.

tactics, the Air Force Court of Criminal Appeals,[14] the Navy-Marine Court of Criminal Appeals,[15] and the CAAF[16] issued important opinions, none of which covered precisely the same issue. The Army Court of Criminal Appeals issued an important decision in *United States v. Cain*[17] in the area of conflicts that the CAAF recently reversed. The Supreme Court and the Army Court pushed forward the jurisprudence concerning effective assistance of counsel in sentencing in *Wiggins v. Smith*[18] and *United States v. Kreutzer*,[19] respectively. The Navy-Marine Court also had its say in this area in two cases: *United States v. Starling*[20] and *United States v. Wallace*.[21] Finally, the CAAF spoke on post-trial assistance of counsel in *United States v. Dorman*,[22] a case which clarified the duties of trial defense counsel during appellate review. While there are a number of cases in the area of effective assistance of counsel, trends are difficult to identify given the concept's breadth. Nonetheless, several important lessons can be drawn from each case; this article discusses each one.

When Watching Television Is Necessary: Remote Live Testimony

The Supreme Court in *Maryland v. Craig*[23] faced the issue of whether a witness who testified via one-way closed circuit television satisfied the Confrontation Clause. In holding that a Maryland statute providing for such a procedure passed constitutional muster, the Court declared, "[T]hough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."[24] The basis for the Court's decision was its affirmation of the "important public policy" undergirding the Maryland statute: protecting "the physical and psychological well-being of child abuse victims."[25] To invoke the remote testimony procedure, the Court declared that the trial judge must "hear evidence and determine whether use of the one-way closed circuit television procedure is *necessary* to protect the welfare of the particular child witness who seeks to testify."[26] To satisfy this burden, the Court requires two particular findings: (1) the presence of the accused would traumatize the child witness; and (2) the emotional distress must be more than *de minimis*.[27] Once a trial judge makes these findings, the public policy interest "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[28] That public policy interest notwithstanding, the Court still requires the testimony's reliability to be otherwise assured; that is, the witness must be under oath, subject to cross examination, and observable by the finders of fact.[29]

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14. United States v. Brozzo, No. 34542, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. Aug. 26, 2003), *review granted*, 59 M.J. 399 (2004).

15. United States v. Garcia, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *rev'd*, 59 M.J. 447 (2004). The Navy-Marine Court affirmed a conviction after the appellant alleged ineffective assistance of counsel when his civilian defense counsel waived the Article 32, Uniform Code of Military Justice (UCMJ) hearing without the appellant's consent and for failing to advise the appellant that he could change his not guilty plea during the trial. *Id.* at 722-23, 725. Since drafting this article, the CAAF issued an opinion reversing the Navy-Marine Court's decision on one of these two issues, rendering any initial conclusions moot. Trial and defense counsel should read the Navy-Marine Court's opinion but must understand its lessons in the context of the CAAF's reversal. A full discussion of the CAAF opinion is outside the stretched time scope for this article.

16. United States v. Baker, 58 M.J. 380 (2003).

17. 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004).

18. 539 U.S. 510 (2003).

19. 59 M.J. 773 (Army Ct. Crim. App. 2004).

20. 58 M.J. 620 (N-M. Ct. Crim. App. 2003).

21. 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

22. 58 M.J. 295 (2003).

23. 497 U.S. 836 (1990).

24. *Id*. at 849-50.

25. *Id*. at 853.

26. *Id*. at 855 (emphasis added).

27. *Id*. at 855-56.

28. *Id*. at 853.

29. *Id*. at 857.

In response to *Craig*, the President of the United States by Executive Order No. 13,140[30] promulgated MRE 611(d)[31] and Rule for Courts-Martial (RCM) 914A.[32] The expressed purpose of the rules was "to avoid trauma to children,"[33] which is consistent with the public policy vindicated in *Craig*. Military Rule of Evidence 611(d)(3) expanded the bases for using remote testimony beyond those discussed by the Court in *Craig*.[34] Under MRE 611(d)(3), necessity may be based on a finding of any *one* of the following: the child cannot testify because of fear; there is a substantial likelihood that the child would suffer emotional trauma from testifying; the child suffers from a mental or other infirmity; or conduct by the accused or defense counsel causes the child to be unable to testify further.[35] If the military judge makes any of these findings, "[a] child shall be allowed to testify out of the presence of the accused."[36] The procedures for remote testimony are in RCM 914A,[37] which calls for, in the usual case, two-way closed circuit television.[38] The point, of course, is to ensure that the rights of the accused are protected while maintaining the reliability of the testimony as mandated by the Confrontation Clause and by *Craig*.

In *United States v. McCollum*,[39] the CAAF tackled the constitutionality of MRE 611(d). In this case, U.S. Air Force Staff Sergeant McCollum was charged with various sexual abuse crimes against CS, a child under sixteen years.[40] During trial, the trial counsel moved the court to allow the twelve-year-old victim to testify from a remote location via two-way closed circuit television under the provisions of MRE 611(d).[41] The defense counsel objected, arguing that there was insufficient evidence that the victim would suffer trauma sufficient to render her unable to testify reasonably, and, further, that such a procedure would violate the appellant's Sixth Amendment right to confront witnesses against him.[42]

Seizing on MRE 611(d)(3)(B)'s requirements that trauma be established by expert testimony, the trial counsel called a licensed clinical social worker, Ms. Prior, as an expert[43] to testify about the potential harm to CS if she were required to testify in the appellant's presence.[44] Ms. Prior testified that if required to testify in the presence of the appellant, the victim would "decompensate" or "function in a more disorganized way . . . . She would become highly agitated, her anxiety would increase so that her level of functioning would change overall. She might have a reoccurrence of nightmares, she might

30. 1999 Amendments to the Manual for Courts-Martial, United States, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

31. MCM, *supra* note 9, MIL. R. EVID. 61(d).

32. *Id*. R.C.M. 914A.

33. *Id*. Analysis of R.C.M. 914A, A21-63.

34. *Craig*, 497 U.S. at 856 (specifying that the presence of the accused would traumatize the child).

35. MCM, *supra* note 9.

36. *Id*.

37. Specifically, RCM 914A(a) states in relevant part:

> At a minimum, the following procedures shall be observed:
> (1) The witness shall testify from a remote location outside of the courtroom;
> (2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;
> (3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;
> (4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and
> (5) The accused shall be permitted private, contemporaneous communication with his counsel.

Id.

38. *Id*.

39. 58 M.J. 323 (2003).

40. *Id*. at 326.

41. *Id*. at 327.

42. *Id*.

43. The trial judge accepted the witness as an expert in the field of diagnosing and treating children who have been abused sexually. *Id*.

44. *Id*. Ms. Prior counseled CS at weekly sessions eleven to twelve times.

become more withdrawn."[45] Ms. Prior also opined that testifying "could setback her healing process and reactivate some of the symptoms of CS's Post Traumatic Stress Disorder (PTSD)."[46] While testifying itself would be harmful to CS, Ms. Prior believed that any harm would be "extremely" aggravated if the appellant were in the courtroom.[47] When asked whether the victim desired to testify, Ms. Prior stated although CS wanted to, doing so would be "detrimental to her."[48] In response to the military judge's question about whether the victim expressed any fear of the appellant, Ms. Prior testified that the victim feared that the appellant would beat her if she ever told anyone of the abuse.[49]

Based on the unrebutted expert testimony, the military judge found that the victim would be traumatized if required to testify in the appellant's presence.[50] The military judge also found that the victim was unable to testify in open court because of her fear, which caused her emotional trauma.[51] The military judge ruled that trial counsel met the requirements of MRE 611(d)(3) and *Craig* (that is, the necessity for the procedures) and granted the government's motion.[52] When the trial counsel called the victim, the military judge allowed the appellant to leave the courtroom as permitted by RCM 804(c) and the victim testified in the courtroom.[53]

On appeal, the Air Force Court held that there was ample evidence that the military judge applied MRE 611(d)(3) and *Craig* correctly.[54] Because the reliability of the testimony was otherwise assured (the witness testified under oath, was subject to cross-examination, and was observable by the court-martial), the Air Force Court held that the appellant was not denied his right of confrontation.[55] The court expressly declined to rule on the constitutionality of MRE 611(d)(3), confining its review to the military judge's factual determinations.[56]

Before the CAAF, the appellant asserted several arguments the court found unpersuasive: the military judge erred because the witness's trauma derived, not from testifying in his presence, but rather from being in the court-room; the military judge should have questioned the victim before ruling on the motion; the fear the victim felt was unreasonable, and therefore not a basis for ordering the use of remote testimony; and the military judge erred when she found that the witness would suffer more than *de minimis* harm.[57]

The CAAF spent a good portion of its opinion answering the appellant's argument that MRE 611(d)(3) was constitutional only if certain language were read into the rule. The appellant argued that the rule was constitutional as applied to him only if (1) the military judge found that the child witness would suffer such trauma that she would be unable to testify; and (2) the potential trauma or fear-causing trauma was the result of the appellant's presence.[58] Applying the standards in *Craig*, the court noted that MRE 611(d)(3)'s requirement that the military judge find "that a child is unable to testify in open court in the presence of the accused" means that the inability to testify results, not from the courtroom generally, but from the accused's presence.[59] The CAAF interpreted the rule's language to require that before a military judge orders remote testimony procedures, she must find that a child will suffer more than *de minimis* emotional distress, "whether brought on by fear *or* some form of trauma" that would render the witness from reasonably testifying.[60] In short, the court agreed with the

45. *McCollum*, 58 M.J. at 327 (quoting Ms. Prior's testimony).

46. *Id*.

47. *Id*. at 327 (quoting Ms. Prior's testimony).

48. *Id*.

49. *Id*. at 328.

50. *Id*.

51. *Id*.

52. *Id*.

53. *Id*.

54. United States v. McCollum, 56 M.J. 837, 840 (A.F. Ct. Crim. App. 2002).

55. *Id*. at 841.

56. *Id*. at 840 n.*.

57. *McCollum*, 58 M.J. at 328.

58. *Id*. at 330.

59. *Id*.

appellant that MRE 611(d)(3) must be read consistent with *Craig*, but disagreed that the military judge failed to do so.[61]

With respect to the source of the trauma, the appellant argued that the military judge's decision was premised on a finding that the victim would suffer emotional harm from testifying generally, rather than from the more specific source of having to testify in the appellant's presence.[62] The court rejected the claim that the military judge did not find that the victim would *also* suffer trauma from testifying in the appellant's presence observing, "*Craig* did not require that a child's trauma derive *solely* from the presence of the accused."[63] So long as a military judge makes a finding of necessity based on fear or trauma caused by the accused's presence, that ruling would be consistent with *Craig*'s requirements.[64] The court determined that the military judge made such a finding, supported by Ms. Prior's testimony that any harm would be "extremely" aggravated if CS were required to testify in the appellant's presence.[65] The CAAF concluded "there was sufficient evidence for the military judge to conclude that the fear or trauma, brought on by CS's fear of Appellant alone, would have prevented CS from reasonably testifying."[66]

The appellant's more interesting challenge was his argument that the military judge erred by not questioning CS before making her ruling.[67] The CAAF gave the argument relatively short shrift, determining that the Sixth Amendment does not require a judge to interview or observe the witness before allowing remote testimony.[68] Noting that the expert testimony was unrebutted, the court stated, "While it may be appropriate, and even necessary, in some circumstances for a military judge to question or observe a child witness before ruling . . . such an action is not required per se."[69] In the court's judgment, the military judge had sufficient information to make her decision without talking to or observing CS.[70]

Tackling an avenue of approach not discussed in *Craig*—MRE 611(d)(3)(A)'s fear—the CAAF dismissed the appellant's argument that any fear must be reasonable to provide a basis to order remote testimony.[71] Earlier in its opinion, the court noted that the military judge linked MRE 611(d)(3)(A) and (B).[72] A link between fear and trauma, the court declared, is not required: "the Supreme Court's language in *Craig* is sufficient to uphold the constitutionality of both M.R.E. 611(d)(3)(A) and (B), independent of each other."[73] After identifying trauma and fear as two separate bases for necessity, the CAAF held that MRE 611(d)(3)(A) does not require imminent harm or reasonable fear.[74] Rather, "the fear of the accused [must] be of such a nature that it prevents the child from being able to testify in the accused's presence."[75]

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60. *Id*. at 330-31 (emphasis added).

61. *Id*. at 332.

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*. at 333. Of some importance was that the victim was willing to testify. In a footnote, the CAAF observed that *willingness* to testify is distinct from the *ability* to testify reasonably: "That CS wanted to testify in Appellant's presence does not, by itself, establish that CS would have been able to reasonably testify in Appellant's presence." *Id*. at 333 n.2. In this circumstance, the military judge was "free . . . to defer to Ms. Prior's conclusion that CS would be harmed by testifying in front of Appellant in making her determination that CS would be unable to reasonably testify." *Id*.

66. *Id*.

67. *Id*. at 332.

68. *Id*. at 333.

69. *Id*.

70. *Id*.

71. *Id*.

72. The "military judge appears to have concluded that both fear *and* trauma were required for a finding of necessity." *Id*. at 331 (emphasis added). Military Rule of Evidence 611(d)(3)(B) covers the trauma basis for a finding of necessity. MCM, *supra* note 9, MIL. R. EVID. 611(d)(3)(B).

73. *McCollum*, 58 M.J. at 331.

74. *Id*. at 333.

75. *Id*. The CAAF also took the time to note that although the military judge did not expressly rely on MRE 611(d)(3)(B), her findings were sufficient to show necessity on that basis as well. *Id.* at 334.

In upholding the constitutionality of MRE 611(d), the CAAF broke no new ground. Given the CAAF's prior decision in *United States v. Anderson*,[76] upholding a decision on similar facts should come as no great surprise, particularly when considering that subdivision (B) is similar to the statute in *Craig*.[77] What is of some interest to trial practitioners is that the CAAF upheld subdivision (A) as an *independent* basis—a non-trauma reason—for using remote testimony procedures. A witness's fear must cause emotional distress, causing that witness to be unable to testify reasonably. The basis for the Supreme Court's decision in *Craig*, however, was the promotion of the public interest in protecting children from the *trauma* of having to testify in the accused's presence. Whether fear, by itself, is a sufficient basis to lay aside the preference for face-to-face confrontation is answered in the affirmative, at least for the present.[78] Of further interest, the trial practitioner should note that appellate courts will give appropriate deference to a trial judge's findings of fact when they are supported, as in this case, by unrebutted expert testimony. The persuasiveness of Ms. Prior's testimony as an objective matter is debatable considering the weakness of her opinions drawn from limited interaction with the victim. Nonetheless, if the defense does not mount any challenge with its own expert, the finding of necessity should be no surprise. Finally, the issue regarding whether a military judge should observe a child witness before ruling on necessity is still unsettled. The CAAF held that such a procedure is not required, but advisable in certain cases. The CAAF, however, declined to specify when the circumstances might be appropriate. Certainly, *McCollum* is an important case for the government. The lesson for defense counsel, though, is to mount a challenge to the expert.

The Confrontation Clause and Hearsay: Looking Back to See Forward

Before leaving the Sixth Amendment's right to confrontation, discussion of the landmark case of *Crawford v. Washington*[79] is appropriate. As a result of this case, the paradigm for analyzing a hearsay statement's compliance with the Confrontation Clause changed dramatically. More specifically, the Supreme Court overruled the *Ohio v. Roberts*[80] mode of analyzing the admission of hearsay statements *vis-à-vis* the Confrontation Clause.[81] Before *Crawford*, the reliability of a hearsay statement was the key determination in assessing that hearsay statement's compliance with the Confrontation Clause.[82] After *Crawford*, reliability is a by-product of a procedure mandated by the Confrontation Clause—an opportunity to cross-examine the witness.

The facts of *Crawford* are straightforward.[83] Crawford was charged with assault and attempted murder after he stabbed Mr. Lee. Crawford stabbed Lee during an altercation arising from Lee's alleged rape attempt of Sylvia, Crawford's wife. After the alleged rape attempt, Sylvia led Crawford to Lee's apartment, thus facilitating the assault. Police arrested both Crawford and Sylvia and advised them of their *Miranda*[84] rights. In one of his statements to police, Crawford claimed self-defense. Sylvia gave two statements, the second of which was a recorded statement that ostensibly undermined Crawford's self-defense claim. At trial, Crawford invoked marital privilege to prevent Sylvia from taking the stand in the prosecution's case. In response, the prosecution sought to admit her recorded statement to police as one against her penal interests. The evidentiary privilege Crawford invoked did not extend to hearsay statements by a spouse admissible under a hearsay exception.[85]

Crawford claimed that the statement's admission would violate his confrontation rights.[86] The trial court admitted the

76. 51 M.J. 145 (1999).

77. *See* Maryland v. Craig, 497 U.S. 836 (1990). As quoted in the Supreme Court's opinion in *Craig*, the provision under scrutiny there provided for remote testimony when a "judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id*. at 840 n.1. There was no similar provision regarding a witness having fear of the accused.

78. Because the military judge in this case was (perhaps presciently) cautious by linking fear and trauma in finding necessity, this case is not particularly well-suited for the Supreme Court's adjudication if the appellant is looking for a different result on a higher appeal.

79. 124 S. Ct. 1354 (2004).

80. 448 U.S. 56 (1980) (holding that a hearsay statement meets the requirements of the confrontation clause if it possesses indicia of reliability established either through a showing that the statement fits within a firmly-rooted exception to the hearsay rule or it possesses particularized guarantees of trustworthiness).

81. *See Crawford*, 124 S. Ct. at 1374.

82. *Roberts*, 448 U.S. at 66.

83. *See Crawford*, 124 S. Ct. at 1356-58.

84. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that before a custodial interrogation, a subject must be warned that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the presence of an attorney).

85. *Crawford*, 124 S. Ct. at 1358.

statement, using the *Roberts* test to conclude that the statement possessed particularized guarantees of trustworthiness[87] (a necessary finding as a statement against penal interest is not firmly rooted).[88] The trial court offered several reasons to support its conclusion that the statement was trustworthy: Sylvia did not shift blame from herself, but rather corroborated Crawford's statement that he acted in self-defense; she had direct knowledge as an eyewitness; the events described were recent; and the statement was made to a "neutral" law enforcement officer.[89]

The Washington Court of Appeals reversed Crawford's conviction, applying a nine-factor test to determine that Sylvia's statement did *not* possess sufficient particularized guarantees of trustworthiness.[90] The Washington Supreme Court unanimously reinstated Crawford's conviction finding that Sylvia's statement *did* possess particularized guarantees of trustworthiness because it interlocked with Crawford's statement.[91] The Supreme Court framed the issue as "whether the State's use of Sylvia's statement violated the Confrontation Clause."[92]

The Court reversed the Washington Supreme Court's judgment. Justice Scalia, writing for the seven-member majority (Chief Justice Rehnquist and Justice O'Connor concurred in the judgment), reviewed the pedigree of the Confrontation Clause and its meaning in English common law and early American jurisprudence.[93] His review generated the following important inferences: (1) that the Confrontation Clause was principally directed against the civil-law mode of criminal procedure, particularly its use of *ex parte* examinations against a criminal defendant[94] and (2) "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[95]

Regarding the first inference, Justice Scalia noted that the Framers' focus on the civil-law mode of criminal procedure means that "not all hearsay implicated the Sixth Amendment's core concerns."[96] For example, an "off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[97] Contrasting such a hearsay statement, Justice Scalia wrote, "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them."[98] The Court declined to specify which of the

86. *Id*. The Court noted that the lower court opinion resolved the problem of Crawford creating the Confrontation Clause issue. The lower court held that forcing Crawford to choose between the marital privilege and the Confrontation Clause was "an untenable Hobson's choice." *Id*. at 1359 n.1 (quoting Washington v. Crawford, 54 P.3d 656, 600 (Wash. 2002)).

87. *Id*.

88. Lilly v. Virginia, 527 U.S. 116, 134 (1999) (plurality opinion).

89. *Crawford*, 124 S. Ct. at 1358.

90. *Id*. The Washington Court of Appeals' reasons included the following: the statement contradicted one given previously; it was made in response to leading questions; and Sylvia admitted to closing her eyes during the alleged assault. *Id*. Those factors were reviewed in the lower court's unpublished opinion, *Washington v. Crawford*, 2001 Wash. App. LEXIS 1723, *14-*17 (Wash. Ct. App. July 30, 2001) (unpublished) (listing and applying the nine factors: whether the declarant had an apparent motive to lie; whether the declarant's general character suggests trustworthiness; whether more than one person heard the statement; whether the declarant made the statement spontaneously; whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness; whether the statement contained expressed assertions of past fact; whether cross-examination could help show the declarant's lack of knowledge; the possibility that the declarant's recollection was faulty because the event was remote; and whether the circumstances surrounding the making of the statement suggest that the declarant misrepresented the defendant's involvement).

91. *Crawford*, 124 S. Ct. at 1358. The Washington Supreme Court did not apply the nine-factor test applied by the lower court because if the statement interlocked with Crawford's statement, Sylvia's statement possessed sufficient indicia of reliability. *Crawford*, 54 P.3d at 661. Why the Washington Supreme Court did not apply or even cite *Idaho v. Wright*, 497 U.S. 805 (1990) is unexplained in its opinion. *Wright* stands for the simple proposition that an out-of-court statement's particularized guarantees of trustworthiness is tested by looking *only* at the circumstances surrounding the making of the statement, extrinsic evidence having no role in that determination. *Id*. at 819. Therefore, the interlocking nature of the statements is immaterial to the reliability analysis. Indeed, as noted by Chief Justice Rehnquist in his concurrence in the judgment, a citation to *Wright* would have been sufficient to dispose of the issue before the Court. *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

92. *Id*. at 1359.

93. *Id*. at 1359-63.

94. *Id*. at 1363.

95. *Id*. at 1365.

96. *Id*. at 1364.

97. *Id*.

98. *Id*.

many varieties of hearsay statements have Sixth Amendment implications. What the Court made clear, however, is that "testimonial"[99] hearsay statements *do* have Sixth Amendment implications.[100] The Court noted that even if the Sixth Amendment "is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."[101]

Regarding the second inference, the Court determined that the common law in 1791 conditioned the admissibility of an absent witness' examination "on unavailability and a prior opportunity to cross-examine."[102] The Sixth Amendment, therefore, incorporated those limitations.[103] The requirement for the opportunity to cross-examine is dispositive "and not merely one of several ways to establish reliability."[104] Justice Scalia, after discussing the history of several cases interpreting the Confrontation Clause,[105] turned his attention to determining what, if anything, was left of the *Roberts* test.

The Court overruled *Roberts* declaring that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[106] Most notably, the Court stated, "[The Clause] commands, not that evidence be reliable, but that *reliability be assessed in a particular manner*: by testing in the crucible of cross-examination."[107] The case at bar was an ideal example of the "unpardonable vice of the *Roberts* test," that is, "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[108] Justice Scalia noted that "*Roberts*' failings were on full display in the proceedings below" with the trial court applying several factors showing reliability while the intermediate appellate court relied on different factors for a different result.[109] The Washington State Supreme Court in yet another analysis relied only on the interlocking nature of the statements (how similar the statements were), disregarding every factor considered below it.[110] To the Court, "[t]he case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application."[111]

Refusing to be drawn into "reweighing the 'reliability factors' under *Roberts*," the Court declared that the "Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our devision."[112] Therefore, the Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[113] When non-testimonial evidence is at issue, however, "it is wholly consistent with the Framers' design to

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99. Justice Scalia listed the various formulations of the class of "testimonial" statements:

> "[*E*]*x parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially" [citation omitted]; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" [citation omitted]; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" [citation omitted].

Id.

100. *See id*. at 1365.

101. *Id*. This language is of particular importance in considering whether *Crawford* has implications to the myriad of other hearsay exceptions routinely admitted at trial.

102. *Id*. at 1366.

103. *Id*.

104. *Id*. at 1367.

105. *Id.* at 1367-69.

106. *Id*. at 1370.

107. *Id*. (emphasis added). Perhaps the best quotation and most telling from the case is: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id*. at 1371.

108. *Id*.

109. *Id*. at 1372; *see supra* note 90.

110. *Id*. at 1372.

111. *Id.*

112. *Id*. at 1373.

afford the States flexibility in the development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[114] The Court did not give the practitioner much help in defining the precise parameters of "testimonial hearsay" noting only that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[115]

The Court's decision in this case raises several questions. Given the holding, it would appear that the *Roberts* unavailability standard (limited by the Court's later decisions in *United States v. Inadi*[116] and *White v. Illinois*[117]) has been resurrected, at least in relation to cases involving testimonial hearsay. Before the prosecution can present a testimonial hearsay statement in which the declarant was subjected to cross-examination, it must show that the witness is unavailable. Further, what *Crawford* means to many of the previously admissible (for both evidentiary as well as Confrontation Clause purposes) hearsay statements under the rubric of "firmly rooted" is unclear. The Court sought to downplay the *Crawford* decision's impact on such cases as *White* by noting that *White* involved the very narrow question of whether the *Roberts* unavailability requirement applied to excited utterances and statements made for medical diagnosis and treatment.[118]

For the trial practitioner, however, the practical effects of this decision are muddy at best. At a minimum, careful trial counsel should ensure that any complainants' hearsay statements are at least subjected to the opportunity for cross-examination.[119] In that light, Article 32, Uniform Code of Military Justice (UMCJ)[120] investigations likely will gain greater importance, particularly in cases involving reluctant witnesses or witnesses who potentially will have trouble testifying at trial. Even if the defense offers to waive the hearing, a prudent trial counsel may want to go forward with the hearing to give the accused the opportunity for cross-examination. Outside of the clearly testimonial arena, however, there are many unanswered questions. For example, what will matter more, the essential character of the statement or the intent of the declarant at the time the statement is made or at whose behest a statement is made? Will the Court interpret future cases very narrowly or will the facts cause the Court to look outside the "core" concerns that motivated the framers?[121]

In cases involving, for example, child sexual abuse victims who make statements to persons other than law enforcement (mothers, guidance counselors, etc.) or medical personnel, *Crawford*'s impact is unclear. A cursory review of case law reveals that such statements are routinely admitted as excited utterances or statements made for medical treatment or diagnosis—firmly rooted exceptions under *Roberts*—or as residual hearsay.[122] Will trial courts parse out the "testimonial" aspects of such statements or will the exceptions fall *in toto* to the requirements of the Confrontation Clause as interpreted by *Crawford*? Will trial courts look at whether there is a difference in the declarant's mindset in determining what is testimonial and what is not? The answers are not clear.

For example, the reason underlying the hearsay exception for an excited utterance under MRE 803(2)[123] is that a statement made under the stress of excitement possesses inherent reliability because the excitement removes any opportunity for calculation.[124] Do the circumstances under which the statement is

113. *Id*. at 1374.

114. *Id*.

115. *Id*. The majority did note "that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be worse than the status quo." *Id*. at 1374 n.10.

116. 475 U.S. 387, 394 (1986) (holding that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable").

117. 502 U.S. 346, 354 (1992) (holding that "*Roberts* stands for the proposition that [the] unavailability analysis is a necessary part of the Confrontation Clause analysis *only* when the challenged out-of-court statements were made in the course of a prior judicial proceeding" (emphasis added)).

118. *Crawford*, 124 S. Ct. at 1368 n.8.

119. The *Crawford* majority made clear that the Confrontation Clause does not bar testimonial statements offered for purposes other than establishing the truth. *Id*. at 1369 n.9.

120. UCMJ art. 32 (2002). "(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." Key to the trial counsel is the language providing that "full opportunity shall be given to the accused to cross-examine witnesses against him if they are available . . . ." *Id*.

121. Justice Scalia hinted that the future of the Confrontation Clause's interpretation may be very narrow. He noted that in *White*, the Court rejected a proposal to apply the Confrontation Clause only to testimonial statements—read *ex parte* testimony—leaving the remainder for regulation by hearsay law. *See Crawford*, 124 S. Ct. at 1369-70 (citing *White*, 502 U.S. at 352-53). He also observed that, while the decision in *Crawford* casts doubt on *White*'s holding, "we need not definitively resolve whether it survives our decision today . . . ." *Id*. at 1370.

122. *See, e.g.*, White v. Illinois, 502 U.S. 346 (1992) (excited utterance and medical diagnosis and treatment); United States v. Donaldson, 58 M.J. 447 (2003) (excited utterance); United States v. Hollis, 57 M.J. 74 (2002) (medical exception); United States v. Ureta, 44 M.J. 290 (1996) (residual hearsay).

made make a difference as to the essential *character* of that statement in terms of whether it is or *could be* "testimonial"? Or are the manner and circumstances under which the statement is made determinative as to whether it is testimonial?[125]

Contrast the declarant's mindset while under a stressful event with the mindset necessary for the hearsay exception for medical diagnosis or treatment. In cases of the latter, if the declarant has the subjective expectation of medical treatment, such statements are thought to be reliable because people seeking medical treatment are more likely to be telling the truth for "selfish reasons."[126] The opportunity—indeed necessity—for cool reflection necessary to inform a medical professional of the injury or symptoms traditionally bears nothing on the reliability analysis of such a statement. A closer look reveals that such a statement *may be* testimonial in that it may identify the person responsible for the injury or harm.[127] Nevertheless, if the Court interprets the Confrontation Clause consistent with the core concerns of protecting against the civil law's method of procuring evidence, such statements would not implicate the Confrontation Clause. To the extent, however, that a declarant identifies the alleged perpetrator, whether under stress or to a doctor, it would seem inapposite *not* to apply the strictures of the Confrontation Clause to test the reasons for the identification.[128]

While the answers to these questions remain unclear at this point, *Crawford* requires that all counsel keep a close eye on future interpretations of the opinion. To do otherwise is to put at risk future prosecutions or to suffer the consequences of ineffective assistance of counsel (IAC).

The (In)Effective Assistance of Counsel: How Much Is Enough?

In *Strickland v. Washington*, the Supreme Court articulated the standard for reviewing claims of IAC.[129] To prevail on a claim of IAC, an accused must show two things. First, she must show that "counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[130] In evaluating an IAC claim, the reviewing court must determine whether the performance of his defense counsel was objectively reasonable—that is, did the performance fall below the prevailing professional standards and norms considering all the circumstances?[131] Second, the accused must show that that failure resulted in prejudice to her. In evaluating prejudice, the reviewing court is tasked to determine whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[132] Stated differently, the accused must show that but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome."[133] The *Strickland* standard

123. MCM, *supra* note 9.

124. 2 Stephen A. Saltzburg, Lee D. Schinasi, & David A. Schlueter, Military Rules of Evidence Manual § 803.02[3][a] (5th ed. 2003).

125. This inquiry is important if only because, as Justice Scalia noted in *Crawford*, the Confrontation Clause is not concerned with the reliability of hearsay statements *per se* as much as it is in the procedure of testing a hearsay statement's reliability through cross-examination. *See supra* text accompanying note 107. Of course, this point may be academic if Justice Thomas' formulation were to carry the day. *See* White v. Illinois, 502 U.S 346, 365 (1992) (Thomas, J., concurring in part and in judgment) (noting that the Clause was aimed at a discrete category of evidence that prosecutors used as a means to deprive criminal defendants of the adversarial process; e.g., "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). Justice Thomas' formulation, interestingly, mirrors the articulated minimums noted in *Crawford*. *See supra* text accompanying note 115.

126. Saltzburg, Schinasi, & Schlueter, *supra* note 124, § 803.02[5][a].

127. The identity of the perpetrator of the injury or harm has been held to fall within the exception. *See, e.g.*, United States v. Quigley, 35 M.J. 345 (C.M.A. 1992) (noting that the identity of the perpetrator is important because if not identified, the child might go back into the same environment where she is being victimized and therapy would not be as effective); *see also* United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) (noting that that "hearsay statements disclosing the identity of a sexual abuser are admissible under [Federal] Rule [of Evidence] 803(3) only 'where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding,'" (quoting United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985))); United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (observing that the identity of the defendant as the sexual abuser was necessary to the therapeutic treatment of the victim, because effective treatment may require that the victim avoid contact with the abuser and because the psychological effects of sexual molestation by a father or other relative may require different treatment than those resulting from abuse by a stranger).

128. Looking at the survey of "testimonial" statements discussed in *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004), one of those definitions includes those statements that an objective person could reasonably believe would be available for use at a later trial. At least with respect to medical diagnosis statements, if a child-victim were taken to a medical professional at the behest of law enforcement, it would be hard to argue that any subsequent statements could not be reasonably seen as made for use at a later trial.

129. 466 U.S. 668 (1984).

130. *Id.* at 687.

131. *Id.* at 688.

132. *Id.* at 687.

for effective assistance of counsel applies to practice in courts-martial by virtue of the Court of Military Appeals' decision in *United States v. Scott*.[134]

Pretrial Investigation and Trial Tactics

United States v. Brozzo[135] is a case that will not go away. The appellant was tried and convicted of wrongful use of cocaine based on a positive random drug test.[136] After trial, defense counsel learned of an internal blind quality control sample that tested positive for cocaine metabolite (a "false positive"). The appellant contended that the report for the result was not disclosed[137] in violation of the requirements of *Brady v. Maryland*.[138] The Air Force Court initially looked at *Brozzo* as a discovery case.[139] After determining that the government did not withhold the requested drug testing information,[140] the Air Force Court affirmed the conviction, observing that "[t]he furnished data put the appellant on notice that there was further information about possible impeachment evidence. We find that the government disclosed information that would have led diligent counsel to the analytical data in question."[141] In view of the Air Force Court's conclusion that the trial defense counsel did not exercise reasonable diligence in discovering an erroneous drug testing laboratory report, the CAAF returned the case to the lower court to determine whether Brozzo was provided effective assistance of counsel.[142]

The Air Force Court began its analysis by correcting any "misunderstanding of the earlier holding of this Court."[143] Senior Judge Breslin, writing for the court, stated the Air Force Court's previous decision did *not* find that trial defense counsel failed to exercise due diligence in discovering the erroneous test report.[144] To support this assertion, the Air Force Court noted the applicable standard for reviewing allegations of error in discovery cases in which the evidence is suppressed.[145] The test for error in such cases is that evidence is not suppressed if the accused knew or should have known, in the exercise of reasonable diligence, of the essential facts that would permit him to take advantage of the evidence.[146] The test for prejudice is similar to the test for prejudice in IAC cases—that there is a reasonable probability that had the evidence been disclosed, the result at trial would have been different.[147] The court then addressed the standard of review for IAC cases, noting that the standards for finding error are different—the test in discovery matters focuses on specific information while the test for IAC focuses on the counsel's entire performance.[148] Given the different standards, the Air Force Court reached a logical conclusion: A determination that the disclosed information would have led a diligent defense counsel to the analytical data at issue was *not* tantamount to a finding that trial defense counsel was ineffective for Sixth Amendment purposes.[149] The court spent the remainder of its opinion on this point, holding that the appellant's trial defense counsel was not ineffective.[150]

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133. *Id*. at 694.

134. 24 M.J. 186 (C.M.A. 1987).

135. United States v. Brozzo, 57 M.J. 564 (A.F. Ct. Crim. App. 2002), *set aside by* 58 M.J. 284 (2003), *aff'd on remand*, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. Aug. 26, 2003) (unpublished), *review granted*, 59 M.J. 399 (2004).

136. *Id*. at 565.

137. *Id*.

138. 373 U.S 83 (1963).

139. Major Ekman's article extensively covered this case as a discovery matter. Ekman, *supra* note 3, at 108.

140. Trial defense counsel submitted a specific discovery request for "false positives" and "false negatives." The appellant's counsel also requested "copies of documents relating to inspections of the laboratory, the quality control program, mishandling of samples, and other administrative errors in testing for the three months before the appellant's sample was tested, the month of the testing, and the month after the testing." *Brozzo*, 57 M.J. at 565.

141. *Id.* at 567.

142. United States v. Brozzo, 58 M.J. 284 (2003).

143. United States v. Brozzo, 2003 CCA LEXIS 187, *3 (A.F. Ct. Crim. App. Aug. 26, 2003) (unpublished).

144. *Id*.

145. *Id*. at *4.

146. *Id*.

147. *Id*.

148. *Id*. at *6.

As framed by the Air Force Court, the appellant asserted that "trial defense counsel was deficient for failing to investigate the quality control report showing a technician's error regarding one specific quality control sample occurring two months before the testing of appellant's sample."[151] The Air Force Court reasserted its earlier finding that the defense counsel was not deficient in this regard.[152] Indeed, there was no evidence in the record that defense counsel failed to inquire into the quality control sample: "All we can tell from the record is that trial defense counsel did not specifically cross-examine the expert witness about the 'technician error' for this particular failure of a blind quality control sample."[153] Reviewing the entire performance of the defense counsel, the Air Force Court concluded that "it is apparent trial defense counsel zealously defended their client in this case."[154] Although the defense counsel did not cross-examine the primary government expert witness about the technician's error on the blind quality control sample at issue, the Air Force Court did not find that this failure rose to deficient performance under *Strickland*.[155] Simply because "appellate defense counsel . . . can devise more cross-examination questions on this point does not mean that, considering all circumstances, the appellant was effectively deprived of counsel under the Sixth Amendment."[156]

The Air Force Court then noted that even if defense counsel did not inquire further into quality control data the government provided, there was still no deficient performance.[157] The court premised its conclusion on the following: (1) the monthly reports revealed that personnel in the quality control section made errors, and trial defense counsel elicited that information on cross-examination; (2) the reports did not disclose unusual or significant problems in the quality control section during the month the appellant's sample was tested; (3) there was a separation between the quality control section and the section handling members' samples; and (4) "there was little to be gained from focusing an attack on the quality control section."[158]

Finally, the Air Force Court analyzed the prejudice prong of *Strickland*, noting the similarity in the standard between discovery cases and IAC claims. Reprising its conclusion that the evidence on the discovery issue was not material, the Air Force Court similarly found no reasonable probability that the result would have been different if defense counsel had investigated further or presented additional impeachment information regarding the erroneous sample.[159] The court dismissed with dispatch the various arguments the appellant made in an effort to show prejudice. First, the Air Force Court rejected the conclusion that the result at issue was a "false positive" because the sample was never reported as positive.[160] Further, there was no evidence that the gas chromatography/mass spectrometry (GC/MS) test was flawed.[161] Also, the problem with the quality control sample was in its aliquoting or handling of the sample, not in the test itself, which was supervised, but not handled, by the same expert who testified at trial.[162] Finally, the court rejected the argument that a negative urine sample could reach GC/MS contaminated by a prior sample because a member's sample reaches GC/MS only after two positive preliminary tests.[163]

The trial practitioner should take note of this case for two reasons. First, the CAAF has granted review on the case—so the *Brozzo* saga continues.[164] Whether the CAAF will determine that the defense counsel was ineffective for failing to discover the report is debatable. Given the CAAF's recent decision in *United States v. Jackson*,[165] it seems more likely that

149. *Id.* at *6-7.

150. *Id*. at *19.

151. *Id.* at *8.

152. *Id*.

153. *Id*.

154. *Id.* at *9.

155. *Id*. at *12.

156. *Id*. at *12-13.

157. *Id*. at *13.

158. *Id.* at *14-15.

159. *Id.*at *16.

160. *Id*. at *17.

161. *Id*.

162. *Id.* at *18.

163. *Id*. at *18-19.

the CAAF will dispose of this case on the granted discovery issue.[166] The second reason this case is important is that the Air Force is putting the onus on the defense counsel to carefully review information the government provides and to exercise reasonable diligence in culling through the disclosed information. If the CAAF does not reverse the Air Force Court on this point, trial counsel can rely on the Air Force Court opinion in support of an argument that the defense, if it has access to the information requested, carries a burden to exercise reasonable diligence in securing requested discovery. The next case discusses what defense counsel should do when faced with knowing that a client is likely to commit perjury.

United States v. Baker[167] demonstrates the ethical and constitutional quandary defense counsel face when they believe their client will not testify truthfully in his own defense. After the defense began its case-in-chief with two witnesses, four stipulations of expected testimony, and eight other exhibits, the defense requested a short recess.[168] Forty-five minutes later, the military judge conducted an Article 39(a), UCMJ, session to discuss the request of the appellant's two defense counsel to be removed from the case.[169] After discussing the issue with both defense counsel, the military judge deduced that the reason for the withdrawal request was because counsel had concerns about their client committing perjury. The military judge then began a discussion with the appellant as to how the trial would proceed if he chose to testify.[170]

The military judge told the appellant he would have to testify without the assistance of counsel, that he would be cross-examined by trial counsel and questioned by members without the assistance of counsel, and that his defense counsel could not use anything he said in his testimony in their closing argument.[171] The military judge refused to allow either defense counsel off of the case.[172] Recognizing the likelihood of appellate litigation, she instructed both defense counsel to prepare a memorandum for record detailing the situation as known by them both before and after the appellant's testimony.[173] The military judge informed the appellant that these memoranda would be retained in counsel's files, but would be releasable if the appellant raised an IAC claim.[174] The appellant eventually testified in a narrative form, responding to questions from both the trial counsel and the military judge.[175]

The CAAF noted that under circumstances in which a defense counsel believes an accused will commit perjury, the defense counsel is placed at the "intersection of competing and sometimes conflicting interests."[176] The first issue the CAAF addressed was the factual standard an attorney must apply to determine whether the proposed testimony is false.[177] The CAAF stated that defense counsel must have a "firm factual basis" to believe their client is going to commit perjury before being required to take action under the ethical standards.[178] Once this basis is satisfied, the proper approach for defense counsel is to provide non-specific notice to the trial court that

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164. The CAAF granted review on the following IAC issue: "II. WHETHER, IN VIEW OF THE CONCLUSION OF THE AIR FORCE COURT OF CRIMINAL APPEALS THAT TRIAL DEFENSE COUNSEL DID NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE ERRONEOUS TEST REPORT, APPELLANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL." United States v. Brozzo, 59 M.J. 399 (2004).

165. 59 M.J. 330 (2004) (holding that the government's failure to disclose to defense information detailing a report of a negative blind quality control sample that tested positive for the cocaine metabolite violated RCM 701(a)(2)(B) with such failure being prejudicial to the appellant).

166. *Brozzo*, 59 M.J. at 399. The court granted review on the following discovery issue:

> I. WHETHER BRADY V. MARYLAND AND ARTICLE 46, UCMJ, REQUIRE THE GOVERNMENT TO DISCLOSE EVIDENCE OF A URINALYSIS 'FALSE POSITIVE' FOR COCAINE WHERE APPELLANT WAS CHARGED WITH USE OF COCAINE; THE QUALITY CONTROL PROCESS COULD NOT DETERMINE THE CAUSE OF THE ERROR; THE LABORATORY MADE THE ERROR LESS THAN TWO MONTHS PRIOR TO TESTING APPELLANT'S SAMPLE; THE GOVERNMENT EXPERT WITNESS WORKED SUBSTANTIVELY ON BOTH TESTS; AND TRIAL COUNSEL DID NOT EXERCISE DUE DILIGENCE IN DISCLOSING THE ERROR.

Id.

167. 58 M.J. 380 (2003).

168. *Id.* at 381.

169. *Id*. at 382.

170. *Id*. at 382-83.

171. *Id*.

172. *Id*. at 383.

173. *Id.*

174. *Id*.

175. *Id*. at 384.

the accused will testify in a narrative form without the assistance of counsel.[179]

In the case at bar, there was no direct evidence on the record as to why the defense counsel requested to withdraw and allowed their client to testify in a narrative form.[180] In the case's current posture, therefore, the CAAF set aside the decision of the service court and remanded the case for a *DuBay* hearing.[181] The CAAF suggested procedures for defense counsel and military judges to use in future cases when they are faced with client perjury issues in court.[182]

This case's importance is clear for defense counsel at a similar "intersection." Although the CAAF did not resolve the issue before it, the nonbinding guidance for the defense counsel and military judge in such circumstances is very helpful. It would seem a harsh result for the CAAF to find IAC under these facts unless counsel did not conduct a sufficient investigation and advise the appellant on the options after the investigation. The tack taken by the CAAF suggests what a careful defense counsel should already do if faced with a similar circumstance. Counsel who does not heed the CAAF's baseline suggestions does so at their client's and their own peril.

Conflicts and Ineffective Assistance: United States v. Cain *and the Creation of a New Per Se Category of Conflict*

The accused's right to the effective assistance of counsel, includes the right to an attorney free from conflicts.[183] The case of *United States v. Cain*[184] tested the parameters of this constitutional guarantee in the context of a criminal homosexual relationship between a defense counsel and his client. The Army Court decided the case in October 2002 and the CAAF issued its reversal in March 2004. Given the importance of the CAAF's holding in *Cain*, it is appropriate to discuss the case. The Army Court opinion will be discussed in some detail, followed by a discussion of the CAAF opinion.

The appellant was convicted pursuant to his pleas of two specifications of indecent assault.[185] In his initial brief to the Army Court, the appellant alleged that he and his lead military defense counsel had a coerced homosexual relationship that denied him effective assistance of counsel.[186] The Army Court ordered a *DuBay* hearing to determine the underlying facts.[187] The court determined the following: Major S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation on 3 December 1997; the relationship continued until the conclusion of the trial about six months later; the appellant told several people about the relationship, including two civilian attorneys, who told the appellant that he should fire MAJ S because MAJ S's behavior was

176. *Id*. Those interests include: the constitutional right to the effective assistance of counsel; the constitutional right to present a defense; the ethical obligation of defense counsel to provide competent and diligent representation; the general prohibition against disclosure of communications between an attorney and her client; the criminal prohibitions against perjury; the ethical duty of an attorney to not offer or assist in offering material evidence known to be false; the ethical duty of an attorney who knows that a client is contemplating a criminal act to counsel the client against doing so; the ethical duty of an attorney to withdraw if a client persists in fraudulent or criminal conduct; and the rules governing impeachment and rebuttal. *Id*. at 384-85.

177. *Id.* at 386.

178. *Id*.

179. *Id*.

180. *Id*. at 387. Counsel did not prepare the memoranda for record as directed by the military judge. *Id.*

181. The issues to be addressed were as follows: (1) What information led defense counsel to conclude that the appellant's testimony would present an ethical problem? (2) What inquiry did defense counsel make? (3) What facts did the inquiry reveal? (4) What standard did defense counsel use in assessing those facts? (5) What determination did counsel make with respect to the testimony in light of those facts? (6) After making any determinations, what advice did counsel provide to the appellant? (7) What was the appellant's response? (8) What information did counsel disclose during the off-the-record conversation with the military judge? *Id*.

182. Those procedures include: defense counsel should conduct an investigation into the facts and discuss her findings with the client, including the potential consequences of providing perjured testimony; defense counsel should request an *ex parte* hearing with the military judge if the client persists; and the military judge should not inquire into the reasons but should remind the counsel to conduct an investigation; ensure that the client understands the consequences of narrative format testimony; direct further consultations between defense counsel and the client and direct the preparation of a memorandum for record describing the investigation, the factual concerns, and the advice provided to the client. *Id.* at 387-88.

183. Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

184. 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004).

185. *Id.* at 734.

186. *Id*.

187. *Id*.

unethical and illegal; the appellant did not fire MAJ S because he believed that MAJ S was the best military defense counsel available; in January 1998, MAJ S detailed Captain (CPT) L to the case at the appellant's request; after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the government regarding a pretrial agreement; on 2 June 1998, the accused pled guilty and was found guilty by a military judge sitting as a general court-martial; on 6 June 1998, the appellant's parents, without the appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; on 18 June 1998, Lieutenant Colonel F, the Trial Defense Service Executive Officer, informed MAJ S of the allegation in the letter; and the following morning, MAJ S killed himself.[188]

When alleged IAC arises from a conflict of interest, the Army court applies the two-pronged test of *Cuyler v. Sullivan*: an accused who raises no objections at trial must show that (1) an actual conflict of interest existed; and (2) the conflict of interest adversely affected counsel's performance.[189] If both elements are shown, prejudice is presumed.[190] In cases involving a guilty plea, the *Cuyler* test is modified in that the accused must show (1) an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the plea.[191] Quoting *United States v. Mays*,[192] the court specifically noted that an accused "must point to specific instances in the record to suggest an actual conflict . . . [and] must demonstrate that the attorney made a choice between possible alternative courses of action" to the accused's detriment.[193] The Army Court also noted that an accused may waive the right to conflict-free counsel, but such waiver must be made "voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences."[194]

Analyzing whether there existed an actual conflict, the Army Court found that the appellant failed to meet his burden. The Army court, citing *United States v. Babbit*[195] for support, noted that a counsel's sexual relations with a client do not create a *per se* actual conflict of interest and declined the appellant's invitation to adopt a *per se* criminal conduct rule.[196] Although his conduct was similar to the charged misconduct of the appellant, MAJ S's conduct was unrelated to the appellant's charged crimes.[197] To the Army Court, "[t]he best way to maintain appellant's confidence required that M[ajor] S represent appellant's interests to the utmost of his abilities, and that appellant know of MAJ S's efforts on his behalf." Therefore, "not only did MAJ S and appellant's interests not conflict, in some respects, they converged."[198]

The court then reviewed, even if there were an actual or potential conflict, whether the appellant waived it. The question before the court was

> whether someone, at some point, "laid out for appellant at the *basic* ramifications and pitfalls of the arrangement so that he could make informed judgments as to (1) whether his counsel had a conflict of interest . . . and (2) if so, whether he wished to waive the right to conflict-free counsel."[199]

The appellant sought and received the benefit of talking to several people, including two civilian attorneys who told him that MAJ S's conduct merited his release. Notwithstanding that advice, the appellant "wanted M[ajor] S to continue to represent him because he believed him to be the best military attorney available."[200] Most telling was that when asked by the military judge during the providence inquiry whether he was satisfied with his counsel's advice, the appellant told the mili-

188. *Id.* at 735-36.

189. 446 U.S. 335, 346-47 (1980).

190. *Id.* at 349-50.

191. *Cain*, 57 M.J. at 737 (citing Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987)).

192. 77 F.3d 906, 908 (6th Cir. 1996).

193. *Cain*, 57 M.J. at 737.

194. *Id.*

195. 26 M.J. 157 (C.M.A. 1988).

196. *Cain*, 57 M.J. at 737-38.

197. *Id.* at 738.

198. *Id.*

199. *Id.* (quoting United States v. Henry, 42 M.J. 231 (1995)) (emphasis added).

200. *Id.* at 739.

tary judge that he was satisfied.[201] Given these facts, plus that he asked for and received additional counsel, was sufficient for the court to conclude, "Appellant knew what he was doing when he made his choice."[202]

Finally, the Army Court found that, even if MAJ S labored under an actual conflict that the appellant did not waive, there was no evidence in the record that the conflict adversely affected the defense team's performance, the appellant's decision to plead guilty, or the terms and conditions of the appellant's guilty plea.[203] Further, even if MAJ S labored under a conflict, CPT L did not, because CPT L knew nothing of the relationship.[204] The court stated, "Measuring the combined efforts of M[ajor] S and C[aptain] L on behalf of appellant, it is difficult to imagine what more they could have done on his behalf to produce a more favorable result."[205]

The Army Court's opinion, while well-written and supported in fact and law, did not withstand the CAAF's scrutiny. The CAAF looked at the same facts, applied the same legal standard, yet came to the opposite conclusion: there was an actual, unwaived conflict that created IAC.[206] In reviewing the facts, the CAAF fleshed-out in more detail than did the Army Court the misgivings the appellant held during MAJ S's representation.[207] The theme throughout the quotations pulled from the *DuBay* hearing was that the appellant was caught between the fear of exposing MAJ S's conduct and the appellant's "deep need . . . to believe his defense counsel would 'save him.'"[208] The CAAF then discussed the various possible criminal[209] and administrative[210] consequences that both MAJ S and the appellant faced because of their sexual relationship, concluding that "Major S . . . engaged in a course of conduct with Appellant . . . which exposed both of them to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy."[211] Even if not tried by court-martial, the CAAF noted that "the conduct initiated by Major S exposed him and Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality."[212] The CAAF also noted the ethical considerations involved in the case, observing that MAJ S faced professional disciplinary action for his conduct with the appellant.[213]

Notwithstanding the ethical considerations, however, the CAAF focused on possible criminal results of MAJ S's actions holding, "The uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant."[214] In so holding, the CAAF avoided the harder issue of the appellant's being required to show prejudice.[215] In declaring that the relationship was a *per se* conflict, the CAAF suggested that the possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to the appellant on defense options.[216] In reviewing the Army court's determination that even if there was a conflict the appellant waived it, the CAAF determined that neither civilian counsel whom appellant

201. *Id*.

202. *Id*.

203. *Id.*

204. *Id*.

205. *Id*.

206. United States v. Cain, 59 M.J. 285, 295-96 (2004).

207. *See id*. at 290-92.

208. *Id*. at 291 (quoting Attorney W).

209. Fraternization violates Article 134, UCMJ, while sodomy violates Article 125, UCMJ. MCM, *supra* note 9; UCMJ arts. 125 & 134 (2000).

210. Homosexual conduct is a basis for involuntary separation. U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 15-3 (19 Dec. 2003); U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-22 (3 Feb. 2003).

211. *Cain*, 59 M.J. at 292.

212. *Id*. at 293.

213. *See id*. at 293-94. The CAAF observed that the professional rules applicable to judge advocates prohibit representation by an attorney when interests of the attorney "may be materially limited . . . by the lawyer's own interests." *Id*. at 293 (quoting U.S. Dep't of Army, Reg. 27-26, Legal Services Rules of Professional Conduct For Lawyers app. B, Rule 1.7(b) (1 May 1992)).

214. *Cain*, 59 M.J. at 295.

215. *See* United States v. Cain, 57 M.J. 733, 739 (Army Ct. Crim. App. 2002).

216. *See Cain*, 59 M.J. at 295.

contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations."[217] Therefore, "[a]ppellant's conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."[218]

This case created a new *per se* category of conflict on a very thin reed. With respect to the sexual nature of the conflict, the majority did cite a case with somewhat similar facts, *United States v. Babbit*[219] and sought to distinguish it from the case at bar. The *Babbit* court refused to adopt a *per se* conflict rule in the context of a civilian attorney having a sexual relationship with his military client.[220] Clearly distinguishable from *Babbit*, *Cain* did involve a commissioned officer who abused his military office, violated his duty of loyalty, fraternized, and committed a "same criminal offense" for which the appellant was on trial.[221] The *Babbit* court's opinion, however, was not limited to its facts and the *Cain* majority's attempt to limit *Babbit* is unpersuasive.[222] Also of some importance is that although there are no cases directly like this case, as observed by the majority,[223] similar cases have required a showing of prejudice.[224] What is more, even in the federal cases cited by Chief Judge Crawford's dissenting opinion, there was not "the mitigating presence of an independent counsel, or a guilty plea tested through the extensive providence inquiry required in military practice."[225] Importantly, CPT L did not labor under the conflict,[226] and he *endorsed* the pretrial agreement—indeed he negotiated it.[227] The CAAF majority did not fully explain how an unconflicted counsel's advice would not cure any conflict.[228] Rather, they gave the dismissive comment that "[a]ppellant relied on Major S and was entitled to the benefit of conflict-free advice from Major S about the range of alternatives before him. He did not receive that advice."[229] Also unexplained in the CAAF opinion is why the majority did not analyze the performance under the "team concept," which the court recently reaffirmed.[230] Is the CAAF saying that because one counsel was conflicted, the entire team was conflicted? If so, the majority cited no cases in support of that proposition. If the CAAF was not saying that, the majority should have looked at the defense team rather than looking only at MAJ S to reach its result.[231]

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217. *Id*. at 296. This observation stands in stark contrast to the Army Court's formulation of what the appellant should have been told. *See supra* text accompanying note 200.

218. *Id*.

219. 26 M.J. 157 (C.M.A. 1988) (holding that a civilian attorney who had consensual sexual intercourse with a client the night before the last day of trial was not denied effective assistance of counsel because the attorney was not actively representing conflicting interests). It should be noted that the Court of Military Appeals in *Babbit* agreed with the lower court's characterization of Babbit's argument: "appellant's 'arguments ultimately boil down to the proposition that an attorney's sexual relations with his client *per se* create an actual conflict of interest which violates the client's Sixth Amendment right to effective assistance of counsel.'" *Id.* at 159 (quoting United States v. Babbit, 22 M.J. 672, 677 (A.C.M.R. 1986)).

220. *Id.*

221. *Cain*, 59 M.J. at 295. Major S, however, did not commit the "same criminal offense" as his client. The *DuBay* findings were that the relationship between MAJ S and Cain was *consensual*. United States v. Cain, 57 M.J. 733, 735 (Army Ct. Crim. App. 2002). Therefore, MAJ S, while he did commit criminal acts with the appellant, he did not commit the "same criminal offense" for which Cain was on trial. Cain was on trial for forcible sodomy. *Cain*, 59 M.J. at 286.

222. After the majority cited *Babbit* and discussed its basic facts, the *Cain* majority then discussed its holding with the introductory clause "[i]n those circumstances." *Id*. at 295. A fair reading of the language used by the Court of Military Review in its opinion indicates that it was speaking in terms broader than the specific facts before it. *See supra* text accompanying note 196.

223. The CAAF noted that the "appeal before us presents a case of first impression, with no direct counterpart in civilian law. The case involves a volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses." *Cain*, 59 M.J. at 295.

224. As noted by Chief Judge Crawford in her dissent, "there have been many federal cases [that] were allegedly involved in a related criminal endeavor" but those courts have refused to adopt a *per se* rule. *Id.* at 297 (Crawford, C.J., dissenting).

225. *Id*.

226. The majority's opinion does not state that CPT L labored under any conflict.

227. *Id*.

228. Interestingly, one might ask whether the retrial of this case would accomplish the same thing (that is, an unconflicted counsel offering her assistance to the appellant).

229. *Id.* at 296.

230. *Compare* United States v. Adams, 59 M.J. 367 (2004), *with Cain*, 59 M.J. 285. In *Adams*, the CAAF declared: "In analyzing Adams' claim of ineffective appellate representation, we do not look at the shortcomings of any single counsel and speculate about the impact of individual errors. Rather, we measure the impact upon the proceedings 'by the combined efforts of the defense team as a whole.'" (citing United States v. McConnell, 55 M.J. 479, 481 (2001) (quoting United States v. Boone, 42 M.J. 308, 313 (1995))). *Adams*, 59 M.J. at 367.

Effective Assistance in Sentencing—Investigate and Present Arms!

The Supreme Court's latest significant IAC pronouncement is *Wiggins v. Smith*.[232] This case involved a petitioner convicted of murdering a seventy-seven-year-old woman found drowned in her bathtub.[233] Wiggins decided to be tried by a judge, who after a four-day trial convicted Wiggins of first-degree murder, robbery, and two counts of theft.[234] After conviction, Wiggins elected to be sentenced by a jury.[235] His two public defenders moved to bifurcate the sentencing proceedings.[236] Their intent was to first show that Wiggins did not kill the victim by his own hand (a required finding for death eligibility), and then, if necessary, to present a mitigation case.[237] The trial judge denied the motion.[238] At the beginning of the sentencing case, one of Wiggins' public defenders told the jury that they would hear about Wiggins' difficult life.[239] During the defense's sentencing proceedings, however, the defense did not present any such evidence.[240] Instead the defense focused on the theory that Wiggins was not the actual perpetrator of the victim's death.[241] Before closing arguments, the public defender made a proffer outside of the jury's presence, of the mitigation evidence the defense would have introduced but for the judge's ruling on the bifurcation motion.[242] In that proffer, the defense explained it would have introduced psychological reports and expert testimony regarding Wiggins' limited intellectual capacity and immature emotional state, as well as the absence of any aggressive behavior patterns, his capacity for empathy, and his desire to function in the world.[243] Importantly to the Court's holding, "[a]t no point did [counsel] proffer any evidence of petitioner's life history or family background."[244] The jury returned with a sentence of death.[245]

Wiggins' efforts to obtain post-conviction relief based on IAC in Maryland states courts failed.[246] As part of his efforts, his new counsel commissioned a social history report from a licensed social worker certified as an expert by the trial court.[247] That report detailed lengthy abuse at the hands of his mother, his foster parents and siblings, as well as his supervisor in the Job Corps program.[248] At the close of the post-conviction trial proceedings, the trial judge characterized the failure to compile a social history report as "absolute error."[249] Nevertheless, the

231. Naturally, to avoid this difficult issue, the CAAF merely declares a *per se* conflict—thus avoiding a performance and impact analysis—and moves out smartly from there.

232. 539 U.S. 510 (2003).

233. *Id.* at 514.

234. *Id.* at 514-15.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *See id.* at 514-21.

247. *Id.* at 514-15.

248. The Court recounted the sordid details of the report: Wiggins' "mother, a chronic alcoholic, frequently left Wiggins and his siblings alone home for days, forcing them to beg for food and to eat paint chips and garbage"; she also beat the child for breaking into the kitchen, which was often kept locked; she had sex while the children slept in the same bed; forced Wiggins' hand against a hot stove burner; Wiggins' first and second foster mothers repeatedly raped and molested him; at one foster home, the foster mother's sons allegedly gang-raped him on more than one occasion; and after entering into the Job Corps, Wiggins' supervisor sexual abused him. *Id.* at 516-18.

249. *Id.*

judge found that Wiggins' counsel's decision not to investigate was a matter of trial tactics and thus, there was no IAC.[250] The Maryland Court of Appeals affirmed the decision observing that counsel had access to the presentence investigation report (PSI) and the social service records that recorded the abuse, an alcoholic mother, and multiple placements in foster care; therefore, counsel did investigate and made a reasoned tactical choice.[251] Wiggins then filed for a writ of habeas corpus in federal district court.[252] The district court determined that counsel did not perform a reasonable investigation and that the knowledge counsel had triggered an obligation to look further.[253] The Fourth Circuit reversed the district court's determination, holding that counsel made a reasonable strategic decision to focus on Wiggins' direct responsibility.[254] After granting Wiggins' petition for certiorari, the Supreme Court reversed and set aside the death penalty sentence.[255]

Applying the two-pronged *Strickland* test for IAC, the Court held that the failure of Wiggins' defense counsel to conduct a presentencing investigation into potential mitigating evidence fell below professional standards then prevailing in Maryland.[256] Those standards included retention of a forensic social worker (e.g., mitigation expert) to prepare a social history report, for which funds were set aside but never used by Wiggins' counsel.[257] The Court also noted that counsel failed to comply with the American Bar Association's standards for capital litigation, standards the Court declared as "guides to determining what is reasonable."[258] More specifically, the Court stated,"[C]ounsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."[259] Given the information that counsel did know,[260] the Court declared that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses."[261] In this case, the investigation conducted by counsel made "an informed decision with respect to sentencing strategy impossible."[262]

Having determined that counsel did not perform as they should have, the Court turned to a determination of prejudice. The Court found prejudice because of the "powerful" nature of the unpresented evidence: severe privation and abuse while in the custody of his alcoholic, absentee mother; and physical torment, sexual molestation, and repeated rape while in foster care.[263] The Court referred to this type of evidence as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."[264] The Court was troubled that the jury heard only one significant mitigating factor—that Wiggins had no prior convictions.[265] "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."[266]

The lesson from this case is clear: investigate. The Court does not require that counsel investigate and present every conceivable avenue of approach in a sentencing case.[267] What the

250. *Id.*

251. *Id.*.

252. *Id.* at 518.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 524.

257. *Id.*

258. *Id.* (quoting Strickland v. Washington, 466 U.S. 667, 688 (1984)).

259. *Id.*

260. The Court disputed the notion that counsel knew of the instances of sexual abuse because those instances were not recorded in the presentencing report or social service records—"the records contain no mention of molestations and rapes" of Wiggins detailed in his post-conviction social history report. *Id.* at 528.

261. *Id.* at 525.

262. *Id.* at 527-28.

263. *Id.* at 533.

264. *Id.*

265. *Id.* at 537.

266. *Id.*

Court *does* require is a reasonable investigation of the facts before determining the appropriate course. The failure of counsel in *Wiggins* to investigate beyond the PSI and social service records, particularly when those records did not disclose much detail, was the key to the Court's IAC finding. The most recent Army Court case that touches on these same issues is *United States v. Kreutzer*.[268]

On the morning of 27 October 1995, members of Sergeant (SGT) Kreutzer's brigade were getting ready for a unit run to mark the brigade's assumption of duty as the 82d Airborne Division's Division Ready Brigade.[269] The appellant, SGT Kreutzer, hid in a nearby wood-line, and as the unit moved out from their pre-run formation, he opened fire on his fellow Soldiers, wounding seventeen and killing one.[270] He was found guilty, *inter alia*, of one specification of premeditated murder and eighteen specifications of attempted premeditated murder and sentenced to death.[271] The Army Court discussed two issues: (1) whether the military judge abused his discretion when he denied the appellant the services of a mitigation expert; and (2) whether the appellant was denied effective assistance of counsel at the presentencing stage of the trial.[272] A majority of the Army court panel determined that the military judge abused his discretion by denying a defense motion for a mitigation expert; the contested findings were set aside on that basis.[273] The court also unanimously held that defense counsel were ineffective in the sentencing stage of the trial, therefore requiring reversal of the adjudged sentence.[274]

As noted by the Army court, the three military counsel that represented the appellant did not have any prior capital litigation experience, and only one had any capital litigation training.[275] In reviewing the particular failings of the defense team, the Army Court noted a number of crucial errors that led to the conclusion that the appellant was denied effective assistance of counsel.[276]

The Army Court noted that during the government's sentencing case-in-chief, the defense failed to cross-examine several wounded victims, several family members, and a coworker of the dead Soldier.[277] With respect to the evidence presented by the defense, the defense team called a British exchange Soldier and the appellant's platoon sergeant to testify about the appellant's nickname, "Crazy Kreutzer."[278] Two other witnesses testified about the appellant's conduct while deployed to the Sinai Peninsula[279] and about the lack of respect accorded to the appellant.[280] The last witness the defense called was Major (Dr.) Diebold, the president of the appellant's sanity board.[281] The Army court's assessment of Dr. Diebold's testimony was less than ringing. This expert's testimony included answers to hypothetical questions designed to show that the appellant's behavior was tied to his diagnosed mental health

267. *Id.* at 533 ("[W]e emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.").

268. 59 M.J. 773 (Army Ct. Crim. App. 2004).

269. *Id.* at 774.

270. *Id*.

271. *Id*. The appellant pled guilty to the lesser included offense of murder while engaged in an act inherently dangerous to another. He also pled guilty to the lesser included offense of aggravated assault with a loaded firearm as to the attempted premeditated murder specifications. Those findings were affirmed. *Id*.

272. *Id*. at 775.

273. *Id.* The military judge's determination clearly had an adverse impact on the defense's ability to present an effective sentencing case: "[T]he judge's abuse of discretion adversely impacted the fairness of the trial . . . on sentencing as to the presentation of mitigating circumstances that may have made the death penalty inappropriate in the minds of the court members." *Id.* at 779-80.

274. *Id*. at 784. By way of comparison, one judge did not agree that the military judge abused his discretion by failing to order a mitigation expert for the defense. *Id*. at 802 (Chapman, J., concurring in part and dissenting in part).

275. *Id*. at 780. Major Gibson was the only counsel who had any training in the area by virtue of his attendance at a two-day course at the Naval Justice School in 1995. *Id*. at 785. As noted in the concurrence, training and experience in capital cases is not a *per se* requirement for qualification as defense counsel in such cases. *Id*. at 794 (Currie, J., concurring in result).

276. In reviewing this portion of the evidence, the court noted that "[t]he psychiatric evidence failure is most notable." *Id.* at 783.

277. *Id*. at 781.

278. *Id*.

279. While a member of the Multi-national Force Observers (MFO) in 1994, the appellant had and articulated homicidal feelings toward fellow Soldiers, which were the subject of treatment by an Army social worker, CPT Fong. *Id* at 777. The concurring opinion discusses in some detail the appellant's troubles in while assigned to the MFO. *See id*. at 786-87 (Currie, J., concurring in result).

280. *Id*. at 781.

status.[282] The answers "were hardly emphatic or compelling" in making that causal connection.[283] Most devastatingly for the defense's case, on cross-examination, Dr. Diebold agreed that the appellant "was thinking clearly throughout all phases of this attack."[284] He also agreed that none of the diagnosed problems would have any effect on the appellant's ability to plan, premeditate, or execute the shooting.[285] The panel also received the standard "good Soldier" packet and heard a number of stipulations of expected testimony that left, in the opinion of the court, "the impression of a normal, loving, caring, stable, family upbringing."[286] How the counsel thought this sort of evidence—portraying the appellant as a normal Soldier—would square with the notion that the appellant's mental health issues were causally related to his crimes is not explained.

In its discussion, the Army Court berated the defense team for its numerous failures. Specifically, the defense failed to interview and learn of a report prepared by Colonel (Dr.) Brown, a member of the defense team.[287] Dr. Brown interviewed the appellant at Walter Reed Medical Center at the defense's request, and he opined that he was seriously mentally ill and that the crimes committed were causally related to his illness.[288] The defense also did not call CPT Fong,[289] Dr. Diamond,[290] or Dr. Messer,[291] each of whom had significant interactions with the appellant and had testimony that could have been evaluated and presented.[292] The court declared that the defense "failed in significant ways to discover and evaluate the full range of psychiatric evidence and expert opinion available to be used in mitigation."[293] The effect of the defense's failure was the making of "uninformed decisions such as calling Dr. Diebold as the sole defense expert as to appellant's mental health status."[294] The defense team compounded its errors by failing to interview the deceased Soldier's wife, a principal witness in the government's sentencing case.[295] The court called this particular failing "a tragic flaw."[296]

Citing *Wiggins*, the Army Court held that "[d]efense counsel's investigation into appellant's mental health background fell short of reasonable professional standards."[297] As a result of the cumulative deficiencies in the case, the court held that the appellant suffered prejudice in the presentencing proceedings and set aside the death sentence.[298] Interestingly, the Army Court noted that even if the military judge had not erred by denying the defense motion for a mitigation expert, they would have reversed the sentence given the performance of the appellant's detailed defense counsel.[299]

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281. *Id.*

282. *Id.* Dr. Diebold's diagnoses of appellant were: adjustment disorder with mixed anxiety and depressed mood, dsythymia, and a personality disorder not otherwise specified with a mixture of paranoid and narcissistic traits. *Id*.

283. *Id*.

284. *Id* (quoting Dr. Diebold).

285. *Id*.

286. *Id*.

287. *Id.* at 783.

288. *Id*. at 776.

289. Captain Fong, an Army social worker, previously treated the appellant regarding homicidal feelings toward fellow soldiers while assigned to the Multi-national Force and Observer rotation in 1994. *Id*. at 777.

290. Captain (Dr.) Diamond, the 82d Airborne Division psychiatrist, saw and talked to the appellant the morning of the shooting at the CID office. *Id.* at 775.

291. Lieutenant Commander (Dr.) Messer, a lawyer and psychologist, performed a suicide assessment of the appellant while the appellant was in pretrial confinement at Camp Lejeune. He concluded that there were "'definite mental health issues' in appellant's case." *Id*.

292. *Id*. at 783.

293. *Id.*

294. *Id*.

295. *Id*.

296. *Id*. According to the Army Court, Mrs. Badger was "apparently a woman of strong religious faith which gave her a powerful impetus to forgive appellant for his terrible act of killing her kind and loving husband." *Id*.

297. *Id*. at 784.

298. *Id*.

Kreutzer is enormously important for several reasons. First, the result points to the government's failing in its exercise of discretion regarding the employment of a mitigation expert. The defense team made a timely and wholly appropriate request to the convening authority followed by a motion to the military judge. For apparently myopic reasons, the request to the convening authority was denied. The lesson is that if the convening authority wants to refer a case capital, it should pay for the increased expense of a mitigation expert. It cannot expect to obtain a reliable capital sentence "on the cheap."[300] With respect to the Sixth Amendment issues, counsel must recognize that given the "broad latitude" granted by RCM 1004(b)(3)[301] for evidence in extenuation and mitigation, there are many avenues of approach in formulating and presenting a case in presentencing. Further, counsel must dedicate the time necessary to interview all available witnesses, while ensuring that those interviews take place. A key issue in *Kreutzer* was the defense team's failure to establish who was interviewing whom.[302]

Contrasting the failures in *Kreutzer* are *United States v. Starling*[303] and *United States v. Wallace*.[304] In the first case, the appellant alleged IAC because counsel did not present *any* evidence in presentencing or in clemency. In the second case, the defense counsel did not call military witnesses. The Navy-Marine Court determined in both cases that the appellants failed to show their counsel were ineffective.

In *Starling*, after the trial counsel entered pertinent provisions of the appellant's service record, the trial defense counsel did not offer any evidence in extenuation or mitigation.[305] During closing argument, however, the defense counsel highlighted favorable evidence from the appellant's service record.[306] After trial, the defense counsel did not submit anything on behalf of the appellant in clemency.[307] The Navy-Marine Court expressly declined the appellant's invitation to find that the failure to offer evidence in extenuation and mitigation or the failure to submit post-trial matters would constitute ineffectiveness *per se*.[308] Addressing each claim in turn, the Navy-Marine Court noted that the defense's reference to favorable matters in the prosecution exhibit of the appellant's service record "had the identical effect as if the defense had offered the same evidence in extenuation and mitigation."[309] With respect to post-trial matters, the appellant acknowledged his right to submit post-trial matters, yet did not submit any evidence that trial defense counsel acted contrary to his wishes, and further did not submit matters that would have been submitted but for the trial defense counsel's inaction.[310] Thus, the appellant failed to show any prejudice.

In *Wallace*, the appellant was convicted of unpremeditated murder, kidnapping, and obstruction of justice.[311] To support his claim of IAC, the appellant argued that there were two military witnesses who believed his rehabilitation potential was outstanding and that his defense counsel should have called those witnesses.[312] Post-trial declarations from these witnesses showed, however, that their potential testimony was limited to his good military character, which the Navy-Marine Court declared "does not automatically equal rehabilitative potential."[313] By rejecting the appellant's claims, the Navy-Marine Court also noted that the appellant apparently concurred in the trial defense counsel's tactical decision to introduce the appellant's good military character via service book entries.[314] The Navy-Marine Court reaffirmed a well-settled principle from

299. *Id.*

300. As cogently presented in the concurrence, in capital cases "it is prudent that staff judge advocates, convening authorities, and military judges provide the defense team the expert assistance it needs to effectively defend the accused, and thereby render the results of trial reliable." *Id.* at 801.

301. MCM, *supra* note 9, R.C.M. 1004(b)(3).

302. *Kreutzer*, 59 M.J. at 794-95 (Currie, J., concurring in result) (noting each counsel thought the other was responsible for talking to witnesses).

303. 58 M.J. 620 (N-M. Ct. Crim. App. 2003).

304. 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

305. *Starling*, 58 M.J. at 622.

306. *Id.*

307. *Id.* at 621.

308. *Id.* at 622.

309. *Id.* at 623.

310. *Id.*

311. United States v. Wallace, 58 M.J. 759, 761 (N-M. Ct. Crim. App. 2003).

312. *Id.* at 771.

313. *Id.*

Strickland "that a defense counsel's tactical decisions are virtually unchallengeable."[315]

These last two cases offer an interesting contrast to *Wiggins* and *Kreutzer.* Although *Wiggins* and *Kreutzer* were death penalty cases, and the level of scrutiny was necessarily more stringent, the gravity of the offenses in *Wallace* cannot be underestimated. Counsel in *Starling* and *Wallace* had strong support in the records for their decisions—decisions made with the apparent consent of the appellants. In *Starling* and *Wallace,* counsel investigated the appropriate facts and made tactical decisions after acquiring the information necessary to make them. The counsel in *Wiggins* and *Kreutzer* failed in that endeavor and made decisions based on incomplete information. The standard in *Strickland* for showing IAC remains high, and *Starling* and *Wallace* show that that standard *can* be difficult to meet, particularly in non-capital cases.[316]

Post-trial: It Isn't Over until . . . .

An accused maintains his right to effective assistance of counsel through the appellate process.[317] In *United States v. Dorman,*[318] the CAAF spelled out the parameters of that duty *vis-à-vis* trial defense counsel. Pursuant to his pleas, the appellant was convicted of attempted wrongful use of a controlled substance, three specifications of wrongful use of a controlled substance, and wrongful distribution of a controlled substance.[319] After trial, the appellant hired a civilian defense counsel, who asked the trial defense counsel for her case file.[320] The trial defense counsel refused the request, a denial the Air Force Court sustained.[321] After civilian defense counsel filed a motion at the CAAF to compel production of the file, trial defense counsel turned over the requested information.[322] The issue was whether trial defense counsel must grant appellate defense counsel access to the case file on request, irrespective of an IAC claim.[323] The CAAF noted that trial defense counsel maintains a duty of loyalty, which requires counsel to provide reasonable assistance to appellate counsel when permitted.[324] The CAAF also noted that trial defense counsel maintains an ethical duty of confidentiality.[325] The CAAF, therefore, held that trial defense counsel must, on request, supply appellate defense counsel with the case file, but only after receiving the client's written release;[326] the contrary ruling by the Air Force Court was error.[327] The importance of this case is that it clarifies the circumstances under which a trial defense counsel must turn over a file to appellate defense counsel outside of the IAC arena.

Conclusion—What in Tarnation Does It All Mean?

Just like the black cat noted in the quotation at the beginning of this article who is just out for a stroll, appellate decisions, while they appear to portend bad news for either the government or defense, sometimes merely flesh-out well-established legal principles. For the majority of the cases discussed above, this idea is true. In two particulars, however, the black cat does indeed signal a significant change. *Crawford* and *Cain* changed the legal landscape; whether for ill or weal remains to be seen.

The import of *Crawford* is beyond question. With respect to testimonial hearsay, the *Roberts* mode of analysis is dead. No longer will counsel be able to simply show that a statement fits within a firmly rooted hearsay exception or that the statement possesses particularized guarantees of trustworthiness. Now

314. *Id.* This decision was made because of the potential for effective cross-examination of any military witnesses. *Id.*

315. *Id.*

316. The recent case of *United States v. Garcia,* 59 M.J. 447 (2004) is a possible exception.

317. United States v. Dorman, 58 M.J. 295, 297 (2003) (including the rules and cases cited therein).

318. *Id.*

319. *Id.* at 296.

320. *Id.* at 297.

321. *Id.*

322. *Id.*

323. As noted by the CAAF in *Dorman, United States v. Dupas,* 14 M.J. 28 (C.M.A. 1982) stands for the proposition that when a claim of IAC is raised, trial defense counsel must provide appellate counsel with the case file. *Id.*

324. *Id.* at 298.

325. *Id.*

326. *Id.*

327. *Id.* at 299.

the analysis is much more complicated: Is the statement hearsay? Is the statement testimonial hearsay? What does "testimonial" mean in the context of the residual hearsay rule or the firmly rooted hearsay exceptions? Defense counsel should be prepared to make motions *in limine* to exclude all manner of hearsay statements if the declarant is unavailable at trial and was not subject to a prior opportunity cross-examination. Unfortunately for military judges and counsel, the Supreme Court did not offer guidance beyond the narrow class of testimonial statements at which the Confrontation Clause was aimed. It seems unlikely, however, that the Court will hold fast to the narrow definition of "testimonial" articulated in *Crawford*.[328]

The impact of the CAAF's decision in *Cain* will, in all likelihood, be minimal given the unusual facts involved in that case. The importance of the decision, however, is borne out by the appellate courts' differing reasoning. Clearly, the Army Court's opinion was well-reasoned and supported by the facts and law. The CAAF side-stepped the harder questions; the court's willingness to create a new category of *per se* conflict rather than face the hard question of prejudice is troubling.

With respect to the remainder of the cases discussed above, these cases are apparently just cats crossing the path of the military bar, on their way to describe legal precedents that are already fairly clear. Despite their ominous color, these cats bear no ill tidings for military practitioners. The government can protect child witnesses, defense counsel must carefully review the discovery provided by the government, and defense counsel are required to investigate their cases before deciding on an appropriate course of action. These concepts are not new and portend no bad tidings to counsel who are, in the main, very professional and skilled.

328. *See supra* text accompanying notes 79-128.

Duck Soup:[1] Recent Developments in Substantive Criminal Law

Major Jeffrey C. Hagler
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, U.S. Army
Charlottesville, Virginia

Introduction

> *Take two turkeys, one goose, four cabbages, but no duck, and mix them together. After one taste, you'll duck soup for the rest of your life.*[2]

The past year presented a full menu of significant developments in military substantive criminal law. Some of these were full-course dinners, others only quick snacks, while a few may bring back memories of school cafeteria "mystery meat."[3] From legislation amending the Uniform Code of Military Justice (UCMJ) in a manner not seen in almost two decades, to a dramatic pronouncement from the Supreme Court, to substantial holdings from the Court of Appeals of the Armed Forces (CAAF), the year has seen developments in widely divergent areas of substantive criminal law. The diversity of these activities, combined with the breadth of substantive criminal law itself, makes it difficult to categorize them into clear trends.[4] Instead, this article separately analyzes each of the significant developments in legislation and case law. In doing so, it points out potential issues and provides guidance to military justice practitioners.

First, the article addresses three legislative amendments to the UCMJ: the enactment of a new article punishing offenses against an unborn child;[5] the extension of the statute of limitations for child abuse crimes;[6] and the modification of the crime of drunken driving.[7] Next, the article examines a landmark case in which the Court overturned its own precedent and struck down a state statute criminalizing acts of homosexual sodomy on constitutional grounds.[8] The article also considers a Supreme Court case addressing the defeat of a conspiracy by government agents and its effect on the addition of co-conspirators.[9] Finally, the article analyzes the CAAF's rulings from the past year in several areas of substantive criminal law, including general disorders and neglects,[10] sex crimes,[11] offenses against the administration of justice,[12] disobedience,[13] child pornography,[14] and the mistake of fact defense,[15] as well as the related matters of modification[16] and multiplicity.[17]

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1. DUCK SOUP (Paramount Pictures 1933) (following the Groucho Marx theme of this year's *Symposium*).

2. Tim Dirks, *The Greatest Films* (quoting Groucho Marx explaining the title of *Duck Soup*), *available at* http://www.greatestfilms.org/duck.html (last visited June 30, 2004). The author sincerely hopes this article's recipe will not have the same effect on the reader.

3. Readers may recall being served UFOs (unidentified food objects) in their school cafeterias. Often, these items were composed of mystery meat—the precise origin of which was unknown.

4. In addition to purely substantive matters (e.g., definitions of offenses and general principles of liability), this article addresses matters that are procedural in nature but are inherently tied to substantive crimes (e.g., pleading, amendment, and proof of offenses) and defenses (e.g., multiplicity, variance, and the statute of limitations).

5. UCMJ art. 119a (LEXIS 2004).

6. *Id.* art. 43.

7. *Id.* art. 111.

8. Lawrence v. Texas, 539 U.S. 558 (2003).

9. United States v. Jiminez Recio, 537 U.S. 270 (2003).

10. United States v. Saunders, 59 M.J. 1 (2003).

11. United States v. Simpson, 58 M.J. 368 (2003).

12. United States v. Teffeau, 58 M.J. 62 (2003); United States v. Fisher, 58 M.J. 300 (2003).

13. United States v. Moore, 58 M.J. 466 (2003); United States v. Thompkins, 58 M.J. 42 (2003).

14. United States v. O'Connor, 58 M.J. 450 (2003).

15. United States v. Hibbard, 58 M.J. 71 (2003).

Legislative Changes to the UCMJ

Article 119a, UCMJ

During the past year, Congress passed two laws amending the UCMJ. Most recently, the Unborn Victims of Violence Act of 2004 (Laci and Connor's Law) was signed into law by President Bush on 1 April 2004.[18] The Act created a new punitive UCMJ article—the first enumerated offense added by Congress in almost two decades—which will have a significant impact on certain prosecutions under the military justice system.

Article 119a creates additional liability for specified offenses that cause death or injury to an unborn child.[19] The underlying crimes covered by Article 119a are murder (Article 118); voluntary manslaughter (Article 119(a)); involuntary "misdemeanor manslaughter" (Article 119(b)(2));[20] robbery (Article 122); maiming (Article 124); arson (Article 126); and assault (Article 128).[21] When an accused commits any of these offenses against an unborn child's mother and thereby causes death or injury to the unborn child, he may be punished and convicted separately for both offenses.[22] The maximum punishment for violating Article 119a appears to be the same as if the resultant injury or death was inflicted on the unborn child's mother; however, the death penalty is specifically excluded as an authorized punishment.[23]

Article 119a contains three specific exemptions for death or injury caused by a consensual abortion, by medical treatment, or by the mother.[24] Aside from these limitations, the scope of liability under Article 119a appears to be extraordinarily broad.[25] By its own terms, Article 119a requires no proof of any mental state of the accused, not even a negligent failure to know the unborn child's mother is pregnant.[26] Apparently, the *mens rea* for the underlying offense is the only mental state required for liability.[27] Furthermore, the class of potential victims—unborn children—is broadly defined.[28]

Finally, the text of Article 119a is ambiguous in one respect. Although the article requires no intent to kill or injure, it specifically addresses an accused who intentionally kills or attempts to kill an unborn child.[29] Unfortunately, Article 119a does not

16. United States v. Parker, 59 M.J. 195 (2003); United States v. Lovett, 59 M.J. 230 (2004); United States v. Walters, 58 M.J. 391 (2003); United States v. Teffeau, 58 M.J. 62 (2003).

17. United States v. Hudson, 59 M.J. 357 (2004).

18. Pub. L. No. 108-212, 118 Stat. 568.

19. UCMJ art. 119a(a)(1) (LEXIS 2004).

20. "Misdemeanor manslaughter" is shorthand for an unlawful killing that occurs while the accused is perpetrating or attempting to perpetrate an offense directly affecting the person (other than those underlying offenses listed for felony murder). *See, e.g.*, United States v. Henderson, 23 M.J. 77, 81 (C.M.A. 1986); United States v. Waluski, 21 C.M.R. 46 (C.M.A. 1956). Note that Article 119a does *not* include the more common form of involuntary manslaughter, which involves a killing caused by a culpably negligent act or omission. *See* UCMJ art. 119(b)(1) (2002).

21. *Id*. art. 128. Notably, the text of Article 119a does not limit its application to any theory of assault or any minimum *mens rea* under Article 128. Thus, an offer-type assault involving only a culpably negligent act or omission may be punishable under Article 119a if it causes injury to an unborn child, even if the mother was not touched or otherwise harmed. If the unborn child dies, then the accused faces the same maximum punishment as if the mother had died. In effect, this is the same punishment as Article 119(b)(1), involuntary manslaughter, which is not listed as an underlying offense that triggers Article 119a. This may lead to a counter-intuitive result in some cases. For example, if an accused commits simple assault on a mother by culpable negligence and her unborn baby dies, he is liable under Article 119a. Yet if he unlawfully kills *both* a mother and her unborn child through culpable negligence, then he may not liable for the child's death under Article 119a, unless he is charged only with assault of the mother. *See id.* arts. 119(a),(b).

22. UCMJ art. 119a(a)(1) (LEXIS 2004).

23. *See id.* The punishment "shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother." *Id.* At the time of this writing, no punishments have been prescribed for Article 119a. *See* UCMJ art. 56 (2002).

24. *Id*. art. 119a(c).

25. One significant limitation, though briefly mentioned in the article itself, is the requirement for causation, which exists for all the UCMJ homicide offenses. If an accused's conduct is not the proximate cause of injury or death, then he should not be liable under Article 119a. *See generally* United States v. Riley, 58 M.J. 305, 312 (2003) (citing United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1975)).

26. UCMJ art. 119a(a)(2) (LEXIS 2004). Thus, an accused may be convicted even if he had absolutely no reason to know the victim was pregnant. For example, if a husband shoves his wife to the floor, not realizing she is one-month pregnant, and she miscarries, he may be found guilty of Article 119a. *See id*.

27. In this regard, Article 119a is comparable to Article 118(3) felony murder or Article 119(b)(2) misdemeanor manslaughter, neither of which requires additional *mens rea* beyond that of the underlying offense. *See* UCMJ arts. 118, 119 (2002). Of course, in most cases, these offenses involve an accused who is at least aware that the victim *exists*, unlike Article 119a, which explicitly requires no such knowledge as a predicate for its potentially great punishment.

28. "Unborn child," "child in utero," and "child, who is in utero" are defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.* art. 119a(d).

clearly state how such an accused should be charged.[30] Absent future legislation clarifying this issue, it will likely remain unresolved until the CAAF conclusively decides what Congress intended.[31]

Article 43, UCMJ

In November 2003, Congress passed the National Defense Authorization Act for Fiscal Year 2004, which amended two existing UCMJ articles.[32] In Article 43, the Act extended the statute of limitations period for "child abuse offenses," defined as physical or sexual abuse of a person under age sixteen, in violation of any of several specified articles of the UCMJ.[33] For these offenses, the limitations period was previously five years; it now runs until the child victim's twenty-fifth birthday.[34] As amended, the article raises some important issues.

First, the amendment created a patent ambiguity in Article 43.[35] The list of offenses subject to the amended statute includes the rape of a child, but the crime of rape itself has no limitations period because it is a capital offense.[36] Some will argue that the rape of a child victim should be subject to the new limitations period.[37] But this interpretation would lead to an absurd result: a prosecution for the rape of a child victim may be time-barred, while a prosecution for the rape of an adult at the same time would be permitted.[38] Unless this was the intended result, which seems unlikely, Congress should delete the reference to rape in Article 43 to avoid confusion.

Second, the Act does not address whether the amendment is retroactive. That is, will it permit prosecution of an offense whose limitations period expired before 24 November 2003? Alternatively, will it extend an unexpired limitations period for a crime committed before that date? Some may interpret the Act's silence on these issues as permitting the new limitations period to apply retroactively.[39] But even if Congress intended the amendment to be retroactive, a recent Supreme Court case would limit its reach. In *Stogner v. California*, the Court held that reviving a criminal prosecution using a statute enacted after

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29. Article 119a(a)(3) reads:

> If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

Id. art. 119a(a)(3).

30. *Id*. Under one interpretation, such an accused would not be guilty of Article 119a; he would instead be charged and convicted under Articles 80, 118, or 119(a). If so, this would effectively give an unborn child victim the same status as an adult victim under those UCMJ Articles, and it would require modification of the elements of Articles 118 and 119. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 43b, 44b (2002) [hereinafter MCM]. A second interpretation is that the language merely shows Congress' explicit intent to incorporate the maximum punishment for those Articles; such an accused would still be charged under Article 119a.

31. In the interim, counsel may see intentional or attempted killings of unborn children charged in the alternative, under both Article 119a and the other applicable punitive article.

32. Pub. L. No. 108-136, §§ 551-52, 117 Stat. 1392.

33. UCMJ art. 43 (LEXIS 2004). The following offenses are listed: Rape or carnal knowledge (Article 124); Maiming (Article 124); Sodomy (Article 125); Battery or aggravated assault (Article 128); Indecent assault, acts, or liberties with a child (Article 134); Assault with intent to commit murder, voluntary manslaughter, rape, or sodomy (Article 134). *Id.* Note that the Act lists "[s]odomy in violation of § 925 of [title 10] (*article 126*)." *Id.* (emphasis added). This is clearly a drafting error, as Article 126 covers the offense of arson and is contained in 10 U.S.C. § 926. Nevertheless, to avoid unnecessary confusion, Congress should fix this error at the earliest opportunity.

34. This change does not affect the limitations period for offenses punished under Article 15 nonjudicial proceedings, which remains two years. UCMJ art. 43(b)(3) (2002).

35. UCMJ art. 43(b)(1) (LEXIS 2004) states, "Except as otherwise provided under this section (article)," the five-year time limitation applies. The offense of rape, however, is "otherwise provided" for under two conflicting sub-paragraphs of the amended article. *Compare id.* art. 43(a), *with* art. 43(b)(2)(A).

36. *See id.* art. 43(a). Although the maximum punishment for rape is death, the death penalty may be adjudged only when the victim is under the age of twelve or when the accused maimed or attempted to kill the victim. *See* MCM, *supra* note 30, pt. IV, ¶ 45e(1), R.C.M. 1004(c)(9). Nevertheless, rape is still considered a capital offense for the purposes of Article 43, so the default five-year limitations period does not apply. *See* Willenbring v. Neurauter, 48 M.J. 152, 178-80 (1998), *cert. denied*, 537 U.S. 1112 (2003).

37. This interpretation is supported by several "canons" of statutory interpretation. *See* LaFave, Substantive Criminal Law § 2.2 (2d ed. 2003). Under the plain meaning rule, Article 43(b)(2) clearly states that rape of a child under Article 120 is subject to the new law. The "later controls the earlier" and "special controls the general" canons lend further support to a claim that the revised portions of Article 43 should trump the earlier, more general provisions. Finally, strict construction, or lenity, supports applying the law in favor of an accused whose acts would be barred from prosecution under the new rule.

38. For example, if an accused rapes both an adult and a six-year-old child on the same date, then twenty years later he could be tried for raping the adult victim but not for raping the child.

the limitations period expired violates the *Ex Post Facto* Clause of the Constitution.[40] The Court distinguished its holding, however, from cases in which pre-existing limitations periods had not yet run.[41] Thus, as amended, Article 43 could still apply to acts committed before 24 November 2003 and extend any limitations periods that had not expired on that date.

Article 111, UCMJ

The 2004 National Defense Authorization Act also made comparatively minor, yet noteworthy, changes to Article 111, UCMJ.[42] First, the Act amended the threshold for the blood alcohol content (BAC) that serves as an alternative element of the offense.[43] The standard is now a BAC "equal to or exceed[ing] the applicable limits."[44] Thus, a person who operates a vehicle with a BAC of exactly 0.10 now violates Article 111. Second, the Act clarified which BAC limit applies, according to the location of the conduct. The applicable limit within the United States is now the law of the state in which the conduct occurs or a BAC of 0.10, whichever is lower.[45] Finally, the Act made slight changes to the definition of "blood alcohol content limit" and eliminated all other references to "maximum" BAC limits in the article.[46]

Taken together, these changes will not radically alter the day-to-day business of a military justice practitioner, but they will potentially affect many cases involving child abuse, offenses against pregnant mothers, and drunken driving offenses. In the near future, counsel should remain alert for executive orders implementing these changes into the *Manual for Courts-Martial* (*MCM*).

Supreme Court Cases

Is Private, Consensual Sodomy a Crime? Lawrence v. Texas[47]

Responding to a reported weapons disturbance in a private residence, Houston police officers entered John Lawrence's apartment and found him and another adult man, Tyron Garner, engaging in consensual sodomy. Both men were arrested and held overnight.[48] The following day, they were convicted for violating a Texas law forbidding "deviate sexual intercourse with another individual of the same sex."[49] Lawrence and Garner challenged the statute as a violation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution.[50] The Court of Appeals for the Texas Fourteenth District, sitting *en banc*, affirmed the convictions, relying on the U.S. Supreme Court's decision in *Bowers v. Hardwick*.[51] In *Bowers*, the Court, in a five-to-four decision, upheld a Georgia statute prohibiting consensual sodomy, whether or not the participants were of the same sex.[52]

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39. In support of this proposition, proponents may argue that in 1986, when Congress extended the statute of limitations from three to five years, it included a provision limiting the amendment to acts committed on or after its effective date. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 805(c), 100 Stat. 3908 (1986). The current amendment lacks a similar provision, which arguably shows legislative intent to allow retroactive application.

40. Stogner v. California, 539 U.S. 607 (2003).

41. *Id*. at 618. "Even where courts have upheld extensions if *unexpired* statutes of limitations (extensions that our holding today does not affect . . .), they have consistently distinguished situations where limitations periods have *expired*." *Id.*

42. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392.

43. The standard previously read "in excess of the applicable limits." UCMJ art. 111(a)(2) (2002). The 2002 edition of the *MCM* does not contain the substantial amendments to Article 111, including the addition of subsection (b), enacted on 28 December 2001 as part of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 581, 115 Stat. 1123 (2001).

44. UCMJ art. 111(a)(2) (LEXIS 2004). A blood alcohol content of 0.10 means 0.10 grams of alcohol per 100 milliliters of blood or per 210 liters of breath. *See id*. art. 111(b)(3).

45. *Id*. art. 111(b)(1)(A). The provisions regarding military installations located in more than one state have not changed. *See id*. art. 111(b)(2).

46. *See id.* art. 111(b)(1)(B), (b)(3), (b)(4)(A).

47. Lawrence v. Texas, 539 U.S. 558 (2003).

48. *Id*. at 562-63.

49. Tex. Penal Code Ann. § 21.06(a) (Vernon 1994). Under Texas law, "deviate sexual intercourse" includes "any contact between any part of the genitals of one person and the mouth or anus of another person." *Id.* § 21.01(1).

50. U.S. Const. amend. XIV, § 1.

51. Lawrence v. State, 41 S.W. 3d 349 (Tex. App. 2001) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

52. *Bowers*, 478 U.S. at 186. The *Bowers* majority framed the issue in that case as "whether the Federal Constitution confers a fundamental right on homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190.

The Supreme Court granted certiorari and reversed the Texas Court of Appeals' judgment in a six-to-three decision.[53] In an opinion by Justice Kennedy, the Court found the Texas statute unconstitutional as applied to adults engaged in consensual sodomy in a private setting, and in doing so, explicitly overturned *Bowers*.[54] The Due Process Clause gives consenting adults the right to engage in private sexual conduct without government intervention, and in the majority's view, the Texas statute furthered no legitimate state interest to sufficiently justify its intrusion into an individual's personal and private life.[55] In reaching its decision, the Court expressly declined to rely on the petitioners' Equal Protection argument, stating, "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[56]

Justice Scalia, writing in dissent, claimed the majority did not recognize homosexual sodomy as a fundamental right and therefore misapplied the rational basis standard of review.[57] He also chastised the majority for their willingness to overrule the Court's precedent in *Bowers*.[58] In doing so, Scalia challenged the majority's conclusion that there has been little reliance on the decision. Citing a long list of cases that have relied on *Bowers*, to include those upholding the military's homosexual conduct policy, Scalia predicted that *Lawrence* will cause a "massive disruption of the current social order."[59]

What effect will *Lawrence* have on the military and in particular, on Article 125, the prohibition against sodomy? Potentially, its impact will be tremendous. In fact, some will argue *Lawrence* tolls the death knell for Article 125. Certainly, the Court's opinion leaves little room to distinguish Article 125 on its face.[60] The language of the decision is expansive, although the Court did narrow its reach at one point. Noting the case did not involve public conduct, prostitution, minors, persons who might be injured or coerced, or those who might not easily refuse consent, the Court apparently left open the door to prosecution in those areas.[61]

It is also important to note the obvious: *Lawrence* is not a military case. This is significant because the Court has recognized the increased regulation of individual rights in the military, as a separate society requiring good order and discipline.[62] Historically, the UCMJ and military commanders have regulated subordinates' personal lives to a much greater extent than would ever be permissible under civilian laws. The UCMJ prohibits fraternization and adultery, and commanders typically restrict many types of otherwise "private" behavior, to include sexual activity, through punitive orders and regulations.[63] So the privacy and liberty interests underpinning *Lawrence* may not exist to the same extent in military society, particularly in a deployed setting or in a military barracks environment. Several military cases are currently pending review by the CAAF based on the *Lawrence* decision.[64] Regardless of the CAAF's decisions in these and other cases, it is perhaps inevitable that some cases will reach the Supreme Court, so the issue may not be resolved for years to come.

In the short term, then, what should military practitioners do? It appears that sodomy by force or coercion, with a minor, in public, or with a prostitute remains a viable offense, even

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53. *Lawrence*, 539 U.S. at 558. Significantly, the *Lawrence* majority framed the issue as "whether the petitioners were free as adults to engage in the [sic] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564. Given the clear difference between the issues framed by the Court in each case, it is no surprise that the results in *Bowers* and *Lawrence* were different.

54. *Id.* at 579.

55. *Id*. at 578-79.

56. *Id.* at 575.

57. *Id.* at 586-87 (Scalia, J., dissenting).

58. *Id.* at 586-91.

59. *Id.* at 589-91.

60. Unlike the Texas statute at issue in *Lawrence*, the UCMJ prohibits both homosexual and heterosexual sodomy. UCMJ art. 125 (2002). As noted above, however, the *Lawrence* majority plainly intended its decision to cover all laws prohibiting private, consensual sodomy, regardless of the sex of the participants. *See* text accompanying *supra* note 56.

61. *Id.* at 578.

62. *See* Parker v. Levy, 417 U.S. 733, 743-44 (1974).

63. *See, e.g*., MCM, *supra* note 30, pt. IV, ¶ 62 (adultery), ¶ 83 (fraternization); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 4-14 through 4-16 (13 May 2002).

64. At the time of this writing, the CAAF had granted petitions for review in the following cases: United States v. Marcum, 59 M.J. 131 (2003), *rev. granted*, 59 M.J. 142 (2003); United States v. 59 M.J. 146 (2003), *rev. granted*, 59 M.J. 147 (2003); United States v. Bodin, No. 03-0589/AR, *rev. granted*, CCA 20000525; United States v. Hall, CCA 200100832, *rev. granted*, 59 M.J. 223 (2003); United States v. Asbury, CCA 20030367, *rev. granted*, 2004 CAAF LEXIS 42 (Jan. 7, 2004).

after *Lawrence*. Also, when there is a strong tie between the conduct and good order and discipline, charging sodomy may still be a sound decision. Even so, since the law is still unsettled in this area, it would be wise to also charge the conduct as a general disorder under Article 134, so that if the sodomy charge is later dismissed, the Article 134 conviction may still stand.[65] Of course, defense counsel should continue to cite *Lawrence* in challenging sodomy charges at every level of the military justice system, from trial through appeal. Doing so will force the government to justify its charging decision and perhaps expedite the resolution of this contentious issue.

Does Defeat Terminate a Conspiracy?
United States v. Jiminez Recio[66]

Police in Nevada seized a truck carrying illegal drugs and set up a sting operation using the truck's drivers. After driving the truck to Idaho, agents had the drivers page their contact, who said he would call someone to get the truck. Francisco Jiminez Recio and Adrian Lopez-Meza arrived and were arrested after driving the truck away. Although there was little evidence that either defendant was involved in the conspiracy before government agents intervened, both men were convicted of conspiracy to possess and distribute illegal drugs.[67] At the time, case law in the United States Ninth Circuit established that defendants could not be charged with conspiracy if they were brought into a scheme only after law enforcement authorities had already intervened, and their involvement was prompted by the intervention.[68] The Ninth Circuit Court of Appeals reversed and dismissed the respondents' convictions with prejudice, finding the evidence presented at trial insufficient to show they entered the conspiracy before police seized the drugs.[69]

The U.S. Supreme Court reversed the Ninth Circuit, holding that a conspiracy does not automatically terminate simply because the government has defeated its object.[70] The Court noted that under basic conspiracy law, the agreement to commit an unlawful act is "'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'"[71] Further, a conspiracy poses a danger beyond the threat of the object crime, because the "combination in crime makes more likely the commission of [other] crimes," and because it "decreases the probability that the individuals involved will depart from their path of criminality."[72] This danger remains—as does the agreement—even after police have frustrated a conspiracy's objective, because conspirators who are unaware of police involvement have neither abandoned nor withdrawn from the conspiracy.[73] In response to claims that such a rule threatens "endless" potential liability, the Court stated that the defense of entrapment prevents the government from drawing an unlimited number of persons into the conspiracy.[74]

Although the case would have had a much more substantial impact on military justice had the Court decided the other way, *Jiminez Recio* still merits consideration, because it makes clear that defeat or impossibility does not automatically terminate a conspiracy.[75] This termination point is significant for several reasons. It not only affects whether new members can join, it also affects other issues common to conspiracy cases, such as vicarious liability for crimes by other parties, the admissibility of co-conspirators' statements, and the commencement of the statute of limitations period, all of which are tied to the life of the conspiracy.[76] While the result in *Jiminez Recio* is consistent with military practice in that factual impossibility is no defense to conspiracy, military courts have not squarely addressed the issue of adding members after a conspiracy is "defeated."[77]

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65. Counsel may do so by using language similar to that in the model specification for Article 125 with the addition of a clause stating that the conduct was prejudicial to good order and discipline and/or service-discrediting. Under normal circumstances, charging in this manner may violate the Preemption Doctrine. *See* MCM, *supra* note 30, pt. IV, ¶ 60c(5)(a). If an Article 125 charge is found to be unconstitutional, however, then charging the conduct under Article 134 should not be preempted. At the very least, charging the conduct under both Articles 125 and 134 would satisfy an accused's due process notice rights and permit the military judge to instruct on the Article 134 charge as a lesser-included offense. *See infra* note 150 for a discussion of charging child pornography offenses in a similar manner.

66. United States v. Jiminez Recio, 537 U.S. 270 (2003).

67. *Id*. at 272-73.

68. United States v. Cruz, 127 F.3d 791, 795 (9th Cir. 1997).

69. United States v. Recio, 258 F.3d 1069, 1074 (9th Cir. 2000).

70. *Jiminez Recio*, 537 U.S. at 274. Thus, a conspiracy does not end through "defeat" when the government intervenes, making the conspiracy's goals impossible to achieve, even if the conspirators do not know that the government has intervened and are unaware that the conspiracy is bound to fail. *Id.*

71. *Id*. (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)).

72. *Id*. at 275 (quoting Callanan v. United States, 364 U.S. 587, 593-94 (1961)).

73. *Id.*

74. *Id.* at 276.

75. Under military case law, a conspiracy ends when the objectives are accomplished, the aims are abandoned, or when the members withdraw. *See, e.g.*, United States v. Hooper, 4 M.J. 830, 836 (C.M.R. 1978) (citing United States v. Beverly, 34 C.M.R. 248 (C.M.A. 1964); United States v. Salisbury, 33 C.M.R. 383 (C.M.A 1963); United States v. Miasel, 24 C.M.R. 18 (C.M.A. 1957)).

Lastly, the case also affirms the rationale for making conspiracy a separate crime, which is periodically a source of contention both within the military justice system and among legal scholars.[78]

CAAF Cases

Harassment Is an Offense under Article 134
United States v. Saunders[79]

Specialist (SPC) Daniel Saunders was stationed in Germany when he became engaged to "H," a German national. After some time, H began to tire of SPC Saunders' increasingly possessive treatment and told him she wanted to end the relationship. Undeterred, SPC Saunders visited H and called her at home and work with growing frequency. Over the next few months, his behavior became more and more erratic, making H feel uneasy. He apparently copied a "hidden" emergency key and used it to enter H's apartment without her consent. During two visits, SPC Saunders locked himself in H's kitchen and threatened to kill himself. Even after receiving a no-contact order from his commander, SPC Saunders continued to call and visit H. Events finally came to a head shortly after SPC Saunders stopped by H's apartment, demanding that she return letters and gifts he had given her. The electricity went out in H's apartment, and when she went to check the fuse box, SPC Saunders pulled her inside the apartment and sexually assaulted her.[80]

Specialist Saunders was charged with "harassment" as service-discrediting conduct in violation of Article 134, Clause 2. Because the UCMJ contains no specific offense covering this course of conduct, and because the federal Assimilative Crimes Act (ACA) does not apply to crimes committed overseas,[81] the government modeled the specification after a Georgia "anti-stalking" statute.[82] Significantly, the specification added a service-discrediting element and omitted the Georgia law's requirement that the conduct be done "for the purpose of harassing and intimidating the other person."[83] In a trial before members, the military judge denied a defense motion to dismiss the specification for failure to state an offense, and she instructed the panel, defining harassment as "a knowing and willful course of conduct directed at a specific person which would cause substantial emotional distress in a reasonable person or which placed that person in reasonable fear of bodily injury."[84] The panel found SPC Saunders guilty of the offense.[85]

On appeal, the CAAF affirmed the conviction in a unanimous decision, holding that the specification adequately stated an offense and that SPC Saunders had sufficient notice that his conduct was subject to criminal sanction.[86] In doing so, the court reviewed the two components of "notice" required for criminal liability.

First, due process notice requires that a person have fair warning that his contemplated conduct is subject to criminal sanction.[87] In a previous decision during its 2003 term, *United States v. Vaughan*, the CAAF affirmed a conviction for child neglect charged under Article 134, Clause 2.[88] As in *Saunders*, Vaughan's misconduct was not captured under the enumerated articles of the UCMJ, and because the acts occurred in Germany, the government was unable to assimilate local child neglect laws under the ACA. Nevertheless, the CAAF reasoned that Vaughan received "fair notice" that her conduct was

76. *See* MCM, *supra* note 30, pt. IV, ¶ 5c(5); *id.* MIL. R. EVID. 801(d)(2)(E).

77. *See id.* pt. IV, ¶ 5c(7).

78. *See, e.g.*, Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 79 (citing Judge Learned Hand in referring to conspiracy as "the darling of the prosecutor's nursery"); *see also* Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39 (1977); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003).

79. United States v. Saunders, 59 M.J. 1 (2003).

80. *Id*. at 2-4.

81. 18 U.S.C. § 13 (2000).

82. GA. CODE ANN. § 16-5-90 (1997). The Georgia law prohibits a knowing and willful course of conduct, directed at a victim, which causes emotional distress by placing the victim in reasonable fear of death or bodily harm. *Id.* The *Saunders* opinion contains the entire specification, which may be helpful to counsel in future cases. *See Saunders*, 59 M.J. at 5.

83. *Id*. at 6 n.5.

84. *Id.* at 5.

85. The members excepted and substituted language in the specification to accurately reflect the overt acts committed by the accused. *See id*.

86. *Id*. at 9.

87. *Id*. at 6 (citing United States v. Vaughan, 58 M.J. 29, 31 (2003)).

criminal from several other sources, including state laws, military case law, military custom and usage, and military regulations.[89]

In *Saunders*, the court recognized that the accused's conduct was likewise prohibited, in varying degrees, by "anti-stalking" statutes in all fifty states and in the District of Columbia.[90] The court also identified a federal criminal law—the interstate stalking statute—which would prohibit SPC Saunders' course of conduct if it occurred under necessary jurisdictional conditions within the United States.[91] Taken together, these statutes and cases provided SPC Saunders fair notice that his course of conduct was subject to criminal prosecution.

The court also found that framing the accused's acts as service-discrediting misconduct, rather than as a specific intent offense, did not deprive him of fair notice.[92] Citing Supreme Court precedent, the court noted that charging service-discrediting conduct does not necessarily require published advance notice of the precise elements; rather, the full spectrum of what is service-discrediting may be defined by military custom and usage.[93] Here, SPC Saunders was on fair notice that his course of conduct was criminal, because a reasonable soldier would have understood such actions were service-discrediting.[94]

To satisfy the second component of notice, the accused must have "fair notice as to the standard applicable to the forbidden conduct" against which he must defend.[95] Here, the court held that the specification provided SPC Saunders with adequate notice of the elements of the offense and described conduct a reasonable fact finder could determine was service-discrediting in the context presented.[96]

The result in *Saunders*, taken together with *Vaughan*, is noteworthy for several reasons. First, the cases expressly permit charging stalking and child neglect under Article 134, Clause 2. This is particularly significant to prosecutors in an overseas environment, where there is no local law to assimilate under the ACA. In recognizing the offenses as service-discrediting misconduct, the court resolved a split among the service courts. Until *Vaughan* was decided, the Army did not recognize child neglect as a viable offense under Article 134 when no actual harm came to the child, but the Air Force had allowed such an offense.[97] Second, the CAAF opened the door to charging a wide range of conduct that would otherwise be punishable only under state law. Thus, when faced with unusual fact situations not covered by the enumerated UCMJ crimes, the government may seek out relevant state law and other sources, both to assist in drafting specifications and instructions and to satisfy due process notice requirements. Counsel, however, should take note of the CAAF's exhaustive review of relevant state statutes in *Saunders*. Not all charged conduct will be prohibited by federal and state law to the same extent as stalking or child neglect. Counsel for both sides should examine how consistently these other sources of law track the conduct in a pending case and argue whether such sources effectively satisfy the accused's right to fair notice that the charged conduct is criminal.

Finally, *Saunders* and *Vaughan* may indicate the CAAF's increasing willingness to accept non-typical charging practices when the purpose of doing so closes a "loophole" that effectively gives overseas military members license to commit acts that would be criminal in the United States. By permitting such offenses to be charged under Article 134, the CAAF has given additional protection to victims—specifically, targets of harassment and children at risk of harm—where their location overseas previously afforded them far less robust protection.

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88. *Vaughan*, 58 M.J. at 30; *see* Major David D. Velloney, *Recent Developments in Substantive Criminal Law: A Continuing Education*, ARMY LAW., Apr./May 2003, at 74 (discussing *Vaughan*).

89. *Vaughan*, 58 M.J. at 31-32.

90. *Saunders*, 59 M.J. at 7. Military practitioners should note that some of these laws have legitimately served as the basis for courts-martial convictions when assimilated under the ACA and charged as violations of Article 134, Clause 3. *Id.* at 8 (citing United States v. Sweeney, 48 M.J. 117 (2000); United States v. Rowe, ACM No. 32852, 1999 CCA LEXIS 125 (A.F. Ct. Crim. App. 1999), *rev. denied*, 52 M.J. 417 (1999)).

91. *Id.* at 7 (citing 18 U.S.C. § 2261A (1997)).

92. *Id.* at 9.

93. *Id.* at 8-9 (citing Parker v. Levy, 417 U.S. 733, 752-56 (1974)).

94. *Id.* at 9.

95. *Id.* (quoting United States v. Vaughan, 58 M.J. 29, 31 (2003) (citing Parker v. Levy, 417 U.S. 733, 755 (1974))).

96. *Id.* at 9-10.

97. *See Vaughan*, 58 M.J. at 31-32; *compare* United States v. Wallace, 31 M.J. 561 (A.C.M.R. 1991), *with* United States v. Foreman, ACM No. 28008, CMR LEXIS 622 (A.F.C.M.R. May 25, 1990) (unpublished).

Constructive Force in Non-Consensual Sex Offenses
United States v. Simpson[98]

For eighteen months, Staff Sergeant (SSG) Delmar Simpson was a drill sergeant assigned to the U.S. Army Ordnance Center and School at Aberdeen Proving Ground, Maryland.[99] During this period, SSG Simpson participated in numerous acts of sexual misconduct with more than a dozen female trainees assigned to the two companies of which he was a member.[100] Evidence at trial portrayed SSG Simpson as having a reputation as an intimidating, tough disciplinarian. A physically imposing man, he stood six feet, four inches tall, comparatively much larger than his victims.[101]

As the Army Court of Criminal Appeals (ACCA) noted, SSG Simpson was a "sexual predator who carefully selected his victims."[102] In short, the evidence showed that SSG Simpson's behavior often followed a similar pattern: he ordered female trainees to report to his office, made deliberate, repeated sexual advances toward them, and then had sexual intercourse with them. He also had sexual intercourse with victims after using his authority to order them to remote areas of the barracks and to his on-post quarters.[103]

The testimony of SSG Simpson's various victims established that they offered little, if any resistance to his demands, either because they believed resistance was futile or because they feared injury or other harm.[104] Consequently, the military judge instructed the panel, in addition to the elements of rape,[105] on the concept of "constructive force" and its potential impact on the elements of force and lack of consent.[106] The panel found SSG Simpson guilty, *inter alia*, of eighteen specifications of rape and twelve specifications of indecent assault.[107] In an opinion containing a concise discussion of the substantive law of rape, the ACCA affirmed the bulk of the convictions.[108]

On appeal to the CAAF, Simpson argued that the military judge's constructive force instruction was erroneous. The CAAF unanimously affirmed the ACCA's decision, adopting much of the lower court's rationale in its opinion.[109] The court held that the military judge's instructions sufficiently informed the members of the elements of rape, including force and lack of consent, and that constructive force could satisfy both elements.[110] In doing so, the court highlighted three key points. First, the court endorsed the ACCA's list of "factors" that supported a finding of constructive force on the facts of the case, emphasizing that rank disparity alone is insufficient.[111] Second,

98. United States v. Simpson, 58 M.J. 368 (2003).

99. United States v. Simpson, 55 M.J. 674, 679, 693 (Army Ct. Crim. App. 2001). Although the CAAF opinion does not address the underlying facts of the case in detail, it cites the lower court opinion, which contains an extensive discussion of the factual and procedural background. *Simpson*, 58 M.J. at 370.

100. Following an investigation into one trainee's complaint of a non-sexual assault, SSG Simpson received a rehabilitative transfer to another company in the same battalion. *Simpson*, 55 M.J. at 695.

101. *Id.* at 693.

102. *Id.* at 709.

103. *Id.* at 698-707.

104. *Id.* at 707-09.

105. United States v. Simpson, 58 M.J. 368, 377 (2003). Article 120 defines the elements of rape as the following: (a) That the accused committed an act of sexual intercourse; and (b) That the sexual intercourse was done by force and without consent. UCMJ art. 120 (2002).

106. *Simpson*, 58 M.J. at 377-79. The military judge included the following in his 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, created 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.

Id.

107. In addition, SSG Simpson pled guilty to numerous violations of a general order prohibiting personal relationships between cadre members and trainees. *Simpson*, 55 M.J. at 678.

108. *Id.* at 695-97, 710. The ACCA set aside and dismissed, on factual sufficiency grounds, three indecent assault specifications and one rape specification, modified several other specifications, and reassessed the sentence. *Id.* at 709-10.

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

the court recognized that force and lack of consent are separate elements of rape, although they are often so "intertwined" that the same evidence may prove both of them.[112] Finally, the court held that constructive force arising through the abuse of military authority may satisfy both elements, even though a victim does not fear "great bodily harm."[113] Despite contrary language in the *MCM* and the *Military Judges' Benchbook* (*Benchbook*), the court held that a victim need only reasonably believe that resistance would be futile or that she would suffer some physical injury.[114]

Although *Simpson* is notable, it is not because it breaks new legal ground. After all, the doctrine of constructive force has been around since the infancy of the UCMJ.[115] *Simpson* is perhaps most noteworthy because it clarifies the conflict between case law, the *MCM*, and the *Benchbook* regarding the level of fear required to negate consent and to satisfy the force element. The case is also instructive because it lays out factors that may support a finding of constructive force. While the court did not describe these factors as a "test" and did not specify the quantum of evidence necessary to make such a finding, military practitioners may find the list helpful in evaluating the presence or absence of constructive force in future cases.[116] Moreover, *Simpson* may be helpful, particularly to new counsel, because it discusses the interrelated concepts of force and lack of consent. In cases involving constructive force, these closely related elements often cause confusion, because constructive force may act as a substitute for the element of force, and it may also negate an otherwise permissible inference of the victim's consent.[117]

False Statements to Civilian Police May Be Official
United States v. Teffeau[118]

Staff Sergeant (SSgt) Charles Teffeau was assigned to a recruiting substation in Wichita, Kansas. During the morning of a duty day, SSgt Teffeau told his supervisor that he and a fellow recruiter, SSgt Finch, were going to a nearby town as part of their recruiting duties. The two men drove a government vehicle to the home of a Delayed Entry Program (DEP) recruit to celebrate the impending departure for boot camp of another recruit, Ms. Keely. They stopped to buy beer on the way. After their arrival, SSgt Teffeau and SSgt Finch drank liquor with Ms. Keely for almost three hours, while they remained in their uniforms. Later, as they were returning from a nearby lake where they continued the celebration, SSgt Finch and Ms. Keely were involved in a single-car accident. Ms. Keely was killed and SSgt Finch was injured. Staff Sergeant Teffeau, who was driving the government vehicle, was not injured.[119]

Local police officers, who were aware of SSgt Teffeau's military status and duties, interviewed him more than once as part of their investigation into the accident. At times during the course of these interviews, SSgt Teffeau was in uniform and accompanied by his supervisor. He made three false statements

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110. *Id.*

111. *Id.* at 377. The ACCA opinion identified the following facts in the case, which demonstrated constructive force:

> (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.

Simpson, 55 M.J. at 707.

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

113. *Id.* at 377-78.

114. *Id.* at 378-79 (citing United States v. Cauley, 45 M.J. 353, 356 (1996)). The *MCM* and the *Benchbook* use "reasonable fear of death or great bodily harm" to describe situations in which constructive force may negate an inference of consent. *See* MCM, *supra* note 30, pt. IV, ¶ 45c(1)(b); U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ch. 3, para. 3-45-1 n.6 (15 Sept. 2002) [hereinafter BENCHBOOK].

115. *See Simpson*, 55 M.J. at 696 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 199a (1951); United States v. Henderson, 15 C.M.R. 268, 273 (C.M.A. 1954) (discussing the history of constructive force in military jurisprudence).

116. A note of caution—counsel should not misinterpret the *Simpson* factors, which are drawn from the relatively egregious facts of that case, as the bright line standard for constructive force. Instead, they should argue for or against a constructive force based on the totality of the circumstances in each case. Moreover, several of the sexual offenses described in *Simpson* clearly involved the use of actual force. Although the CAAF considered only the issue of constructive force, the ACCA opinion squarely addressed multiple instances in which SSG Simpson used actual force to rape his victims. *See Simpson*, 55 M.J. at 707.

117. *See* MCM, *supra* note 30, pt. IV, ¶ 45c(1)(b). This confusion is not aided by the fact the discussion of these elements is just as often "intertwined" in appellate court opinions and in the *MCM*. *See id.*; *Simpson*, 58 M.J. at 377-78.

118. United States v. Teffeau, 58 M.J. 62 (2003). This article also addresses the *Teffeau* case in its discussion of variance. *See infra.*

119. *Teffeau*, 58 M.J. at 63-64.

to the police concerning the events surrounding the accident.[120] At trial, the defense moved to dismiss the specifications for failure to state an offense, arguing that the statements were not official under Article 107, UCMJ.[121] The military judge denied the motion and made findings of fact and conclusions of law to support his decision.[122] The panel found SSgt Teffeau guilty of the specifications, and the Navy-Marine Court affirmed.[123]

In a unanimous decision, the CAAF affirmed, holding the statements to local police were "official" and thus within the scope of Article 107.[124] At the outset, the court noted that Article 107 sweeps more broadly than the federal law prohibiting false statements, because the "primary purpose of military criminal law—to maintain morale, good order and discipline—has no parallel in civilian criminal law."[125] The court then found that the entire incident and investigation "bore a direct relationship to Appellant's duties and status" as a military recruiter.[126] In support of this conclusion, the court offered a litany of pertinent facts indicating the strong nexus between the events and SSgt Teffeau's military duties.[127] Further, the court noted that military authorities were also investigating the incident and that the subject matter of the police investigation was within the jurisdiction of the courts-martial system.[128]

At first glance, *Teffeau* appears to be a groundbreaking case, one that dramatically expands the government's power to criminalize conduct previously not punishable under the UCMJ. While the case will certainly open up a wide realm of inquiry into the relationship between the accused's position, his authority and the underlying subject of any false statements, the CAAF has defined the standard so that such situations will likely be uncommon, if not rare.

First, the court repeatedly emphasized the "clear and direct relationship" between the underlying circumstance and the accused's duties. This appears to be a strict standard, and given the multiple facts supporting the nexus in *Teffeau*, a burden which will be difficult to meet in many cases.[129] Second, the court noted several times that the underlying subject matter itself—a recruiter's involvement in the death of a recruit—generated substantial military interest. Again, many situations involving soldiers will likely not create the same level of military interest.

Taken together, these apparent limitations show that *Teffeau* will probably have a more modest impact. Nevertheless, when combined with *Fisher*, discussed below, *Teffeau* demonstrates the CAAF's willingness to interpret a crime broadly enough to

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120. *Id*. at 67-68. The contents of the false statements were not discussed in either the Navy-Marine Court or the CAAF opinions.

121. *Id.* at 68. "[O]fficial statements include all . . . statements made in the line of duty." MCM, *supra* note 30, pt. IV, ¶ 31c(1).

122. *Teffeau*, 58 M.J. at 62.

123. United States v. Teffeau, 55 M.J. 756 (N-M. Ct. Crim. App. 2001). The defense also challenged the false official statement specifications, arguing that he had no independent duty or obligation to speak at the time he was interrogated. The defense cited the *MCM*, *supra* note 30, pt. IV, ¶ 31c(6)(a), which read, "A statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak." *Id.* This provision has since been eliminated from the *MCM*.

124. *Teffeau*, 58 M.J. at 69; UCMJ art. 107 (2002).

125. *Teffeau*, 58 M.J. at 68 (citing United States v. Solis, 46 M.J. 31, 34 (1997)). The federal false statement law requires that the matter fall under federal jurisdiction and that the false statement be "material." *See* 10 U.S.C. § 1001 (2000). From the appellate opinions, it is difficult to tell if the result in *Teffeau* would be different under federal law, because the contents of the false statements were not mentioned, as discussed *supra* at note 124.

126. *Teffeau*, 58 M.J. at 69.

127. *Id.* The court wrote:

> Appellant knew Staff Sergeant Finch and both women as a result of his official duties. Appellant reported to his supervisor that he was meeting with someone in Winfield on January 3, implying to [Gunnery Sergeant] Quilty that the meeting was related to Appellant's recruiting duties. Both the women were newly recruited into the Marine Corps DEP, and both had used SSgt Finch as a recruiter. Appellant and SSgt Finch used an official government vehicle when they went to meet the women. Appellant and SSgt Finch were in uniform when they went to meet the women. Unquestionably, the entire sequence of events had its origin in Appellant's duties, responsibilities, and status as a recruiter. The Winfield police were aware of Appellant's duties and status. A military supervisor accompanied Appellant to the Winfield Police Department the night of the accident. Appellant was in uniform when interviewed by the Winfield police officers.

Id.

128. *Id.* While this is true, it does little to increase the nexus to the appellant's duties since the UCMJ has worldwide jurisdiction over crimes committed by military members on active duty. Likewise, had the court not ruled that the statements were "official," then the statements would not be subject to punishment under the UCMJ.

129. For example, consider whether the same nexus would exist in a more typical situation, in which the accused is a junior enlisted soldier not occupying a position of trust and authority. There would probably not be a sufficient nexus because the accused's status would not factor so heavily in the equation. Also, consider whether the court would find a nexus if an accused lies for some purpose other than to cover up his involvement in a crime during an ongoing investigation. If he simply lies for some less serious, yet still unlawful purpose, the court may not "go the extra mile," to protect the integrity of the investigative process, as it apparently did in *Teffeau*.

encompass the misconduct of a blameworthy accused. Regardless of whether this case is potentially broad or a more limited, result-oriented holding, it is clear that the CAAF will look closely at an accused's position and the risk his conduct poses to the military justice system.

False Swearing by Omission
United States v. Fisher[130]

Specialist Justin Fisher's roommate, Private First Class (PFC) Winchell, was murdered in his barracks at Fort Campbell, Kentucky. Throughout the day and evening leading up to the murder, SPC Fisher provided Private (PVT) Glover with beer and taunted him about losing a fistfight to PFC Winchell the previous day. That night, while Fisher and Glover were in Fisher's barracks room, and PFC Winchell was asleep on a cot in the hallway, Glover became increasingly agitated, pacing the room, muttering and swinging a baseball bat. After about ten minutes, PVT Glover told Fisher he wanted to "f**k up" PFC Winchell, to which Fisher replied, "Go for it." Glover then left the room and hit the sleeping Winchell in the head and neck with the baseball bat, killing him. Glover then returned to Fisher's room and said he had just "whooped [PFC Winchell's] ass." Fisher then helped Glover wash blood off the bat.[131]

In three separate sworn statements to CID, SPC Fisher feigned ignorance and mischaracterized his involvement in the course of events. At trial, SPC Fisher pled guilty to false swearing regarding all three statements.[132] The third statement, which gave rise to the issue on appeal, omitted the facts that Glover left the room after saying he wanted to "f**k up" PFC Winchell and that SPC Fisher responded, "Go for it."[133] During the providence inquiry regarding the third statement, SPC Fisher agreed with the military judge's characterization that the statement was false "by omission," because it failed to mention Glover's final statement of his intent to assault Winchell.[134] Fisher further admitted the statement was false because Glover did not walk to Winchell's side of the room and because Fisher did not believe Glover was going "home" when he left the room, as he said in the statement.[135] The military judge accepted SPC Fisher's plea and found him guilty of false swearing, in violation of Article 134.[136]

On appeal, the only issue the CAAF granted was whether the guilty plea was improvident because it was based on information omitted from the statement.[137] In a unanimous decision, the CAAF affirmed the conviction, finding instead that that statement in question contained numerous literal falsehoods.[138] The court explicitly declined to reach the issue of whether the guilty plea was provident if based solely on information omitted from the statement.[139] In doing so, the court took great care to avoid affirming the falsity of those portions of the statements SPC Fisher agreed were false by omission, yet which contained no literal falsehoods that could be confirmed by the record.[140]

Fisher is significant because it leaves open the question of whether statements rendered false by omission are the proper subject of false swearing charges. Although the CAAF did not rule on the issue, the decision implies that charging actual falsehoods is the preferred course of action. Further, the court's obvious effort to identify and explain how SPC Fisher's statements were literally false may show its willingness to sustain a guilty plea based on relatively insignificant statements, so long as an accused clearly intends to mislead investigators by not telling the full story. The result in *Fisher* may spring from the fact that the case was a guilty plea, or it may signal the court's distaste toward attempts to interfere with the administration of justice. If the latter is true, then *Fisher*, like *Teffeau*, may demonstrate that the CAAF will not narrowly construe crimes governing conduct clearly intended to subvert the criminal justice

130. United States v. Fisher, 58 M.J. 300 (2003).

131. *Id.* at 301.

132. *Id.* at 301-02.

133. *Id.* at 303. The third sworn statement contained the following narrative, which served as the basis for the specification: "[T]hen he [PVT Glover] walked over to Winchell's side of the room, and shortly thereafter I hear [sic] the room door shut. I did not think anything of it, I assumed Glover went home. I did not think anything of it until he came back." *Id.* at 302.

134. *Id.*

135. *Id.* at 303.

136. *Id.* at 300.

137. *Id.* at 301. The court identified the issue, as framed by the appellant, "Whether appellant's plea of guilty . . . is provident where the allegedly false statement was information omitted from an otherwise literally true statement to the CID." *Id.*

138. *Id.* at 304.

139. *Id.*

140. *Id.* These portions included Fisher's statements that he "did not think anything of it" after Glover left the room. *Id.*

system. Even so, counsel should be cautious about charging such conduct as false swearing.

Undoubtedly, the better course of action is to charge only the literal falsehoods as false swearing or as false official statements under Article 107. Of course, when the government makes charging decisions, it does not know whether the accused will plead guilty, and if so, what portions of a statement the accused will admit are false. When the accused fails to tell "the whole truth," government counsel may find it necessary to proceed under the theory of false statement by omission.[141] If the accused intends to plead guilty, however, the government should take great care during plea negotiations to secure a stipulation of fact that shows the statements are factually false.

Disobedience Offenses
No-Contact Order Not Overbroad or Void for Vagueness
United States v. Moore[142]

In response to complaints that he improperly touched a disabled civilian employee, Fire Control Technician Second Class (FC2) James Moore's supervising petty officer ordered him "not to converse with the civilian workers" in an on-base dining facility.[143] Within a half hour, however, FC2 Moore disobeyed the order by speaking to another civilian employee about the incident. He was charged and convicted, *inter alia*, of failure to obey a lawful order.[144] On appeal to the CAAF, FC2 Moore challenged the order as being unconstitutionally vague and overbroad.[145]

The CAAF affirmed the conviction in a unanimous opinion, which discussed several of the basic precepts underlying the offense of disobedience.[146] First, the CAAF stated, a superior's order is presumed to be lawful and is disobeyed at the subordinate's peril. To sustain this presumption, an order must relate to military duty, it must not conflict with the statutory or constitutional rights of the person receiving the order, and it must be a specific mandate to do or not to do a specific act.[147] Second, the right of free speech in the armed services is not unlimited; it must be balanced against the "paramount consideration of providing an effective fighting force" for national defense.[148] In sum, the court held, an order is presumed lawful if it has a valid military purpose and is a clear, specific, narrowly drawn mandate.[149]

Here, the no-contact order was not overbroad in violation of the First Amendment.[150] Noting that the Supreme Court recognizes the military as a separate society with a need for obedience, the court found it unnecessary to determine whether, at its outer limits, the no-contact order was unconstitutional.[151] Given the context of the order and FC2 Moore's almost immediate violation of the order, it was not overbroad. Furthermore, the order was not void for vagueness in violation of the Fifth Amendment.[152] Due process requires that an accused have actual notice of an order's nature and terms and fair notice that his conduct is proscribed.[153] Again, the court found that under the circumstances of the order and FC2 Moore's conduct, he had actual and fair notice that his conduct was criminal.

The *Moore* case demonstrates how the "contextual approach" can save what might otherwise be considered an overbroad order. A civilian may challenge a law restricting First Amendment rights on its face, using hypothetical situations to show how the law might impermissibly burden protected speech. On the other hand, a military member may only

141. Of course, to prove such an offense, the government must have evidence showing the purported omissions made the sworn statement false. In most conceivable cases, this will consist of contradictory admissions or other evidence showing the accused knew something yet failed to mention it in the statement. Such evidence should also be sufficient to prove a statement contains literal falsehoods in most cases. Without such evidence, it will be quite difficult to prove a statement is false by omission, unless the accused pleads guilty and admits to the omissions during providency.

142. United States v. Moore, 58 M.J. 466 (2003).

143. *Id.* at 467.

144. *Id.* at 466-67.

145. *Id*. at 467.

146. *Id*.

147. *Id.* at 467-68 (citing MCM, *supra* note 30, pt. IV, para. 14.c.(2)(a); United States v. Nieves, 44 M.J. 96, 98 (1996)).

148. *Id.* at 468 (citing United States v. Brown, 45 M.J. 389, 396 (1996) (quoting United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972))).

149. *Id*.

150. U.S. CONST. amend. I.

151. *Moore*, 58 M.J. at 468-69 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).

152. U.S. CONST. amend. V.

153. *See supra* note 91 and accompanying text.

challenge such a law—or in this case an order with a legitimate military purpose—given the circumstances surrounding the order and how it was violated.[154] *Moore* further reinforces the CAAF's commitment to the principles underlying a superior's broad authority, even when this authority is used to curtail a military member's constitutional rights. Finally, *Moore* is instructive because it succinctly lays out the requirements for a lawful order, which may serve as a tutorial for new counsel and a useful refresher for their more experienced counterparts.

No Need to Prove Improper Purpose for Disobedience
United States v. Thompkins[155]

Airman First Class (A1C) Tomal Thompkins was involved in an off-base fight with other military members during which a bystander was shot. To ensure A1C Thompkins did not discuss the matter with other personnel under investigation, his commander ordered him not to have any contact with several named persons, including A1C Smallwood. While under this order, A1C Thompkins told A1C Smallwood's girlfriend he needed a compact disc, which A1C Smallwood had apparently borrowed. A few days later, investigators saw A1C Smallwood give the compact disc to A1C Thompkins. Airman First Class Thompkins was charged with and found guilty, *inter alia*, of willfully disobeying his commander's no-contact order. At trial, the defense challenged the legality of the order, but on appeal to the CAAF, A1C Thompkins instead challenged the conviction for legal sufficiency.[156]

The CAAF affirmed, finding that A1C Thompkins' initiation of contact through a third party and his subsequent contact with A1C Smallwood were legally sufficient evidence to sustain the conviction.[157] The CAAF held that a military member who violates the terms of a no-contact order is subject to punishment under either Article 90 or Article 92, without the need to prove the contact was made for an improper purpose.[158] The court held that public policy supports the strict reading of a no-contact order issued by a commander with a legitimate interest in deterring contact between a military member and another person.[159] Thus, a commander is not required to scrutinize every unauthorized contact, after the fact, to find that the accused had an unlawful purpose.[160]

Thompkins is significant because it establishes a bright line rule: commanders need not evaluate whether disobedience of a no-contact order had a non-criminal purpose so long as the order was lawful. The case also highlights the limits of the contextual approach described in *Moore*. Although the court will consider the context of an accused's violation of an order in determining whether the order was vague or overbroad, it will not examine the underlying reason for the disobedience, unless, of course, that reason raises a legal defense, such as justification or duress. Taken together, the *Moore* and *Thompkins* decisions reveal the CAAF's willingness to support the legitimate use of command authority. The cases also show the court's recognition that relatively minor disobedience offenses can have a powerful impact on good order and discipline, even when the immediate harm is not apparent.

Child Pornography: United States v. O'Connor[161]

Senior Airman (SrA) Barry O'Connor pled guilty, *inter alia*, to receiving and possessing images depicting child pornography, in violation of the Child Pornography Prevention Act of 1996 (CPPA), charged under Article 134, Clause 3.[162] After the Air Force Court and the CAAF affirmed the convictions, SrA O'Connor petitioned the Supreme Court for certiorari, arguing that the definition of child pornography was unconditionally vague and overbroad.[163] In light of its recent decision in *Ashcroft v. Free Speech Coalition*,[164] holding certain portions of the CPPA to be unconstitutional, the Supreme Court vacated the

154. *See* United States v. Padgett, 48 M.J. 273, 278 (1998).

155. United States v. Thompkins, 58 M.J. 42 (2003).

156. *Id.* at 44-45.

157. *Id.*

158. *Id.* at 45. The record did not indicate the contents of the compact disk (e.g., music or information relevant to the incident under investigation). *Id.* at 44.

159. *Id.* at 45.

160. *Id.*

161. United States v. O'Connor, 58 M.J. 450 (2003).

162. *Id.* at 451; 18 U.S.C. §§ 2251-60 (2000).

163. *O'Connor*, 58 M.J. at 451.

164. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Specifically, the Court found unconstitutional the prohibition against images that "appear[] to be" minors or that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they depict minors. *Id.* at 245, 258 (citing 18 U.S.C. § 2256(8)(B), (D)).

findings and remanded the case to the CAAF for further consideration.[165]

On remand, the CAAF set aside the findings, holding that the "virtual" or "actual" nature of the images was of constitutional significance after *Free Speech Coalition*.[166] For a plea of guilty to a violation of the CPPA to be provident, it must reflect that the images depict "actual" minors, a fact which SrA O'Connor's providence inquiry failed to establish.[167] Noting that the First Amendment rights of civilians and military members "are not necessarily coextensive," the court stated that it will continue to closely examine the connection between conduct protected by the First Amendment and its effect in the military environment.[168] Nevertheless, the court declined to uphold SrA O'Connor's guilty plea as service-discrediting conduct in violation of Article 134, Clause 2.[169] Here, the court held, the plea inquiry was focused on whether SrA O'Connor's conduct violated the CPPA, not on whether his conduct was of a nature to bring discredit on the armed forces.[170] Thus, the record did not demonstrate that he clearly understood the nature and implications of his conduct as an Article 134, Clause 2 offense.

Although the law in this area remains unsettled, *O'Connor* is important for several reasons. First, it establishes that the "actual" character of visual depictions is now a factual predicate to any plea of guilty under the CPPA and by extension, an element of an offense charged as a violation of the CPPA.[171] Accordingly, *O'Connor* has served as the basis for invalidating a number of convictions for CPPA violations.[172] Even so, the CAAF left open the door to charging possession of images of child pornography under several alternative theories of liability. For example, the CAAF recently held an accused's possession of such images may be service-discrediting or prejudicial to good order and discipline, regardless of whether the images fall under the unconstitutional definitions of the CPPA and are protected under the First Amendment.[173] Likewise, possession of even constitutionally-protected child pornography may constitute conduct unbecoming an officer, or it may violate punitive service regulations if viewed on a government computer.[174] In light of the evolving case law, government counsel would be well-advised to charge possession of child pornography both as a violation of the CPPA and under one of these alternative theories in order to maximize the chance of the conviction being affirmed on appeal.[175]

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165. O'Connor v. United States, 535 U.S. 1014 (2002).

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

167. *Id.* at 453-54.

168. *Id.* at 455.

169. *Id.* at 454-455; *cf*. United States v. Sapp, 53 M.J. 90, 92 (2000) (affirming appellant's improvident plea to violation of the CPPA, charged under Article 134, Clause 3, as service-discrediting conduct in violation of Article 134, Clause 2); United States v. Augustine, 53 M.J. 95, 96 (2000).

170. *O'Connor*, 58 M.J. at 455.

171. Military courts of criminal appeals have affirmed convictions in several recent cases, finding the evidence sufficient to show the images at issue depicted actual children. *See* United States v. Sollmann, 59 M.J. 831 (A.F. Ct. Crim. App. 2004); United States v. Schornborn, 2004 CCA LEXIS 70 (N-M. Ct. Crim. App. Mar. 22, 2004) (unpublished) (holding the "actual character" of the images and the accused's providence inquiry showed that the images were of actual minors); United States v. Moffeit, 2004 CCA LEXIS 55 (A.F. Ct. Crim. App. Feb 18, 2004) (unpublished) (affirming finding of guilt when expert testimony and photographs themselves provided convincing evidence that they depicted actual children); United States v. Tynes, 58 M.J. 704 (Army Ct. Crim. App. 2003) (affirming conviction for possession of images depicting actual children). Of particular interest, the *Tynes* opinion contains appendices with pattern instructions for military judges to use when instructing on violations of 18 U.S.C. §§ 2252A(a)(2) and 2252A(a)(5)(B) (2002) (receipt and possession of child pornography). *Tynes*, 58 M.J. at 710-13.

172. *See*, *e.g.*, United States v. Lee, 59 M.J. 261 (2004); United States v. Harrison, 59 M.J. 262 (2004); United States v. Mathews, 59 M.J. 263 (2004); United States v. Veenstra, 2004 CCA LEXIS 54 (A.F. Ct. Crim. App. Feb. 25, 2004) (unpublished).

173. *See* United States v. Mason, No. 02-0849, 2004 CAAF LEXIS 539 (June 10, 2004) (holding accused's guilty plea to a violation of the CPPA improvident, yet affirming the plea's providency to a lesser-included offense under Clauses 1 and 2 of Article 134); United States v. Irvin, No. 03-0224, 2004 CAAF LEXIS 538 (June 10, 2004).

174. *See* United States v. Mazer, 58 M.J. 691 (N-M. Ct. Crim. App. 2003), *rev. granted*, 59 M.J. 217 (2003) (specifying as an issue whether possession of child pornography can serve as a basis for conviction under Article 133 for conduct unbecoming an officer, in light of *O'Connor*); United States v. Cream, 58 M.J. 750 (N-M. Ct. Crim. App. 2003) (affirming conviction for storing and viewing pornographic images on a government computer, in violation of the Joint Ethics Regulation).

175. Although this practice may result in a multiplicity motion from the defense, it would eliminate any concerns about notice if the panel found the accused guilty of—or an appellate court affirmed the conviction under—the charged alternative theory as a lesser-included offense. *See* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994) ("[I]t seems clear to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives.").

Raising the Mistake of Fact Defense
United States v. Hibbard[176]

Chief Master Sergeant (CMSgt) Bobby Hibbard was charged with raping a subordinate noncommissioned officer, Technical Sergeant (TSgt) W, while both were deployed to Saudi Arabia. At trial, TSgt W testified that on her arrival, CMSgt Hibbard showed her around the base, pointing out a "private" swimming pool. She testified that two days later, after CMSgt Hibbard repeatedly asked her to accompany him to the pool, TSgt W eventually agreed to go with him. That evening, the two spent about an hour in the pool and in an adjacent hot tub, when CMSgt Hibbard unexpectedly rushed at TSgt W and sexually assaulted her. Soon afterward, CMSgt Hibbard and TSgt W had sexual intercourse, which she testified was nonconsensual, on the pool deck. Toward the conclusion of her direct testimony, TSgt W stated that after the incident, CMSgt Hibbard offered, "Well, at least this was consensual," as they were preparing to leave the pool area.[177]

Throughout the trial, the defense theory was that no sexual intercourse occurred and that TSgt W fabricated her rape allegation in order to receive a transfer back to the United States.[178] Nevertheless, the defense counsel requested an instruction on the defense of mistake of fact regarding TSgt W's consent to sexual intercourse. Notably, the defense cited evidence other than CMSgt Hibbard's final statement to TSgt W in support of its request.[179] The military judge denied the request, and the panel found CMSgt Hibbard guilty of rape.[180]

The CAAF affirmed the conviction, holding that while an honest and reasonable mistake of fact as to the victim's lack of consent is an affirmative defense to a charge of rape, the military judge did not err by declining to instruct the panel on the defense.[181] The court held that the totality of the circumstances, to include TSgt W's testimony and the manner in which the issue was litigated at trial, was insufficient to reasonably raise the defense.[182] The court noted that the defense counsel's opening statement, cross-examination of TSgt W, case-in-chief, and closing argument all centered on the defense theory that no sexual intercourse occurred.[183] While stating that the defense need not present evidence of mistake of fact in its case on the merits nor discuss such evidence in argument to obtain an instruction on mistake of fact, the CAAF held that the military judge may consider the absence of such presentation in assessing whether the defense was reasonably raised by the evidence.[184]

Hibbard is significant, especially for trial defense counsel, because it effectively imposes a burden on the defense to ensure that special defenses are reasonably raised to obtain an instruction. In this respect, the CAAF's holding appears to conflict with the Rules for Court Martial (RCM) and the discussion portions of the *MCM*. For example, RCM 916 imposes no burden on the defense to raise or to prove a special defense, except for lack of mental responsibility or mistake of fact as to age for carnal knowledge.[185] Further, RCM 920 states that the military judge shall instruct on any special defense "in issue."[186] In *Hibbard*, however, the unanimous court held a military judge should consider not only the evidence presented, but also the defense counsel's opening statement and closing arguments.[187]

The result in *Hibbard* may be troubling to defense counsel for several reasons. Although statements by counsel are obviously not evidence, *Hibbard* holds that such statements may affect whether a defense is reasonably raised. During opening statements, defense counsel should have a good grasp of what their own witnesses will say on the stand, but their knowledge of how opposing witnesses will testify—particularly during cross-examination and in response to questions from members—is naturally more speculative. To place the onus on

176. United States v. Hibbard, 58 M.J. 71 (2003).

177. *Id*. at 73-74.

178. *Id*. at 73.

179. *Id*. at 74.

180. *Id*. at 75.

181. *Id.* at 72.

182. *Id*. at 76-77.

183. *Id.* at 73-75.

184. *Id*. at 76.

185. MCM, *supra* note 30, R.C.M. 916(b). The discussion of this sub-paragraph states, "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial," and notes that multiple and inconsistent defenses are allowed. *Id*. Discussion.

186. *Id.* R.C.M. 920(e)(3). The discussion adds that a defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.*

187. *Hibbard*, 58 M.J. at 76.

counsel to anticipate such evidence in an opening statement seems unfair. Likewise, to effectively require defense counsel in their closing argument to address a defense the military judge has informed them he will not instruct on seems to impose a burden on defense counsel well beyond that required by RCM 620. Since an accused may assert inconsistent defenses raised by the evidence, then he should be entitled to an instruction on all applicable defenses, regardless of how central they are to the defense theory. This would allow his counsel to argue the strongest defense while relying on the judges' instructions to get the perhaps weaker defenses—though still raised by the evidence—in front of the panel. *Hibbard* appears to substantially undercut this protection.

Consequently, defense counsel should be prepared to take appropriate measures to obtain the instructions their case requires, whether it be by eliciting evidence from government witnesses on cross-examination, introducing it during the defense case-in-chief, or addressing the defense during their opening statement and closing argument. In light of *Hibbard*, the defense cannot afford to rely on the court to instruct sua sponte on defenses—particularly inconsistent defenses—when they are only tangential to the defense theory. This may prove to be a tricky situation in many cases, as inconsistent defenses are allowed, yet often viewed with suspicion by a panel.

Modification[188]
United States v. Parker[189]

Sergeant (SGT) Wayne Parker was charged with rape of multiple victims, including victim "AL." One specification alleged a rape of AL between 1 February and 31 March 1995. In a sworn statement to investigators in June 1995, AL said SGT Parker raped her "in February or March," without specifying the year.[190] In a videotaped deposition eleven days before trial in April 1996, however, AL said she believed the rape occurred in 1993. At trial, the government moved to amend the dates in the relevant specification to read 1993. The defense objected, arguing the amendments were major changes under RCM 603, because the accused would not have adequate notice to defend against a charge of such misconduct in 1993. The military judge denied the motion.[191] Next, the government offered AL's deposition under MRE 413 to support the charged rapes of other victims, and the judge admitted the deposition over defense objection.[192] The government introduced no other evidence of sexual contact between AL and SGT Parker in 1993. At the close of the government's case, the military judge denied a defense motion to dismiss the specification for the rape of AL under RCM 917.[193] The panel found SGT Parker guilty, by exceptions and substitutions, of raping AL between August 1993 and March 1995.[194]

The CAAF set aside the conviction, holding the military judge erred in denying the defense motion to dismiss.[195] Noting that the time, place and nature of SGT Parker's interaction with the victims was a "major focus" of the "closely contested" trial, the court held that the military judge's pretrial rulings "established the parameters" for the case.[196] By denying the government's motion to amend and by admitting AL's deposition for the limited purpose of MRE 413, the military judge highlighted the government's burden to introduce sufficient evidence to prove the rape of AL in 1995, which it failed to meet.[197] Thus, since AL's deposition was admitted only to support the other charged offenses, there was no evidence of a rape of AL in 1995.[198] The court stated the government could have withdrawn and preferred new charges against SGT Parker.[199]

Parker is notable for practitioners because it highlights the consistency between the standards used to measure a major

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188. The three cases discussed *infra* involve the closely related issues of amendment and variance. Because both of these concepts involve changes to specifications as alleged in the charge sheet, and because the rules for measuring the propriety of such changes are similar, military appellate courts have used the term "modification" to describe both types of changes. *See, e.g.*, United States v. Moreno, 46 M.J. 216 (1997).

189. United States v. Parker, 59 M.J. 195 (2003).

190. *Id.* at 197.

191. *Id.* at 198.

192. *Id.* at 198-99.

193. *Id.* at 199-200.

194. *Id.* at 200.

195. *Id.* at 201.

196. *Id.* at 200-01.

197. *Id.* at 201.

198. *Id.*

199. *Id.*

change and a fatal variance. If an accused is surprised at trial by an amendment or a variance, and if his ability to prepare a defense is thereby compromised, then the modification is improper and should not be allowed. If proof of the offense requires such a change, then the government should be prepared to withdraw and re-prefer the charge if the military judge denies the requested amendment. Likewise, defense counsel should move for dismissal of any modified findings when the excepted and substituted language has the same effect as a major change.

Fatal Variance: United States v. Lovett[200]

Staff Sergeant (SSgt) Joshua Lovett was charged with raping his five-year-old step-daughter. He was also charged with solicitation to murder his wife, the girl's mother, to whom the girl first described the events. At trial by members, the evidence indicated that SSgt Lovett told a man he wanted his wife "to disappear," gave the man her picture and car keys, and discussed how much it would cost. During the instructions conference, the government asked the military judge to instruct the panel on a lesser-included offense of solicitation to commit a general disorder under Article 134, UCMJ. Over defense counsel's objection, the military judge instructed the panel on the requested lesser-included offense, which constituted, in effect, solicitation to obstruct justice. The panel found SSgt Lovett guilty, by exceptions and substitutions, of the instructed lesser-included offense.[201]

In a unanimous decision, the CAAF set aside the conviction of the modified offense.[202] The court found that the original specification put the appellant on notice to defend against solicitation to commit premeditated murder, an offense that is substantially different from solicitation to obstruct justice.[203] Noting that findings by exceptions and substitutions "may not be used to substantially change the nature of the offense," the court held that the substituted language created a material variance.[204] Because this variance prevented the appellant from adequately preparing a defense, it was fatal.[205]

Lovett is significant because it clearly lays out the two-pronged standard for a fatal variance: it must be material, and it must prejudice the accused.[206] Under the first prong, a variance is material if it substantially changes the nature of the charged offense. Second, such a variance is prejudicial if it places an accused at risk of another prosecution for the same misconduct, if it denies the accused the opportunity to defend himself against the modified offense, or if the accused has been misled and is thereby unable to adequately prepare for trial.[207]

Lovett further shows the CAAF's apparent discomfort with lesser-included offenses arising from violations of Article 134, the general article. Although case law firmly supports allowing the "enumerated" Article 134 offenses as lesser-included offenses, the court in *Lovett* appears less willing to endorse "unenumerated" general disorders to provide an accused with notice of lesser-included offenses he may face.[208] If this is not the case, then the result in *Lovett* is difficult to explain, as the overt acts alleged in the specification were virtually the same as those contained in the modified specification. It is unclear what, if any, lesser-included offense the CAAF would have found appropriate for the evidence presented in *Lovett*. In light of this, government counsel should be wary of relying on lesser-included "unenumerated" offenses and instead should charge such offenses in the alternative to allow for exigencies of proof at trial. On the other hand, when faced with a variance, defense counsel should be prepared to offer how the alleged specification affected their trial preparation to make a showing of prejudice.

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200. United States v. Lovett, 59 M.J. 230 (2004).

201. *Id.* at 231-33. The modified specification contained the same overt acts as the original specification alleging solicitation to murder. In addition, the modified specification stated that the accused gave the man his wife's car keys and that he solicited the man "to cause [his wife] to disappear or to wrongfully prevent her from appearing in a civil or criminal proceeding." *Id.* at 235.

202. *Id.* at 237.

203. Although the original specification did not mention premeditation, the court said it "suggested" premeditated murder under Article 118(1). The court also noted that the alleged overt acts "impl[ied] premeditation" by the accused and that the defense premised its trial preparation on this assumption. *Id.*; *see also* UCMJ art. 118(1) (2002).

204. *Lovett*, 59 M.J. at 235 (citing MCM, *supra* note 30, R.C.M. 918(a)(1)).

205. *Id*. at 236-37.

206. *Id.* at 235 (citing United States v. Teffeau, 58 M.J. 62, 66 (2003)).

207. *Id.* at 236 (citing *Teffeau*, 58 M.J. at 67).

208. *See* United States v. Foster, 40 M.J. 140 (1994).

Ambiguous Findings: United States v. Walters[209]

Airman Basic (AB) Ricky Walters II was charged in a duplicitous specification with wrongful use of methylenedioxymethamphetamine (MDMA) "on divers occasions between on or about 1 April 2000 and on or about 18 July 2000."[210] At trial before members, the evidence indicated that AB Walters may have used MDMA on as many as six occasions.[211] Nonetheless, the panel found him guilty, by exceptions and substitutions, of using MDMA on "one occasion" during the same period, without specifying the occasion.[212]

In a four-to-one decision, the CAAF set aside the findings and dismissed the charge and specification with prejudice.[213] The majority held that the findings of guilty and not guilty did not disclose the conduct on which each of them was based, so they were ambiguous.[214] The military judge erred in giving incomplete instructions regarding the use of findings by exceptions and substitutions and in failing to secure clarification of the court-martial's findings before their announcement.[215] Consequently, AB Walters' substantial right to a full and fair review of his conviction under Article 66(c) was rendered impossible by the ambiguous findings, because the Air Force Court could not conduct its required factual sufficiency review.[216]

Walters is notable because it requires military judges and government counsel to ensure that findings by exceptions and substitutions will allow for sufficient review by appellate courts. As the court noted, "Where a specification alleges wrongful acts on 'divers occasions,' the members must be instructed that any findings by exceptions and substitutions that remove the 'divers occasions' language must clearly reflect the specific instance of conduct on which their modified findings are based."[217] The panel can do so by referring to a relevant date or other facts in evidence to put the accused and reviewing courts on notice of what conduct served as the basis for the findings.[218]

Fatal Variance: United States v. Teffeau[219]

As previously discussed in this article, SSgt Teffeau was found guilty of making false official statements to local police during an investigation into the death of a DEP recruit. He was also charged under Article 92(1), UCMJ, with violating subparagraph "6(d)" of a lawful general order by providing alcohol to a person enrolled in the DEP.[220] The panel found SSgt Teffeau guilty by exceptions and substitutions of violating the superior paragraph "6" of the same order by wrongfully engaging in a "nonprofessional personal relationship" with the same DEP member.[221] On appeal, the Navy-Marine Court of Criminal Appeals (N-MCCA) found that the findings created a material variance by convicting the accused of a "related, but materially different, incident than the one originally charged in

209. United States v. Walters, 58 M.J. 391 (2003).

210. *Id.* at 392.

211. *Id.* at 392-93.

212. *Id.* at 394. The military judge's findings instructions included the following:

> If you have a doubt about the time or place in which the charged misconduct occurred, but you are satisfied beyond a reasonable doubt that the offense was committed at a time, at a place, or in a particular manner which differs slightly from the exact time, place or manner in the specification, you may make minor modifications in reaching your findings by changing the time, place, or manner in which the alleged misconduct described in the specification occurred, provided that you do not change the nature or identity of [the] offense . . . . [I]f you do what is called findings by exceptions and substitutions, which is the variance instruction I have given you earlier, where you may—and this is just an example—on the divers uses, you may find just one use, and you except out the words divers uses and you substitute in the word one time, or something like that.

Id. at 393.

213. *Id.* at 397.

214. *Id.* at 395-97.

215. *Id.* at 396.

216. *Id.* at 396-97.

217. *Id.* at 396.

218. *Id.*

219. United States v. Teffeau, 58 M.J. 62 (2003).

220. *Id.* at 64 (citing Headquarters, U.S. Marine Corps Recruit Depot, San Diego, Order No. 1100.4a (21 May 1992)).

221. *Id.* at 65-66.

the specification."[222] Still, the N-MCCA denied relief, holding that the variance did not substantially prejudice SSgt Teffeau.[223]

In a unanimous decision, the CAAF set aside the findings, holding that the modified specification constituted a fatal variance.[224] Accepting the N-MCCA's finding that the modified specification reflected a "different incident" than the one charged, the CAAF disagreed that the variance was not prejudicial.[225] The variance substantially prejudiced SSgt Teffeau's due process rights by depriving him of the opportunity to defend against the substituted paragraph of the order.[226]

On the variance issue, *Teffeau* is significant because it shows the CAAF will strictly enforce an accused's right to notice of the charge against which he must defend. While the *Moore* and *Thompkins* cases, discussed *infra*, support a commander's legitimate use of authority to enforce discipline, *Teffeau* shows that due process notice serves as the ultimate backstop to that authority. Disobedience of an order may be punishable, but an accused must still be able to defend himself if he is to be punished. In light of *Teffeau*, government counsel would be well-advised to charge orders violations under more general, superior paragraphs to allow for exigencies of proof. By the same token, defense counsel should move for a bill of particulars to direct the government to specify in as much detail as possible what conduct serves as the basis for the alleged violation. *Teffeau* further underscores the two-prong test for measuring a fatal variance. To satisfy the test, defense counsel should be prepared to show how the modification of the original specification prejudiced their trial preparation.

Taken together, the CAAF's decisions in *Parker*, *Lovett*, *Teffeau*, and *Walters* provide an excellent primer on the concepts of amendment and variance. Although the cases make no dramatic changes to the law, they offer sound practical guidance to counsel and military judges who face these issues.

Multiplicity: United States v. Hudson[227]

While under pretrial restriction for wrongful use of a controlled substance (OxyContin), Fireman Apprentice (FA) David Hudson took a government vehicle and left the Coast Guard installation for two days. He pled guilty and was convicted, *inter alia*, of breaking restriction and unauthorized absence. On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) determined the absence charge was a lesser-included offense of the breaking restriction charge; thus, the two charges were multiplicious. The CGCCA held the military judge committed plain error by not dismissing the absence charge, set aside the finding of guilty for that offense, and reassessed the sentence. The Coast Guard Judge Advocate General certified the case to the CAAF.[228]

The CAAF reversed the CGCCA in a unanimous decision, holding that the military judge's decision not to dismiss the absence charge was not plain error.[229] Noting that an unconditional guilty plea waives a multiplicity claim absent plain error, the court said that if two specifications are facially duplicative, that is, "factually the same," then they are multiplicious, and it is plain error not to dismiss one of them.[230] Using the "elements" test, the court lined up the elements realistically to determine whether one offense is rationally derived from the other.[231] By comparing the "factual conduct alleged in each specification" and considering the providence inquiry, the court found the offenses factually distinguishable.[232] First, the breaking restriction specification required proof of FA Hudson's restriction by an authorized individual, which the absence offense did not.[233] Second, the absence specification required proof of his absence for the specified two-day period, which the breaking restriction offense did not.[234] Consequently, the two offenses were not factually the same.

Hudson is a useful case for practitioners due to its straightforward application of the rules governing multiplicity, which

222. *Id.* at 66 (citing United States v. Teffeau, 55 M.J. 756, 762 (N-M. Ct. Crim. App. 2001)).

223. *Id.*

224. *Id.* at 67. Judge Baker filed a concurring opinion. *Id.* at 69.

225. *Id.* at 67.

226. *Id.*

227. United States v. Hudson, 59 M.J. 357 (2004).

228. *Id.* at 358.

229. *Id.* at 361.

230. *Id.* at 358-59.

231. *Id.* at 359.

232. *Id.* at 359-60.

233. *Id.* at 360-61.

is perhaps the most frequently misunderstood area in the law of pleadings. Although the CAAF opinion discusses multiplicity generally, it focuses on the concept of plain error, the more deferential standard of review given to a military judge's decision on multiplicity when the accused pleads guilty. *Hudson* is also noteworthy in that the CAAF endorses the use of the accused's statements during providency to determine whether the charged offenses are factually the same. In doing so, the court is effectively looking at the offense "as proven" rather than "as alleged in the specification," which is the standard method for weighing a multiplicity claim using the elements test.[235] However, counsel should note that because *Hudson* was a guilty plea, considering the providency inquiry was proper.[236] In a contested case, of course, there is no providency inquiry, and a multiplicity motion is often raised during pretrial motions before any evidence is admitted. Even so, if a multiplicity motion is raised after evidence is admitted, such as during post-trial proceedings or on appeal, counsel should realize that the elements test applies only to the factual content of the specification not the evidence admitted at trial.

Conclusion

If you've heard this story before, don't stop me, because I'd like to hear it again.[237]

Examining the past year's developments in substantive criminal law, we can identify three somewhat interrelated but noteworthy trends. First, the UCMJ amendments have expanded an accused's criminal liability, particularly for crimes against victims whom Congress feels are in need of additional protection: child abuse victims[238] and unborn children.[239] Similarly, the CAAF has shown a willingness to define and clarify substantive crimes in a manner that extends the reach of what is considered criminal under the UCMJ. This willingness is revealed in three distinct areas: crimes that provide enhanced protection to certain classes of victims,[240] crimes that threaten legitimate law enforcement functions,[241] and crimes against command authority.[242] At the same time, the CAAF has scrupulously enforced the defense's trump card—due process notice—to ensure an accused will receive a fair trial when charged with such offenses.[243]

Yet several of the recent developments leave significant questions unanswered. What is the future of Article 125's prohibition of sodomy? How will prosecutions for "virtual" child pornography cases be resolved? What effect will the amended Article 43 have on unexpired limitations periods for child abuse offenses? How will Article 119a affect military justice? Some of these issues currently await disposition at the CAAF; they and others may eventually be resolved in the Supreme Court.[244] Although some of these developments are not novel, they do offer sound guidance to counsel who encounter such issues in their military practice. So whether you intend to just sample the *hors d'oeuvres* or go straight to the buffet, perhaps this article will serve as food for thought. Dig in!

234. *Id.* at 361.

235. *See, e.g*, United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994); United States v. Harwood, 46 M.J. 26, 28 (1997).

236. *See* United States v. Lloyd, 46 M.J. 19, 23 (1997) (holding the CCA must consider the providence inquiry to ensure a guilty plea is correct in law and fact under Article 66(c), UCMJ).

237. Groucho Marx, *quoted in* World of Quotes, *available at* http://www.worldofquotes.com/author/Groucho-Marx/1/ (last visited June 30, 2004).

238. *See* UCMJ art. 43 (2002).

239. *See id.* art. 119a.

240. *See* United States v. Saunders, 59 M.J. 1 (2003) (victims of harassment residing overseas); United States v. Simpson, 58 M.J. 368 (2003) (trainee victims of sexual offenses committed by superiors).

241. *See* United States v. Teffeau, 58 M.J. 62 (2003) (false statements to civilian police); United States v. Fisher, 58 M.J. 300 (2003) (false sworn statements to military criminal investigators).

242. *See* United States v. Thompkins, 58 M.J. 42 (2003) (no-contact order); United States v. Moore, 58 M.J. 466 (2003) (no-contact order).

243. *See* United States v. Lovett, 59 M.J. 230 (2004); United States v. Parker, 59 M.J. 195 (2003); United States v. Teffeau, 58 M.J. 62 (2003). *But see* United States v. Saunders, 59 M.J. 1 (2003) (holding the accused's due process rights were satisfied).

244. For example, regardless of how the CAAF rules in the pending sodomy cases, it is likely that the Supreme Court will eventually hear the issue. Likewise, given the trend of affirming child pornography convictions and the use of alternative theories of liability that do not exist in the civilian sector, the Court may hear some of these cases.

Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings

Major Jan E. Aldykiewicz
Professor, Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

Introduction

> *"Gentlemen, Chicolini here may talk like an idiot, and look like an idiot, but don't let that fool you. He really is an idiot. I implore you, send him back to his father and brothers who are waiting for him with open arms in the penitentiary. I suggest that we give him ten years in Levenworth or eleven years in Twelveworth."*[1]

How does the government get "*Chicolini* . . . ten years in Levenworth or eleven years in Twelveworth?"[2] Conversely, what can or should the defense do to ensure that *Chicolini's* new mailing address does not end in "*worth*"? This article, a potpourri of sentencing cases, highlights those cases, including cases applying waiver, that military justice practitioners should be aware of to successfully represent either the United States government or those service members on the front lines defending the United States. Divided into eleven sub-parts, this article addresses the following areas: pretrial agreement terms affecting sentencing; personnel records; summary courts-martial convictions; aggravation evidence; rehabilitative potential evidence; the unsworn statement; the case in rebuttal; instructions; argument; sentence credit; and sentence rehearings.

Pretrial Agreement Terms Affecting Sentencing—Rule for Courts-Martial (RCM) 705[3]

Rule for Courts-Martial 705(c)[4] governs the terms and conditions of a pretrial agreement.[5] For sentencing purposes, coun-

1. DUCK SOUP (Paramount Pictures 1933) (explaining an appeal to the court when Chicolini (Chico Marx) goes on trial for treason).

2. *Id*.

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c) (2002) [hereinafter MCM].

4. *Id*.

5. Rule for Court-Martial (RCM) 705(c) states:

> (1) *Prohibited terms or conditions*.
>
> (A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.
>
> (B) *Deprivation of certain rights*. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.
>
> (2) *Permissible terms or conditions*. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:
>
> (A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;
>
> (B) A promise to testify as a witness in the trial of another person;
>
> (C) A promise to provide restitution;
>
> (D) A promise to confirm the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and
>
> (E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

Id. R.C.M. 705(c).

sel need to focus on RCM 705(c)(1)(B) which prohibits a term of a pretrial agreement which deprives an accused of "the right to complete sentencing proceedings."[6] *United States v. Libecap*,[7] *United States v. Edwards*,[8] and most recently, *United States v. Sunzeri*[9] are three cases addressing RCM 705(c)(1)(B).

In *United States v. Libecap*[10] the appellant entered into a pretrial agreement in which he agreed to request a bad conduct discharge.[11] On appeal, the appellant argued he was entitled to a sentence rehearing because the term requiring him to request a punitive discharge was both prohibited by RCM 705 and contrary to public policy.[12] The Coast Guard court agreed, finding the term violated RCM 705(c)(1)(B) because "as a practical matter, it deprived the accused of a complete sentencing proceeding."[13] The court found, in effect, that any effort by the accused to avoid a punitive discharge through the presentation of evidence on sentencing would be negated by his specific request for such a discharge.[14] Applying the same reasoning, the court also found the term was contrary to public policy.[15]

In *United States v. Edwards*,[16] the Court of Appeals for the Armed Forces (CAAF) confronted the same issue that was

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6. *See id.* R.C.M. 705(c)(1)(B).

7. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

8. 58 M.J. 49 (2003).

9. 59 M.J. 748 (N-M. Ct. Crim. App. 2004).

10. 57 M.J. 611 (C.G. Ct. Crim. App. 2002). The appellant was tried at a special court-martial and convicted, pursuant to his plea, of three specifications of assault upon his wife and one specification of assault upon a sentinel. The military judge sentenced him to reduction to E-1, forfeiture of $1,134 pay per month for six months, confinement for six months, and a bad conduct discharge. *Id*. at 612.

11. *Id*. at 613. The term in question reads as follows:

> I agree that I will request that the Military Judge award me a Bad Conduct Discharge. My defense counsel has fully advised me that a punitive discharge from the service will carry with it an ineradicable stigma that is commonly recognized by our society. I realize that a punitive discharge will place limitations on employment opportunities and will deny me other advantages that are enjoyed by one whose discharge characterization indicates that he/she has served honorably. A punitive discharge will affect my future with regard to my legal rights, economic opportunities, and social acceptability.

Id.

12. *Id*.

13. *Id*. at 615-16.

> While a provision requiring the accused to request a bad conduct discharge at trial leaves him free to otherwise make the best case he can for a minimal sentence, including evidence and argument to the effect that a punitive discharge is unwarranted, we are persuaded that the accused's request for a bad conduct discharge will always have the potential to seriously undercut any other efforts at trial to avoid a punitive discharge. Thus, we are convinced that although such a sentencing proceeding might in some sense be viewed as complete, the requirement to request a bad conduct discharge would, in too many instances, largely negate the value of putting on a defense case, and create the impression, if not the reality, of a proceeding that was little more than an empty ritual, at least with respect to the question of whether a punitive discharge should be imposed.

Id. *See* MCM, *supra* note 3, R.C.M. 705(c)(1)(B). The right to "complete sentencing proceedings" is a specific right guaranteed in RCM 705(c)(1)(B), however, "complete" is undefined.

14. *See supra* note 16.

15. *Libecap*, 57 M.J. at 616.

> For the same reasons [that the court found a violation of R.C.M. 705,] we conclude that, under the circumstances of this case, the provision requiring the Appellant to request a bad conduct discharge was against public policy . . . . [W]e are convinced that enforcement of the provision would interfere with the sentencing process and undermine public confidence in the integrity and fairness of the Appellant's court-martial.

Id. Since the prohibited term dealt with sentencing only, the court affirmed the findings, set aside the sentence, and authorized a rehearing on sentence. *Id.* at 617. Although the term of the pretrial agreement required the appellant to request a punitive discharge, he failed to comply with that term at trial, a failure deemed by the court to be breach of a material term of the pretrial agreement. *Id*. Despite this breach, neither the military judge nor the government inquired into it, resulting in what the court termed an incomplete pretrial agreement inquiry. *Id*. On remand, the convening authority ordered a rehearing at which the military judge sentenced the appellant to reduction to E-1, 125 days confinement, and a bad conduct discharge. United States v. Libecap (Libecap II), 59 M.J. 561, 562 (C.G. Ct. Crim. App. 2003). On appeal for a second time, the sentence was approved. *Id*.

16. 58 M.J. 49 (2003). The appellant was convicted at a special court-martial, pursuant to his pleas, of wrongful use of lysergic acid diethylamide (LSD) and marijuana and sentenced to four months confinement and a bad conduct discharge. *Id.* at 50.

before the *Libecap*[17] court: whether RCM 705 or public policy prohibited a term of a pretrial agreement. After charges were preferred, the appellant's area defense counsel (ADC) contacted the Air Force Office of Special Investigations (AFOSI) to advise them of his representation of the appellant and to further inform them that all requests to question the appellant should go through him. Despite acknowledging the representation, the AFOSI nonetheless contacted the appellant directly, interrogating him without notifying the ADC.[18] As part of the pretrial agreement, the appellant agreed not to mention the AFOSI interview or any rights violations associated therewith.[19]

On appeal, the appellant argued that the AFOSI-interrogation term of his pretrial agreement violated public policy.[20] The service court disagreed.[21] In affirming the lower court's decision, the CAAF found the term was neither contrary to public policy nor prohibited by RCM 705.[22] The court focused on whether the term deprived the appellant of a "complete sentencing proceeding"—specifically, whether the term limited the accused's right to present matters in extenuation, mitigation, or rebuttal. Noting the right to make an unsworn statement is "not unlimited," the court looked to the text of RCM 1001(c)(2)(A) which allows an accused, in his unsworn statement, to present matters in extenuation, mitigation, or rebuttal.[23] After examining the rule and the pretrial agreement term at issue, the court found that the alleged unconstitutional interrogation, even if unjustified or inexcusable, did not "serve to 'explain the circumstances' of the offense [extenuation], tend to 'lessen the punishment to be adjudged [mitigation],' or rebut anything presented by the prosecution [rebuttal]."[24] The term, thus, did not deprive the appellant of a complete sentencing proceeding.

The last case in this area is *United States v. Sunzeri*.[25] In *Sunzeri*,[26] the appellant, as part of his pretrial agreement, offered the following term (paragraph 18f of the agreement):

> That, as consideration for this agreement, the government and I agree not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including but not limited to, Article 32 testimony, affidavits, or letters will not be permitted or considered when formulating an appropriate sentence in this case.[27]

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17. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

18. *Edwards*, 58 M.J. at 50.

19. *Id*. Initially, the government and defense discussed a "four-month cap" without the disputed pretrial agreement term. It was only after the defense counsel submitted notice that his client intended to mention the unlawful interrogation in his unsworn statement that the government indicated it "would not support the pretrial agreement if Appellant intended to discuss any alleged violation of his constitutional rights." *Id*. The relevant portion of the pretrial agreement stated as follows:

> Agree to waive any motion regarding my constitutional rights to counsel and my right to remain silent during AFOSI interviews and other questioning conducted by the AFOSI that occurred after I was represented by counsel. In addition, I agree not to discuss any of the circumstances surrounding my interrogation or questioning during my care [sic] inquiry, any sworn statement, any unsworn statement during my trial. Although it was my intention to discuss these matters at my trial, I specifically waive my rights to discuss these matters to gain the benefit of this pretrial agreement.

Id. at 51.

20. *Id*.

21. *Id*.

22. *Id*. at 53.

23. *Id*.; *see also* MCM, *supra* note 3, R.C.M.1001(c)(2)(A). Rule for Court-Martial 1001(c) states, in part:

> (2) *Statement by the accused*.
> (A) *In general*. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

MCM, *supra* note 3, R.C.M.1001(c)(2)(A).

24. *Edwards*, 58 M.J. at 53.

25. 59 M.J. 758 (N-M. Ct. Crim. App. 2004). The appellant was convicted at a general court-martial, pursuant to his pleas, of various drug related offenses and sentenced to reduction to E-1, confinement for ten months, and a bad conduct discharge. *Id.* at 759.

26. *Id*. at 758.

In examining the pretrial agreement, the military judge "considered rejecting paragraph 18f" as contrary to public policy, however, declined to strike the provision after considering the following: the term (paragraph 18f) originated with the defense; the term was aimed at preventing the government from introducing certain evidence against the appellant on sentencing; were it not for the term (paragraph 18f), the appellant would have called two witnesses, his father and his best friend; the two witnesses the appellant would have called were the subject of an earlier defense motion to compel production, a motion the military judge granted; the appellant stated on the record that he believed the term was in his best interest; and the term applied equally to both the government and the defense.[28]

On appeal, the appellant argued paragraph 18f violated public policy and deprived him of a complete sentencing proceeding. The service court, relying on the plain meaning of RCM 705(c)(1)(B), agreed, finding paragraph 18f to be both contrary to public policy and a violation of RCM 705(c)(1)(B). In setting aside the sentence and remanding the case, the court relied heavily on the appellant's assertions at trial that, but for the agreement, he would have presented more evidence on sentencing, specifically the two witnesses who were the subject of the defense's successfully litigated pretrial motion to compel.[29]

Libecap,[30] *Edwards*,[31] and *Sunzeri*[32] send a clear message to trial practitioners. Innovative and unique pretrial agreement terms affecting sentencing will be carefully examined to determine if they violate public policy[33] or the plain meaning of RCM 705(c)(1)(B). If they adversely affect an accused's right to present a "complete sentencing proceeding," they will be struck down. Trial counsel, relying on *Edwards*,[34] should argue that a provision in question does not affect an accused's right to present evidence in extenuation, mitigation, or rebuttal.[35] Defense counsel should argue the converse, articulating for the military judge why the provision in question violates public policy by preventing the client from presenting a "complete sentencing proceeding"; that is, the client's right to present evidence in extenuation, mitigation, or rebuttal has been restricted, limited, or, practically speaking, taken from him.

The next part of this article addresses the government's sentencing case, commonly referred to as the case in aggravation.[36] The cases discussed will address the admissibility of Article 15s as personnel records, summary courts-martial convictions as prior convictions, aggravation evidence, and evidence regarding rehabilitative potential.

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27. *Id.* at 759. The agreement also had a provision limiting the funding of travel expenses for off island sentencing witnesses, to wit, paragraph 18c, which stated: "That, as consideration for this agreement, I will not require the Government to provide for the personal appearance of witnesses who reside off the island of Oahu to testify during the sentencing phase of the courts-martial." *Id.* at 760.

28. *Id*.

29. *Id.* at 762. In remanding the case, the court noted that although paragraph 18f was unenforceable, the same was not true for paragraph 18c, which could be enforced. Paragraph 18c only precluded government funded off island live testimony, whereas paragraph 18f, the provision in question, prevented the appellant from introducing any evidence, in any format, from the only two sentencing witnesses he deemed relevant. *Id.* at 763.

30. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

31. 58 M.J. 49 (2003).

32. *Suzeri*, 59 M.J. at 758.

33. Provisions which turn the proceeding into an "empty ritual" violate public policy.

> What provisions violate appellate case law is determined by reference to precedent. Determining what provisions violate "public policy" is potentially more troublesome. Appellate case law, its sources, and R.C.M. 705 are, themselves, statements of public policy. The United States Court of Military Appeals has observed that a pretrial agreement provision that "substitutes the agreement for the trial, and, indeed, renders the latter an empty ritual" would violate public policy. United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174, 178, 1968 WL 5361 (1968). Beyond that, however, the Court of Military Appeals "has not articulated any general approach to pretrial agreement conditions that can be used to determine which conditions are permissible and which are to be condemned. An analysis of the cases suggests, however, that the court will disapprove those conditions that it believes are misleading or [abridge] fundamental rights of the accused . . . ." Francis A. Gilligan & Frederick I. Lederer, Court-Martial Procedure § 12-25.20 (1991).

Id. at 760-61.

34. *Edwards*, 58 M.J. at 49.

35. *See* MCM, *supra* note 3, R.C.M. 1001(c).

36. Referring to the government's case as the case in aggravation is actually a misnomer because the applicable RCM 1001(b), is broken down into five discreet components: "Service data from the charge sheet"; "Personal data and character of prior service"; "Evidence of prior convictions of the accused"; "Evidence in aggravation"; and "Evidence of rehabilitative potential." *See id.* R.C.M. 1001(b)(1)-(5).

Personnel Records—Rule for Courts-Martial 1001(b)(2)[37]

Personnel records under RCM 1001(b)(2) are admissible on sentencing provided they are "maintained in accordance with departmental regulations" and "they reflect the past military efficiency, conduct, performance, and history of the accused."[38] Items normally offered by the government under RCM 1001(b)(2) include, among other items, letters of reprimand[39] and Article 15s.[40] The key to admitting documents from a service member's personnel records is that the evidence offered is maintained in accordance with the applicable departmental regulations. The case worth noting in this area is *United States v. LePage*.[41]

In *LePage*,[42] the government offered, without objection from the defense,[43] prosecution exhibit (PE) 3, a record of non-judicial punishment dated 14 April 1999.[44] On appeal, the appellant alleged that the military judge committed plain error[45] by admitting PE 3 in direct violation of § 0141 of the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C (JAGMAN).[46] This section prohibits the admission of non-judicial punishment actions for offenses committed over two years before any of the offenses for which an accused stands convicted.[47] The nonjudicial punishment action related to an offense committed in March 1999. The offense for which the accused was convicted was committed in January 2002, nearly three years after the offense captured by PE 3. In short, the personnel record was inadmissible under the relevant service regulation. Upon realizing his error, the military judge held a post-trial Article 39(a)[48] session where he made findings of fact, to include a finding that the appellant was prejudiced by his erroneous admission and consideration of the nonjudicial punishment action, and recommended that the convening authority disapprove the discharge.[49] Notwithstanding the military judge's post-trial actions, the convening authority approved the discharge.[50]

37. *Id.* R.C.M. 1001(b)(2).

38. *Id.* Rule for Courts-Martial 1001(b) states, in part:

> (2) *Personal data and character of prior service of the accused*. Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.
>
> "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id. R.C.M. 1001(b)(2).

39. *See, e.g.*, United States v. Clemente, 50 M.J. 36 (1999); United States v. Williams, 47 M.J. 142 (1997). *But see* United States v. Zakaria, 38 M.J. 280 (C.M.A. 1993).

40. *See, e.g.*, United States v. Craze, 56 M.J. 777 (A.F. Ct. Crim. App. 2002); United States v. Godden, 44 M.J. 716 (A.F. Ct. Crim. App. 1996); United States v. Mack, 5 M.J. 238 (C.M.A. 1978).

41. 59 M.J. 659 (N-M. Ct. Crim. App. 2003).

42. *Id*. The appellant was tried by a military judge alone sitting as a special court-martial for one specification of wrongful use of marijuana on 2 January 2002 and sentenced to reduction to E-1, forfeiture of $737 pay for one month, fifteen days confinement and a bad conduct discharge. *Id*.

43. *Id*.

44. *Id*.

45. Plain error is (1) error (2) that is plain and obvious and (3) materially prejudices a substantial right of an accused (or appellant). *See, e.g.*, United States v. Scalo, 59 M.J. 646, 649 (Army Ct. Crim. App. 2003); United States v. Kho, 54 M.J. 63, 65 (2000); United States v. Wilson, 54 M.J. 57, 59 (2000); United States v. Finster, 51 M.J. 185, 187 (1999); United States v. Powell, 49 M.J. 460, 463 (1998).

46. MANUAL OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE GENERAL INSTR. 5800.7C (C3, 27 July 1998) [hereinafter JAGMAN]. *LePage*, 59 M.J. at 659-60. The appellant also made two other allegations: that the military judge erred by failing to take corrective action in a post-trial Article 39(a) session and that his trial defense counsel was ineffective for failing to object to the admission of PE 3. *Id.* Since the court found that the admission of PE 3 was both plain error and prejudicial, the court granted relief on this basis and failed to reach the remaining two allegations of error. *Id*.

47. *Id*. at 660.

48. UCMJ art. 39(a) (2002).

49. *LePage*, 59 M.J. at 660. The military judge also erroneously determined that he lacked authority to cure the defect post-trial when in fact he could have held a post-trial proceeding in revision under RCM 1102(b)(2) to cure the defect. *Id*.

In evaluating whether the erroneous admission of the nonjudicial punishment action was waived by the defense counsel's failure to object, the court noted:

> Plain error leaps from the pages of this record. The military judge's remarks leave no doubt that Prosecution Exhibit 3 had a significant and prejudicial effect on his sentencing deliberations and on the sentence ultimately imposed on the appellant. The military judge's remarks also make clear that he would not have imposed a bad-conduct discharge absent his consideration of Prosecution Exhibit 3.[51]

Finding plain error, the court held that the waiver did not apply and set aside the punitive discharge.[52]

Trial and defense counsel dealing with personnel records, whether attempting to introduce them or opposing the introduction, must be familiar with the applicable service regulations. Admission of evidence specifically prohibited by regulation will certainly result in a finding of error and possibly, plain error (i.e., error resulting in prejudice). Defense counsel—the good news for your client is that your failure to object to the admission of evidence specifically precluded by regulation does not waive the issue on appeal. The bad news, however, is that such a failure screams of ineffective assistance of counsel. Trial counsel—justice and the command are ill-served when an appellant's discharge is set aside because it is based, in part, on obviously inadmissible evidence.

Summary Courts-Martial Convictions—Rule for Courts-Martial 1001(b)(3)[53]

Summary courts-martial convictions are admissible under RCM 1001(b)(3)[54] provided an accused was afforded the opportunity to consult with counsel before accepting the summary court-martial[55] and the court-martial underwent the required Article 64,[56] Uniform Code of Military Justice (UCMJ) legal review.

In *United States v. Kahmann*,[57] the CAAF addressed the responsibilities of the trial participants in establishing compliance with the requirements of *United States v. Booker*[58] and Article 64, UCMJ[59] prior to admitting a summary court-martial conviction on sentencing.

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50. *Id*.

51. *Id*. at 661.

52. *Id*. The court affirmed the findings and only so much of the sentence as provided for reduction to E-1, forfeiture of $737 pay for one month, and fifteen days confinement. *Id*.

53. MCM, *supra* note 3, R.C.M. 1001(b)(3).

54. *Id*. Rule for Courts-Martial 1001(b) states, in part:

> (3) *Evidence of prior convictions of the accused*.
> (A) *In general*. The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged. In a civilian case, a "conviction" includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a "civilian conviction" does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.
> (B) *Pendency of appeal*. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 64 or 66, if applicable. Evidence of the Pendency of appeal is inadmissible.
> (C) *Methods of proof*. Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

Id. R.C.M. 1001(b)(3).

55. *See* United States v. Kelly, 45 M.J. 259 (1996); United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1978).

56. UCMJ art. 64 (2002). Article 64, UCMJ, states, in part: "(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned." *Id*. *See also* MCM, *supra* note 3, R.C.M. 1001(b)(3)(B); U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-45 (6 Sept. 2002) (discussing RCM 1112 reviews, the review which summary courts-martial convictions receive).

57. 59 M.J. 309 (2004). The appellant was convicted at a special court-martial of unauthorized absence and sentenced to forfeiture of $695 pay per month for three months, ninety days confinement, and a bad conduct discharge. *Id.* at 310.

58. *Booker*, 5 M.J. at 238 (holding that a record of summary court-martial conviction may not be admitted on sentencing unless the accused was afforded the opportunity to consult, or validly waived the right to counsel, prior to imposition of the summary court-martial).

In *Kahmann*,[60] the government introduced PE 1, excerpts from the appellant's military service record, which included page 13, a document reflecting the appellant's prior punishment at a summary court-martial.[61] Page 13, however, failed to reflect whether the appellant was afforded an opportunity to consult with counsel prior to the summary court-martial or whether the summary court-martial underwent a legal review as required by Article 64, UCMJ.[62] Despite the absence of any affirmative evidence establishing compliance with *Booker*[63] and its progeny, or compliance with Article 64, UCMJ, the defense counsel failed to object to the admission of page 13.[64] In fact, the defense counsel conceded PE 1's admissibility.[65]

On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) found that the defense counsel's failure to object waived any objection to the admissibility of page 13, absent plain error.[66] Examining the record for plain error, the NMCCA found no error, plain or otherwise.[67] The NMCCA concluded its opinion by noting that absent plain error or a timely objection, compliance with the "*Booker*/*Mack*" mandate and Article 64, UCMJ are presumed.[68]

On appeal to the CAAF, the appellant renewed his argument that the military judge committed plain error by admitting evidence of a summary court-martial conviction when there was no evidence that (1) the appellant had an opportunity to speak with counsel prior to receiving the summary court-martial and (2) the review requirements of Article 64, UCMJ, were complied with.[69] The CAAF disagreed, affirming the lower court's decision and rationale. In reaching its decision, the CAAF first held that the "admissibility of the record from such a [summary court-martial] proceeding is governed by the objection and plain error provisions of M.R.E. 103."[70] After noting the applicability of MRE 103, the court noted the following: first, "absent objection by the defense, the prosecution is under no obligation to introduce [ ] evidence [of compliance with the right to counsel and the Article 64, review]"[71]; second, "absent timely objection, irregularities do not provide a basis for relief without a showing that any errors were plain, or obvious, or that

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59. UCMJ art. 64.

60. *Kahmann*, 59 M.J. at 309.

61. United States v. Kahmann, 58 M.J. 667, 668-69 (N-M. Ct. Crim. App. 2003).

62. *Id*. at 669.

63. *Booker*, 5 M.J. at 238.

64. *Kahmann*, 58 M.J. at 669. The defense counsel did, however, proffer an MRE 403 objection to some information in PE 1, but not to the consideration of the conviction itself.

> Counsel objected to consideration by the military judge of that portion of the document describing the offenses that did not involve absence on the grounds that such information was irrelevant, and that it was more prejudicial than probative. Counsel expressly stated that the defense objection did not preclude consideration of the summary court-martial conviction for unauthorized absence.

Kahmann, 59 M.J. at 312. *See also* MCM, *supra* note 3, MIL. R. EVID. 403.

65. *Kahmann*, 59 M.J. at 312.

66. *Kahmann*, 58 M.J. at 676; *see also* MCM, *supra* note 3, MIL. R. EVID. 103, which states in pertinent part:

> (a) *Effect of erroneous ruling*. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
> (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or . . .
> . . .
> (d) *Plain error.* Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

MCM, *supra* note 3, MIL. R. EVID. 103.

67. *Kahmann*, 58 M.J. at 676. In examining page thirteen, the court noted that "not only is there no evidence of any 'deviation from customary practice' in the completion of page [thirteen], there is no suggestion that it was 'incomplete on its face.'" *Id*. at 674 (citing United States v. Dyke, 16 M.J. 426, 427 (C.M.A. 1983)).

68. *Id*. at 676.

69. *Kahmann*, 59 M.J. at 313.

70. *Id*.

71. *Id*.

they were prejudicial"[72]; third, "[t]he opportunity to object is sufficient to protect Appellant's rights under RCM 1001(b)(3)(B);"[73] and finally, "the military judge is not required to inquire on his or her own motion whether such [Article 64] review has been completed."[74]

Kahmann has modified how summary courts-martial convictions are handled at sentencing. Military judges need not sua sponte confirm compliance with *Booker* and its progeny because, absent evidence to the contrary, compliance is presumed. Defense counsel should object to the admissibility of a summary court-martial if there is any question whether the client was afforded the opportunity to speak to counsel prior to the summary court-martial or when it appears that Article 64, UCMJ, has not been complied with. Trial counsel should be ready with evidence to establish compliance with *Booker* and its progeny as well as Article 64, UCMJ, should the defense object.

Evidence—Rule for Courts-Martial 1001(b)(4)[75]

Rule for Courts-Martial 1001(b)(4)[76] addresses the admissibility of evidence in aggravation, allowing the trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[77] Stated another way, there must be some nexus, link, or causal relationship between the offense committed and the evidence being introduced.[78] The evidence contemplated and authorized by RCM 1001(b)(4) is divided into three sub-categories: victim impact evidence; mission impact evidence; and hate crime evidence.[79] Even if properly placed into one of the three 1001(b)(4) sub-categories, aggravation evidence must still survive an MRE 403 analysis.[80]

The cases that will be addressed in the area of aggravation are *United States v. Gogas*,[81] *United States v. Dezotell*,[82] and *United States v. Warner.*[83]

In *United States v. Gogas*,[84] the government offered a letter the accused sent to his congressman requesting assistance in his

72. *Id*.

73. *Id*. at 314.

74. *Id*.

75. MCM, *supra* note 3, R.C.M. 1001(b)(4).

76. *Id*.

77. *Id*. Rule for Courts-Martial 1001(b)(4) states:

> *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused [victim impact evidence] and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense [mission impact evidence]. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person [hate crime evidence]. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

Id.

78. *See, e.g.*, United States v. Mance, 47 M.J. 742 (N-M. Ct. Crim. App. 1997) (holding that it is improper to allow a victim of an assault and assault consummated by a battery to testify that the accused made telephonic threat and also assaulted a third when there was no evidence linking the accused to the additional crimes and they were not related to the offenses of which the accused was convicted); United States v. Rust, 41 M.J. 471 (1995) (stating that a suicide/homicide note was improper when there was no causal relationship between the accused's dereliction of duty and false official statement offenses and the unforeseeable crimes of a third party); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985) (stating that there must be a reasonable linkage between the evidence proffered and the alleged impact of the offense).

79. *See Witt*, 21 M.J. at 637.

80. *See* MCM, *supra* note 3, MIL. R. EVID. 403; *see also Rust*, 41 M.J. at 478.

81. 58 M.J. 96 (2003).

82. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

83. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

84. *Gogas*, 58 M.J. at 96. The appellant was convicted at a general court-martial of wrongful use and distribution of lysergic acid diethylamide (LSD) and sentenced to reduction to E-1, eighteen months confinement, and a bad conduct discharge. *Id.* at 97.

pending court-martial. The letter stated, in part: "'I was living my life with blinders on and not thinking of the consequences at the time. The only thing I was concerned with was making myself happy with using [LSD].'"[85] The military judge admitted the letter, over defense objection, as aggravation evidence under RCM 1001(b)(4) and evidence of rehabilitative potential under RCM 1001(b)(5).[86] The service court affirmed, finding no abuse of discretion by the military judge.[87]

On appeal, the CAAF held the letter was properly admitted under RCM 1001(b)(4) as aggravation evidence directly relating to the offenses of which the accused was convicted.[88] The court noted that the letter revealed "an aggravating circumstance: Appellant's indifference to anything other than his own pleasure."[89] The court went on to say "[i]ndifference to the nature or consequences of criminal conduct is an aggravating factor that may be considered in determining an appropriate sentence."[90]

The next two cases, *United States v. Dezotell*[91] and *United States v. Warner*,[92] shed further light on the limits of proper aggravation evidence under RCM 1001(b)(4).

In *Dezotell*,[93] the appellant was convicted at a special court-martial of unauthorized absence and missing movement. On appeal, the appellant alleged that the military judge abused his discretion[94] by admitting improper aggravation evidence from Senior Boatswain's Mate (BMCS) Sleigh, the only aggravation witness called by the government.[95] At the time of the appellant's offenses, he was a member of BMCS Sleigh's Deck Department aboard the Aircraft Carrier USS Abraham Lincoln, however, he was temporarily assigned outside the department to another part of the ship, the food services section. Senior Boatswain's Mate Sleigh testified that the ship was undergoing "work-ups" and its "Final Examination Problem" during the appellant's absences and that during these training cycles every sailor has a mission. When one sailor departs, other sailors have to pull that sailor's weight, adversely affecting the mission and unit efficiency.[96] Defense counsel objected to this testimony, arguing that the witness had minimal interactions with the appellant, a fact confirmed by the witness during cross-examination, and that the testimony was not relevant. The military judge disagreed.[97]

On appeal, the court found no abuse of discretion by the military judge, noting that BMCS Sleigh's testimony "fairly stated, in contextual terms . . . the detrimental impact of the appellant's offenses . . . on the mission and efficiency of the command."[98] In arriving at its decision, the court found that although a "direct and logical connection or relationship between the offense and evidence offered [is required] . . . the Rule [R.C.M. 1001(b)(4)] does not require that the evidence must be of a type subject to precise measurement or quantification."[99] Applying MRE 403, the court concluded that the aggravation evidence was unobjectionable.[100]

85. *Id*. at 99. The letter in question also said that the charges were not provable because there was no physical evidence, only witness testimony. *Id.*

86. *Id*. at 97.

87. United States v. Gogas, 55 M.J. 521 (A.F. Ct. Crim. App. 2001).

88. *Gogas*, 58 M.J. at 98 (finding the letter admissible as aggravation evidence under RCM 1001(b)(4), the court did not reach the issue of whether the evidence was also admissible as rehabilitative potential evidence under RCM 1001(b)(5)).

89. *Id*. at 99.

90. *Id*.

91. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

92. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

93. *Dezotell*, 58 M.J. at 517. The appellant was sentenced to forfeiture of $500 pay per month for two months, ninety days confinement, and a bad conduct discharge. *Id*.

94. A military judge has broad discretion in determining whether to admit evidence under RCM 1001(b)(4). *See, e.g.*, United States v. Humpherys, 57 M.J. 83, 91 (2002); United States v. Wilson, 47 M.J. 152, 155 (1997); United States v. Rust, 41 M.J. 472, 478 (1995).

95. *Dezotell*, 58 M.J. at 518.

96. *Id*.

97. *Id*.

98. *Id*. at 519.

99. *Id*.

100. *Id*.

In *United States v. Warner*,[101] the appellant was initially charged with two specifications of aggravated assault upon his two and one-half month old infant son.[102] A general court-martial composed of officers and enlisted members convicted him of one specification of the lesser-included offense of assault and battery upon a child under sixteen years of age.[103] On appeal, the appellant alleged the military judge erred by allowing a medical expert, Dr. Boos, to testify on sentencing regarding the significant injuries to the child.[104] The appellant argued that since he was acquitted of the aggravated assault, the doctor's testimony regarding the child's injuries was improper aggravation that contradicted the member's findings.[105] He also argued that the evidence should have been excluded under MRE 403 as unduly prejudicial.[106]

The service court disagreed and after applying MRE 403, found that the testimony of Dr. Boos was proper aggravation evidence in the appellant's case.[107] The court noted that RCM 1001(b)(4) allows the government to introduce evidence "directly relating to or resulting from the offenses of which the accused has been found guilty."[108] After analyzing Dr. Boos' testimony, the court determined that the testimony, contrary to the appellant's assertions, did not relate to the use of a force likely to produce death or grievous bodily harm, as he was originally charged; rather, the testimony related directly to the injuries resulting from the assault and battery on the child and as such was proper aggravation evidence under RCM 1001(b)(4).[109] Additionally, the testimony was not inconsistent with the member's findings.[110] The court noted that the panel's acquittal of the greater offenses does not support the appellant's argument that the panel believed the victim did not suffer significant injuries.[111]

United States v. Gogas,[112] *United States v. Dezotell*,[113] and *United States v. Warner*[114] highlight that aggravation evidence is broad in scope, need not be subject to precise measurement and is not necessarily constrained by the court's announced findings.[115] Trial counsel should be creative in both their search for aggravation evidence as well as their arguments in support of the admission thereof. Remember, "indifference to anything other than [one's] own pleasure"[116] or to the "nature or consequences of criminal conduct" [117] is proper aggravation. Like-

101. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

102. *Id*. at 574. The aggravated assault charge was "with a means or force likely to produce death or grievous bodily harm." *Id*.

103. *Id*. The panel sentenced the appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for eighteen months, and a bad conduct discharge. *Id*.

104. *Id.* at 581.

105. *Id*. "[T]he appellant argue[d] that Dr. Boos's testimony concerning the significant injuries BT [the child victim] sustained was inconsistent with the court members' findings that the appellant did not use 'a force likely to produce death or grievous bodily harm.'" *Id*.

106. *Id.*

107. *Id*. at 581-82. Regarding the military judge's MRE 403 ruling, the court, reviewing the military judge's ruling for an abuse of discretion, first noted that the military judge's failure to place his analysis on the record deprived him of the "heightened deference" given a judge when the analysis is placed on the record. *Id*. at 581. Regardless, after applying the less deferential standard of review for abuse of discretion, the court found that the military judge did not abuse his discretion in admitting the doctor's testimony. *Id*. at 582.

108. *Id*. (quoting United States v. Gogas, 58 M.J. 96, 98 (2003)).

109. *Id*. Dr. Boos's testimony was "directly related to the appellant's actions in 'shaking and grabbing' his son." *Id*.

110. *Id.*

111. *Id*. "It was not 'necessarily inferable' from the verdict that the court members did not believe BT had significant injuries." *Id*. (quoting United States v. Terlep, 57 M.J. 344, 348 (2002)).

112. *Gogas*, 58 M.J. at 96.

113. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

114. *Warner*, 59 M.J. at 573.

115. *See id.*; *see also* United States v. Terlep, 57 M.J. 344 (2002). Staff Sergeant Terlep was initially charged with wrongful use and distribution of marijuana, burglary, and rape. Pursuant to a pretrial agreement, he plead guilty at a general court-martial to wrongful use and distribution of marijuana, unlawful entry and assault consummated by a battery, however, the victim's testimony regarding rape was admissible. Neither the plea agreement nor the stipulation of fact precluded the evidence. In affirming the case, the CAAF noted that a plea agreement in a case, absent express language to the contrary, does not, and should not, prevent the trier of fact from knowing and fully appreciating the "true plight of the victim in each case." *Id.* at 350.

116. *Gogas*, 58 M.J. at 99.

117. *Id*.

wise, the increased workload on fellow Soldiers, Sailors, Airmen, Marines, or Coast Guardsmen is proper aggravation evidence in the form of mission impact. Defense counsel should be aware that aggravation evidence is broadly construed and should be ready to object to the government's aggravation evidence as irrelevant under MRE 401[118] and RCM 1001(b)(4).[119] If the military judge rules against the relevance objection, defense counsel should argue that MRE 403[120] requires exclusion.

Rehabilitative Potential Evidence—Rule for Courts-Martial 1001(b)(5)[121]

Rule for Courts-Martial 1001(b)(5)[122] allows the government to present evidence regarding an accused's potential for rehabilitation, a term referring to the "accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[123] A witness providing an opinion under this rule must have a "foundation"[124] for the opinion, the opinion must have a proper "bases,"[125] and finally, the opinion must be limited in "scope."[126] A government rehabilitative potential witness cannot testify that he or she believes a punitive discharge is warranted or that the accused should not be returned to his unit, the latter simply being a euphemism for "discharge the soldier."[127] Arguably, the same rules apply to defense witnesses who would conversely testify that the accused should be retained or returned to his unit or that the witness would "be willing to serve with the accused again."[128]

United States v. Warner[129] and *United States v. Griggs*[130] address the issue of rehabilitative potential from the government and defense perspective, the former seeking the introduc-

118. *See* MCM, *supra* note 3, MIL. R. EVID. 401.

119. *Id.* R.C.M. 1001(b)(4).

120. *See id.* MIL. R. EVID. 403.

121. *Id.* R.C.M. 1001(b)(5).

122. *Id*.

123. *Id*.

124. Rule for Courts-Martial 1001(b)(5)(B) states:

> *Foundation for opinion*. The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

Id. R.C.M. 1001(b)(5)(B). *See also* United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).

125. Rule for courts-Martial 1001(b)(5)(C) states:

> *Bases for opinion*. An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

MCM, *supra* note 3, R.C.M. 1001(b)(5)(C). *See also* United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

126. Rule for Courts-Martial 1001(b)(5)(D) states:

> *Scope of opinion*. An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

MCM, *supra* note 3, R.C.M. 1001(b)(5)(C). *See also* United States v. Williams, 50 M.J. 397 (1999); United States v. Aurich, 31 M.J. 95 (C.M.A. 1990).

127. MCM, *supra* note 3, R.C.M. 1001(b)(5)(C); *see also* United States v. Williams, 50 M.J. 397 (1999); United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Ohrt, 28 M.J. 301 (C.M.A. (1989); United States v. Yerich, 47 M.J. 615 (Army Ct. Crim. App. 1997).

128. *See* United States v. Ramos, 42 M.J. 392 (1995) (noting mirror image of RCM 1001(b)(5)(D) prohibition appears to apply to the defense); United States v. Hoyt, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App., July 5, 2000) (unpublished) (stating that a defense witness cannot comment on appropriateness of discharge), *pet. denied*, 54 M.J. 365 (2000); *see also* United States v. Griggs, 59 M.J. 712 (A.F. Ct. Crim. App. 2004). *But see* United States v. Bish, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (stating that RCM 1001(b)(5) is a government rule and does not appear to apply to the defense).

129. 59 M.J. 590 (C.G. Ct. Crim. App. 2003).

tion of testimonial evidence that the appellant lacks any potential for continued military service; the latter seeking the admission of written evidence recommending retention of the appellant.

In *Warner*,[131] during his sentencing case, the appellant called his civilian supervisor who previously served fours years on active duty in the Coast Guard before being honorably discharged. On direct examination, the witness testified that the appellant was an excellent worker. When asked by the defense counsel if he had an opinion about the appellant's rehabilitative potential, the witness testified that the appellant "had 'taken the right steps . . . to better his future after the Coast Guard.'"[132] On cross-examination, the trial counsel asked the defense witness if he was familiar with the "'Coast Guard's drug policy' and whether [the] Appellant had 'rehabilitative potential, in the Coast Guard, given his drug abuse?'"[133] When the witness' opinion did not change, the trial counsel asked the witness whether he understood that drug use was "'contrary to the [Coast Guard's] core mission'" and could adversely affect unit efficiency and the command.[134] At this point, the defense counsel objected arguing that the trial counsel was eliciting improper aggravation evidence, an objection the military judge overruled.[135]

On appeal,[136] the Coast Guard court found the trial counsel erred in his rehabilitation potential cross-examination of the defense witness.

> We believe that trial counsel, intentionally or unintentionally, improperly linked the witness' opinion on rehabilitative potential with award of a punitive discharge when she focused on Appellant's "rehabilitative potential in the Coast Guard," and referred to the "Coast Guard's drug policy" and incompatibility of drug use with a Coast Guard "core mission."[137]

Despite finding error, the court held it was harmless since the witness' opinion remained unchanged after cross-examination and the trial was before a military judge alone, an individual "presumed to know and follow the constraints of [*United States v.*] *Ohrt* [28 M.J. 301 (C.M.A. 1989)] and RCM 1001(b)(5)."[138]

In *Griggs*,[139] during an Article 39(a) session while the members were deliberating on findings, the appellant offered six character letters from noncommissioned officers.[140] The letters followed the same general format: paragraph one indicated that the author was familiar with the appellant and the charges against him; paragraph two described the appellant's duty performance and highlighted the appellant's favorable character traits; and paragraph three, the final paragraph, addressed the appellant's rehabilitative potential.[141] The final paragraph of all six letters contained material that the trial counsel objected to, arguing that the comments were recommendations for retention and would confuse the members.[142] The relevant language was as follows:

> [Letters 1, 2 and 3] I have no doubt Sr A Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the

130. *Griggs*, 59 M.J. at 712.

131. *Warner*, 59 M.J. at 590. The appellant was convicted at a special court-martial of unauthorized absence and wrongful use of Ecstasy and methamphetamine and was sentenced to a bad conduct discharge. *Id*. at 590-91.

132. *Id*. at 594.

133. *Id*.

134. *Id*.

135. *Id*.

136. Note–the case was submitted "on the merits," meaning no issues were raised by appellate counsel. Despite affirming the findings and sentence, the court believed the case raised "several issues [warranting] further discussion," one of which was the cross-examination of a defense witness improperly linking the witness' rehabilitative potential opinion testimony to a punitive discharge. *Id*. at 590-91.

137. *Id.* at 595.

138. *Id*.

139. 59 M.J. 712 (A.F. Ct. Crim. App. 2004). The appellant was convicted at a general court-martial of two specifications of wrongful use of Ecstasy, two specifications of wrongful distribution of Ecstasy, and one specification of wrongful use of marijuana and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for 150 days, and a bad conduct discharge. *Id*. at 713.

140. *Id*.

141. *Id*.

142. *Id*.

> panel [to give Sr A Griggs] a second chance to be a productive member of the United States Air Force.
> [Letter 4] In fact, I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him.
> [Letter 5] I continue to hear, "This is not a one mistake Air Force . . . ."
> [Letter 6] [I] am convinced that he . . . can still be of great potential to the United States Air Force . . . . We seem to . . . toss [young airmen] out after investing so much time, effort and money.[143]

Notwithstanding the Air Force Court of Criminal Appeals (AFCCA) decision in *United States v. Bish*,[144] holding that RCM 1001(b)(5) is a "Government rule," the defense counsel conceded the rule's applicability to its six character letters.[145] In sustaining the trial counsel's objection and ordering the objectionable language redacted, the military judge noted that the language would confuse the members.[146] He also noted that RCM 1001(b)(5)(D) prohibited opinion testimony regarding whether an accused should be discharged or returned to his unit.[147]

On appeal, the appellant argued that the military judge abused his discretion by applying RCM 1001(b)(5), a government-only rule, to his six character letters and ordering the "objected to" language redacted.[148] The service court disagreed. Although RCM 1001(b)(5)(D) appears under the section entitled "Matter to be presented by the prosecution,"[149] a "strict textual interpretation of this provision . . . ignores the long and nuanced history of the rules governing opinion testimony about an accused's rehabilitative potential."[150] The court noted that the rules and limitations regarding opinion testimony by a government witness "balance several important interests"[151] including: insertion of improper command influence into the process; confusion of the members; usurping the role of the sentencing authority; ensuring that the witness rendering an opinion has a proper foundation; and avoiding improper reference to uncharged misconduct on direct examination.[152] Considering these interests, the court concluded that the "risk of confusion, usurpation of the sentencing authority's role, and foundational requirements logically apply to the defense as well as the prosecution."[153] Next, the court addressed the guidance in *United States v. Ohrt*, indicating that whether a service member should be discharged, or retained, is a matter within the purview of the court-martial and "cannot be usurped by a witness."[154]

Finally, the court considered that RCM 1001(c)(1)(B),[155] which addresses evidence in mitigation, is silent regarding whether a defense witness can render an opinion recommending that an accused remain in the military. After considering the general limitations on opinion testimony and the rationale behind those limitations, the CAAF's (then the Court of Military Appeal's) guidance regarding rehabilitative potential testimony, RCM 1001(c)(1)(B), and defense counsel's concession

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143. *Id*. Regarding letters one through three, the trial counsel noted he would have no objection if the language was changed from "productive member of the United States Air Force" to "productive member of the society," a recommended change the defense opted not to make. *Id.*

144. 54 M.J. 860, 863 (A.F. Ct. Crim. App. 2001), *pet. denied*, 55 M.J. 372 (2001).

145. *Griggs*, 59 M.J. at 713.

146. *Id*.

147. *Id*.

148. *Id*.

149. MCM, *supra* note 3, R.C.M. 1001(b).

150. *Griggs*, 59 M.J. at 714.

151. *Id*.

152. *Id*.

153. *Id*.

154. United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).

> [A] witness be he for the prosecution or the defense should not be allowed to express an opinion whether an accused should be punitively discharged. The question of appropriateness of punishment is one, which must be decided by the court-martial; it cannot be usurped by a witness. Thus for the same reasons that we do not permit an opinion of guilt or innocence, or of "truthfulness" or "untruthfulness" of witnesses, we do not allow opinions as to appropriate sentences . . . . The use of euphemisms, such as "No potential for continued service"; "He should be separated"; or the like are just other ways of saying, "Give the accused a punitive discharge."

Id. at 304. *See also* United States v. Ramos, 42 M.J. 392, 396 (1995).

regarding the applicability of RCM 1001(b)(5)(D), the court found the decision to redact the language in question was not an abuse of discretion.[156] Assuming arguendo that the military judge did err, the court found any error to be harmless.[157] The unredacted portions of the statements sufficiently conveyed the witnesses' opinions about the appellant, painting a positive picture of the appellant's military service, and the redacted language added little significance to the statements.

Warner[158] and *Griggs*[159] are good refresher cases on the admissibility of, and limits on, rehabilitative potential evidence. *Warner*[160] highlights that cross-examination of a rehabilitative potential witness cannot seek an impermissible opinion on whether the appellant should be discharged or retained. *Griggs*[161] highlights the fact that defense submissions that render opinions on retention are objectionable. Although the Air Force court has held that RCM 1001(b)(5) is a "Government" rule[162] and notwithstanding the defense's concession of RCM 1001(b)(5)'s applicability in *Griggs*,[163] the rationale used by the *Griggs* court in concluding that rehabilitative potential opinions are limited in scope, regardless of which side seeks the opinion, is compelling. Trial counsel should use this rationale to object to opinions by defense witnesses arguing for retention.

The Unsworn Statement—Rule for Courts-Martial 1001(c)(2)(C)[164]

Once the government finishes presenting its case via RCM 1001(b),[165] it is the defense's turn. Rule for Courts-Martial 1001(c)[166] governs the defense's presentation of evidence in extenuation,[167] mitigation,[168] and rebuttal,[169] including the accused's unsworn statement.[170]

The cases discussed in this section address the accused's right to make an unsworn statement, a right, which, although broad and virtually unfettered,[171] is not without limitations. *United States v. Sowell*[172] and *United States v. Johnson*[173] are cases in which the military judge imposed limitations on the appellant's right to make an unsworn statement. A third case, *United States v. Adame*,[174] while not ground breaking, is a reminder to all trial participants on the cross-examination limitations associated with the unsworn statement.

In *Sowell*,[175] the appellant wanted to tell the enlisted panel during sentencing that one co-conspirator, Fire Controlman Third Class (FC3) Elliott, was acquitted at an earlier court-martial of two identical specifications for which the appellant was convicted.[176] The trial counsel objected and the military judge sustained the objection, finding that the mention of the co-conspirator's acquittal in her unsworn would be a "'a direct impeachment of the members' determination.'"[177] The military judge did, however, allow the appellant to mention that FC3 Elliott "went to a court-martial."[178]

On appeal, the appellant alleged that the military judge abused his discretion in preventing her from mentioning her co-conspirator's acquittal.[179] The service court agreed, noting "the appellant's right of allocution is so significant that it has few limitations" and "the trend is clearly toward an expansive view of what can be included in unsworn statements."[180] As for the appellant's ability to mislead or confuse the members with her unsworn statement, the court focused on the military judge's

155. MCM, *supra* note 3, R.C.M. 1001(c)(1)(B). Rule for Courts-Martial 1001(c)(1)(B) states:

> *Matter in mitigation*. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

Id.

156. *Griggs*, 59 M.J. at 715.

157. *Id*. at 715-16.

158. 59 M.J. 590 (C.G. Ct. Crim. App. 2003).

159. *Griggs*, 59 M.J. at 712.

160. *Warner*, 59 M.J. at 590.

161. *Griggs*, 59 M.J. at 712.

162. *See* United States v. Bish, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (stating that RCM 1001(b)(5) is a government rule and does not appear to apply to the defense).

163. *Griggs*, 59 M.J. at 713.

164. MCM, *supra* note 3, R.C.M. 1001(c)(2)(C).

165. *Id.* R.C.M. 1001(b).

ability to tailor an appropriate instruction to avoid such a situation.[181] Finding prejudice, the court set aside the sentence and authorized a rehearing.[182]

United States v. Johnson,[183] the second case in which the military judge limited the appellant's unsworn statement, provides guidance to trial practitioners on circumstances justifying limiting the accused's right of allocution.

In *Johnson*,[184] after being found guilty of wrongfully possessing marijuana with the intent to distribute, the appellant wanted to tell the panel members that he passed a polygraph examination in which he indicated he was unaware that he possessed marijuana.[185] The military judge, however, ruled that the mention of the polygraph examination was not proper mitigation under RCM 1001(c) and was an improper attempt to impeach the verdict through the unsworn statement.[186] In addi-

166. *Id.* R.C.M. 1001(c). Rules for Courts-Martial 1001(c), entitled "Matters to be presented by the defense, states, in part:

> (1) *In general*. The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.
> (A) *Matter in extenuation*. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.
> (B) *Matter in mitigation*. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.
> (2) *Statement by the accused*.
> (A) *In general*. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.
> (B) *Testimony of the Accused*. The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.
> (C) *Unsworn statement*. The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both and may be made by the accused, counsel, or both.

Id.

167. *Id.* R.C.M. 1001(c)(1)(A).

168. *Id.* R.C.M. 1001(c)(1)(B).

169. *Id.* R.C.M. 1001(c)(1).

170. *Id.* R.C.M. 1001(c)(2)(C).

171. *See, e.g.*, United States v. Jeffery, 48 M.J. 229 (1998); United States v. Britt, 48 M.J. 233 (1998).

172. 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

173. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

174. 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

175. *Sowell*, 59 M.J. at 552. The appellant was convicted at a special court-martial of conspiracy to steal two computers and larceny of the same two computers, property of a value of approximately $1,100 and sentenced to a $550 fine, thirty days confinement, and a bad conduct discharge. *Id*. at 553.

176. *Id.* at 554. Four sailors were involved in the conspiracy to steal computers, the appellant, Fire Controlman Third Class Elliott, Airman Apprentice (AA) Schwey, and Seaman (SN) Cormier. Fire Controlman Third Class Elliott was charged with conspiracy and acquitted. Neither AA Schwey nor SN Cormier were charged or disciplined for their involvement in the conspiracy, however, both sailors were administratively separated before the appellant's trial. *Id.* at 553-54.

177. *Id.* at 554. *See also* MCM, *supra* note 3, R.C.M. 923. "Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member." *Id*.

178. *Sowell*, 59 M.J. at 554. The military judge also allowed the appellant to tell the members that neither AA Schwey nor SN Cormier were charged with any offenses. *Id.*

179. *Id*. at 553.

180. *Id*. at 555. "We further note that, in recent years, our superior court has consistently found error when the military judge limited the contents of an unsworn statement." *Id*.

tion to finding that the polygraph was not proper mitigation evidence, the military judge found that MRE 707[187] specifically prohibited mention of the polygraph.[188]

On appeal, the appellant argued that the military judge abused his discretion by improperly limiting his unsworn statement. In support of his position, the appellant argued that his purpose in mentioning the polygraph was not to impeach the verdict, rather "to show 'the emotional roller coaster' he was forced to endure before trial."[189] Finding no abuse of discretion on the part of the military judge, the court first noted that limits on an unsworn statement are the exception rather than the norm.[190] Although broad in scope, the court noted that the right of allocution is not wholly unconstrained.[191] Under the facts of this case, a case in which a specific rule, MRE 707, excluded the evidence sought to be admitted, the only logical purpose in mentioning the polygraph was to impeach the verdict, a purpose that goes neither to extenuation nor mitigation.[192] The lack of a valid RCM 1001(c) purpose coupled with a specific rule precluding admissibility results in evidence that is inadmissible

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181. *Id*. at 556.

> Our superior court has expressed confidence that military judges are able to tailor instructions to avoid confusing and misleading the court members with information contained in unsworn statements. "Military judges have broad authority to give instructions on the 'meaning and effect' of the accused's unsworn statement, both to ensure that the members place such a statement 'in the proper context' and 'to provide an appropriate focus for the members' attention on sentencing.'" *United States v. Tschip*, 58 M.J. 275 (C.A.A.F.2003) (quoting *Grill*, 48 M.J. at 133).
>
> The U.S. Air Force Court of Criminal Appeals has approved a tailored instruction for situations in which the accused discusses the results of related cases or other such matters in his unsworn statement. *United States v. Friedma*nn, 53 M.J. 800 (A.F.Ct.Crim.App.2000), *rev. denied*, 54 M.J. 425 (C.A.A.F.2001). "When an accused uses his virtually unrestricted unsworn statement to raise issues for the members to consider, the military judge does not err in providing the court members accurate information on how to appropriately consider those matters in their deliberations." *Friedmann*, 53 M.J. at 803-04.

Id.

182. *Id*. at 558. Judge Ritter dissented finding that the acquittal of a co-conspirator is legally irrelevant under RCM 1001(c) since it does not relate to extenuation, mitigation, or rebuttal. He also expressed concern that the court's decision would "open a 'Pandora's box' of mischief, by eliminating one of the very few clear limitations on unsworn statements [referring to relevance as limited by extenuation, mitigation, or rebuttal evidence]." *Id*. at 560.

183. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

184. *Id.* The appellant was tried and convicted at a general court-martial, contrary to his plea, of wrongfully possessing seventeen pounds of marijuana with the intent to distribute and sentenced to reduction to E-1, forfeiture of all pay and allowances, six months confinement, and a dishonorable discharge. *Id*. at 667.

185. *Id*. at 674. The relevant portion of the appellant's proposed unsworn statement follows:

> Never in my wildest dreams did I ever once imagine that my life would end here in your hands especially after I took and passed a polygraph. I was asked point blank if I knew there was marijuana in the box to which I responded no. The polygrapher found no deception with my answers. I was hopeful at that point that based on the fact that I did pass, I would not face charges again; however, that was not to be and now my future is in your hands.

Id. (the polygrapher referred to was privately retained by the defense).

186. *Id*.

> I find that the rule [R.C.M. 1001(c)] does not allow an Accused, in an unsworn statement, to impeach the verdict of the court. The ruling is that the Accused may not make a statement which the logical consequence is that he is telling the members that he is not guilty of the offense.

Id.

187. *See* MCM, *supra* note 3, MIL R. EVID. 707. "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." *Id.* MIL. R. EVID. 707(a).

188. *Johnson*, 59 M.J. at 674; *see also* MCM, *supra* note 3, MIL. R. EVID. 707. "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." MCM, *supra* note 3, MIL. R. EVID. 707(a).

189. *Johnson*, 59 M.J. at 675.

190. *Id.* "Under the current state of the law, exclusion of objectionable material from an unsworn statement should be the exception and not the norm. This does not mean, however, that an accused's right to say whatever he wants is wholly unconstrained." *Id*.

191. *Id*.

192. *Id*. at 675-76.

even in the context of an unsworn statement with a properly tailored limiting instruction.[193]

The last unsworn statement case is *United States v. Adame*,[194] a gentle reminder to trial practitioners that an accused's unsworn statement is not a proper matter for cross-examination, even if done by a military judge in a judge-alone trial.

In *Adame*,[195] the appellant, as part of his unsworn statement stated, among other things, "'I do believe it would be in the best interest of the Marine Corps that I be discharged.'"[196] Defense counsel argued, in part, "[W]e think it is appropriate that you allow [the appellant] to go back to his family and take care of both of them.'"[197] The military judge then asked the appellant and his counsel about the appellant's desire for a punitive discharge. The following colloquy transpired:

> MJ: Thank you, [DC] . . . are you advocating for a punitive discharge?
> DC: No, sir. I am advocating that my client's unsworn statement be taken into consideration.
> MJ: . . . [H]ave you talked to PFC Adame about the consequences of a punitive discharge?
> DC: I have extensively, sir.
> MJ: *Have you tried to talk him out of a punitive discharge*?
> DC: Yes, sir.
> MJ: *PFC Adame, is that correct?*
> ACC: Yes, sir.
> MJ: So in this regard, at least as far as a punitive discharge, [DC's] advice to you has been that it is not in your best interest?
> ACC: Yes, sir.
> MJ: *You desire a punitive discharge regardless of that advice?*
> ACC: (No response)
> MJ: *Do you think you could complete your enlistment contract if* you are not discharged?
> ACC: No, sir.[198]

On appeal, the appellant argued that the military judge erred when he questioned him and his counsel about his desire for a punitive discharge. The court agreed, describing the military judge's questioning of the appellant and his counsel as "invasive,"[199] by asking the appellant and counsel to "reveal confidential communications."[200] Although a military judge must confirm that an accused desires a punitive discharge when counsel argues for one, the military judge should do so in a manner so as not to expose protected attorney-client communications.[201] Additionally, the colloquy raised concerns that the military judge was cross-examining the appellant on his unsworn statement, an examination that RCM 1001(c)(2)(C) specifically prohibits.[202] Despite finding error in both the disclosure of protected communications as well as the cross-examination of the accused on his unsworn statement, the court found no prejudice.[203]

Trial counsel seeking to limit an accused's unsworn statement should pay careful attention to the guidance provided by the courts in *Sowell*[204] and *Johnson*,[205] as well as the cases cited therein. Starting with the premise that the unsworn statement is

193. *Id*.

194. United States v. Adame, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

195. *Id*. The appellant was convicted at a special court-martial of unauthorized absence and sentenced to reduction to E-1, forfeiture of $600 pay per month for two months, seventy-five days confinement, and a bad conduct discharge. *Id*. at 813.

196. *Id*.

197. *Id*.

198. *Id*. at 813-14.

199. *Id*. at 813.

200. *Id.* at 814.

201. *Id*. at 814-15; *see also* United States v. Evans, 35 M.J. 754 (N.M.C.M.R. 1992); U.S. Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook Instr. 2-5-22 (1 Apr. 2001) [hereinafter DA Pam 27-9].

202. *Adame*, 57 M.J. at 814-15; *see also* MCM, *supra* note 3, R.C.M. 1001(c)(1)(C).

203. *Adame*, 57 M.J. at 815. In finding no prejudice, the court focused on the following: the appellant received exactly what he asked for, a bad conduct discharge; the facts of the case, an eight month period of unauthorized absence coupled with a prior disciplinary history, warranted a punitive discharge; and most importantly, neither the appellant nor his appellate counsel provided the court with any information indicating he no longer desired a punitive discharge. *Id*.

204. 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

205. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

a broad,[206] largely unfettered right,[207] any effort by the government to limit this right will be strictly scrutinized. If the accused's unsworn statement seeks to mention what happened to co-accuseds, trial counsel should think twice before objecting, otherwise the government may see the case again when the appellate court orders a rehearing on sentencing several years later. If, on the other hand, the proposed unsworn statement seeks to impeach the verdict or is specifically prohibited by a RCM, MRE, or other regulatory or statutory provision, trial counsel should object. Defense counsel should prepare the client for the military judge's inevitable inquiry in all cases in which the client or counsel has asked for a discharge, as was the case in *Adame*.[208] More importantly, when the military judge's inquiry seeks disclosure of confidential attorney-client communications, defense counsel should object, advising the client not to answer the military judge's questions.

The Case in Rebuttal—Rule for Courts-Martial 1001(d)[209]

Now that both sides have finished presenting their cases, where do we go from here? Most of the time we go right to instructions,[210] but every now and then we end up in the land of the "last word," an area also known as rebuttal and surrebuttal.

Rule for Courts-Martial 1001(d) allows both the government and defense to present evidence in rebuttal and surrebuttal respectively. Counsel, however, need to be aware of the limitation on the introduction of extrinsic evidence. Therefore, military practitioners seeking to venture to the land of the "last word" should be familiar with *United States v. Henson*[211] and *United States v. Saferite*.[212]

In *Henson*,[213] the defense presented opinion evidence regarding the appellant's good military character. While cross-examining two of the defense witnesses, the trial counsel asked each witness if they knew that the appellant had stolen a microwave and pawned it for spending money.[214] One witness said he was aware of the misconduct and the other was not sure.[215] In rebuttal to the defense's good military character evidence, the trial counsel called the appellant's former roommate who offered extrinsic evidence surrounding the wrongful taking.[216] The trial counsel also called the appellant's First Sergeant (1SG), 1SG M, who testified to the following: that the appellant's military appearance was substandard; that the appellant had a problem keeping his room clean; that the appellant hung a monkey from a noose that "could have affected racial harmony within the unit;" and that the appellant wore clothing, to include a hat and t-shirts, that were "'always about alcohol or drugs.'"[217] Finally, the trial counsel called the appellant's former squad leader who testified about the following: that the appellant's appearance was substandard; that the appellant was overweight; and that the appellant recently quit during the Army Physical Fitness Test.[218] The defense counsel objected to

206. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998).

207. *See, e.g.*, United States v. Grill, 48 M.J. 233 (1998).

208. *Adame*, 57 M.J. at 812.

209. MCM, *supra* note 3, R.C.M. 1001(d). Rule for Courts-Martial 1001(d) states:

> *Rebuttal and surrebuttal*. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

Id.

210. *See id.* R.C.M. 1005.

211. 58 M.J. 529 (Army Ct. Crim. App. 2003).

212. 59 M.J. 270 (2004).

213. *Henson*, 58 M.J. at 529. The appellant was convicted at a general court-martial (judge alone) of conspiracy to commit larceny and two specifications of larceny and sentenced by a military judge to reduction to E-1, eighteen months confinement, and a bad conduct discharge. The military judge also recommended that the convening authority approve only ten months confinement if the appellant paid $400 to each of the three testifying victims, which the appellant did. At action, the convening authority followed the military judge's clemency recommendation and approved only so much of the sentence as provided for reduction to E-1, ten months confinement, and a bad conduct discharge. *Id*.

214. *Id*. at 530.

215. *Id*.

216. *Id*. at 530-31.

217. *Id*.

218. *Id*.

both the roommate's and 1SG's testimony; however, he did not object to the former squad leader's testimony.[219] Despite the defense counsel's objections to the introduction of extrinsic evidence, the military judge allowed the extrinsic evidence to rebut the good character and reputation evidence presented by the defense.[220]

On appeal, the service court held the military judge abused her discretion by allowing extrinsic evidence to rebut evidence of good military character and reputation.[221] After acknowledging the right of rebuttal found in RCM 1001(d), the court noted the difference between rebutting specific good acts with extrinsic evidence that the purported acts did not occur vice rebutting opinion and reputation evidence with specific acts of uncharged misconduct; the former is permissible while the latter is not.[222] Finding error, the court then looked to whether the appellant was prejudiced by the error.[223] Despite a finding of no prejudice, a finding based largely on the military judge's clemency recommendation and the convening authority's decision to follow that recommendation, the court nonetheless reduced the appellant's period of confinement from ten to nine months to "moot any claim of possible prejudice."[224]

In *United States v. Saferite*,[225] the defense presented an unsworn statement from the appellant's wife wherein she stated she loved her husband, he was a "caring father and supportive husband," and she depended on him.[226] The unsworn statement ended with a "passionate plea for compassion for the Appellant."[227] In rebuttal, the trial counsel offered two sworn statements, PEs 141 and 142, the former stating that the wife spoke with the appellant telephonically while he was in pretrial confinement and the latter stating that "approximately 40 minutes after [the] Appellant escaped from custody, Ms. Scholzen [the wife] was stopped by military authorities in the middle of the night as she was driving off Spangdahlem Air Base at a high rate of speed."[228] The government's rationale in offering the documents was to attack the wife's credibility and establish bias. The government argued that the two statements "'tend to establish that circumstantially [the wife] was materially involved in the escape of the accused from pretrial confinement.'"[229] The defense counsel objected, noting that the evidence was both irrelevant and unduly prejudicial, an objection that the military judge overruled.[230]

On appeal to the CAAF, the appellant renewed his objection to PEs 141 and 142 as improper rebuttal evidence, arguing that the evidence "did not 'explain, repel, counteract or disprove'" anything in the wife's letter (i.e., the wife's unsworn statement).[231] Additionally, the appellant argued that the evidence did not establish bias.[232] Finally, the appellant argued that the evidence was unduly prejudicial in that it allowed the trial counsel to refer to uncharged misconduct, that is, the appel-

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219. *Id.*

220. *Id*.

221. *Id*. at 532.

222. *Id*. at 531.

> It is clear that "[t]he prosecution may rebut matters presented by the defense" during presentencing proceedings. Rule for Courts-Martial [hereinafter R.C.M.] 1001(d). For example, the prosecution could rebut evidence of "particular acts of good conduct or bravery" by an accused admitted under the provisions of R.C.M. 1001(c)(1)(B) with contradictory evidence that the acts did not occur. However, a military judge abuses her discretion when she allows the government to rebut opinion or reputation evidence of good character with extrinsic evidence of misconduct by the appellant.

Id.

223. *Id*. at 532.

224. *Id*. at 533.

225. 59 M.J. 270 (2004). The appellant was tried and sentenced in absentia. Despite being placed in pretrial confinement, he escaped from his guards while being held overnight at Spangdahlem Air Base where he was brought to consult with counsel and participate in his trial proceedings. The appellant was convicted of three specifications of attempting to sell military property, eight specifications of selling military property, and twelve specifications of larceny of military property, and sentenced to reduction to E-1, confinement for six years, a dishonorable discharge and a fine of $14,565 and to be further confined for not more than one year if the fine was not paid. The total estimated loss to the United States from the appellant's larcenies exceeded $100,000. *Id.* at 271.

226. *Id*. at 272.

227. *Id*.

228. *Id*. (stating that the appellant was not in his wife's vehicle).

229. *Id*.

230. *Id.* On appeal to the service court, the court found that the military judge did not abuse his discretion in admitting the evidence to show bias because of the wife's "willingness to engage in criminal activity to support [the] Appellant." *Id*. at 272-73.

lant's escape from pretrial confinement, in his sentencing argument.[233] The CAAF agreed, finding that the military judge "clearly abused his discretion" in admitting PEs 141 and 142.[234]

In reaching its decision, the court first addressed the issue of bias and MRE 608,[235] noting that "[a]lthough extrinsic evidence of specific acts of misconduct may not be used to prove a witness's general character for truthfulness, it may be used to impeach a witness by showing bias."[236] Next, the court laid out several basic tenets regarding rebuttal evidence: first, "the legal function of rebuttal evidence . . . is to 'explain, repel, counteract or disprove the evidence introduced by the opposing party'";[237] and second, "'[t]he scope of rebuttal is defined by [the] evidence introduced by the other party.'"[238] Examining the proffered rebuttal evidence against MRE 403, the court found its probative value was minimal. The court described the evidence supporting the wife's alleged complicity in her husband's escape as "tenuous at best."[239] As for her bias, it was clear from her unsworn statement that she was biased towards her husband and PEs 141 and 142 were "merely cumulative on the issue of her bias."[240] After finding the probative value was minimal, the court next examined the danger of unfair prejudice, finding it was high, especially because the trial counsel focused on the wife's alleged complicity during his sentencing argument "notwithstanding the factual deficiency to link [the wife] to [the] Appellant's escape."[241] Despite finding error, the court found the admission of PEs 141 and 142 to be harmless.[242]

Trial practitioners trying to get in the last word via rebuttal or surrebuttal need to first focus on what they are trying to accomplish. If the goal is rebuttal of opinion or reputation evidence, extrinsic evidence is not allowed. If the goal is to rebut specific acts with evidence that the acts did not occur or to establish bias, extrinsic evidence is permissible provided the evidence survives an MRE 403 objection. Trial counsel should be ready to articulate the theory of admissibility for any rebuttal evidence and should be prepared for the inevitable MRE 403 objection. Defense counsel should argue that the evidence sought to be admitted is legally irrelevant in that it does not "explain, repel, counteract or disprove" any of the offered defense evidence. If the military judge disagrees with the relevance objection, defense counsel should argue that MRE 403 prohibits the evidence because it is unduly prejudicial. Finally, if the relevance and prejudice objections are overruled, defense counsel should, in a members case, draft a limiting instruction for the military judge to give the members. As the next section explains, failure to give an accurate, requested instruction, which is not covered by the main charge, may create an appellate issue that ultimately may benefit the client.

Sentencing Instructions—Rule for Courts-Martial 1005[243]

Now that each side has gotten, or attempted to get in the last word, it is time for the incredibly exciting, on the edge of your seat journey through chapter two of the *Military Judges' Benchbook*.[244] It's time for instructions!

In 2003 the CAAF decided two important instruction cases: *United States v. Miller*[245] and *United States v. Tschip*.[246]

231. *Id.* at 273.

232. *Id*.

233. *Id*.

234. *Id*. at 274.

235. *See* MCM, *supra* note 3, MIL R. EVID. 608. Military Rule of Evidence 608(c) states: "*Evidence of bias*. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." *Id*.

236. *Saferite*, 59 M.J. at 273 (citing United States v. Hunter, 21 M.J. 240, 242 (C.M.A. 1986)).

237. *Id.* at 274.

238. *Id*. (citing United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)) (quoting United States v. Shaw, 26 C.M.R. 47, 51 (C.M.A. 1958) (Ferguson, J., dissenting)).

239. *Id.*

240. *Id*.

241. *Id*.

242. *Id*. at 274-75. The finding of no prejudice was based on the following: the members already knew the appellant escaped; the military judge gave the panel a limiting instruction which advised them that they were not to sentence the appellant for his absence because if he was to be punished for the absence, that would come at a "'different forum, on a future date'"; the appellant was facing a maximum punishment of 230 years confinement; the trial counsel asked for a sentence of sixteen years; and the panel only adjudged six years. *Id.*

243. MCM, *supra* note 3, R.C.M. 1005.

244. DA PAM. 27-9, *supra* note 201.

In *Miller*,[247] the government and defense agreed that the appellant was entitled to three days of confinement credit for civilian pretrial confinement related to the offenses for which he was ultimately convicted.[248] While discussing instructions, the military judge informed the parties that he would give "'the standard sentencing instructions in the Military Judge's (sic) Benchbook.'"[249] The judge's instructions did not advise the members that they should consider the appellant's time in civilian confinement in adjudging an appropriate sentence nor did they instruct the members that the accused was entitled to day-for-day confinement credit for his time in civilian confinement (i.e., pretrial confinement credit).[250] After instructing the members, the military judge asked the parties if they had any objections to the instructions given or any requests for additional instructions.[251] The defense counsel had no objections, however, he specifically requested the pretrial confinement credit instruction, to which the military judge responded, "I'm going to provide that independent of whatever happens."[252] There was no specific request for a pretrial confinement instruction as a matter in mitigation instruction; that is, the defense failed to request an instruction advising the members that they should consider the time spent by the appellant in pretrial confinement in adjudging an appropriate sentence. Although the military judge indicated he would give the pretrial confinement credit instruction, as requested by the defense, the military judge failed to give this instruction.[253]

On appeal, the appellant alleged the military judge erred by: (1) failing to instruct the members that they should consider the appellant's time in pretrial confinement in adjudging an appropriate sentence; and (2) failing to give the pretrial confinement credit instruction as requested.[254] In affirming the findings and sentence, the service court found the military judge did not err in failing to give the aforementioned instructions and even if he did, the error was harmless.[255] The CAAF disagreed.[256]

Rule for Courts-Martial 1005(e)(5) requires the military judge to instruct the members to consider, among other items, information presented pursuant to RCM 1001(b)(1) and (2).[257] Rule for Courts-Martial 1001(b)(1) requires the trial counsel to "inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint";[258] RCM 1001(b)(2) addresses personal data pertaining to an accused presented by the govern-

245. 58 M.J. 266 (2003).

246. 58 M.J. 275 (2003).

247. *Miller*, 58 M.J. at 266. The appellant was convicted at a general court-martial of drunk driving, wrongful possession of methamphetamine, and wrongful distribution of methamphetamine and sentenced by a panel of officer members to reduction to E-3 and a bad conduct discharge. *Id.* at 267.

248. *Id*.

249. *Id*.

250. *Id*. at 267-68. The *Benchbook* provides for the following specific instruction when addressing credit for time spent in pretrial confinement:

> MJ: In determining an appropriate sentence in this case, you should consider that the accused spent ____ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve his confinement, and will be given on a day for day basis.

DA PAM. 27-9, *supra* note 201, Instruction 2-5-22 (stating that the instruction quoted from the latest version of *DA Pam 27-9* is identical in all material respects to the version in effect at the appellant's trial). *See* United States v. Miller, 56 M.J. 764, 765 n.1 (A.F. Ct. Crim. App. 2002).

251. *Miller*, 58 M.J. at 267-68.

252. *Id*. at 268.

253. *Id*.

254. United States v. Miller, 56 M.J. 765 (A.F. Ct. Crim. App. 2002).

255. *Id*. at 764.

256. *Miller*, 58 M.J. at 270.

257. MCM, *supra* note 3, R.C.M. 1005(e)(5). Rule for Courts-Martial 1005 states in part:

> (e) Required instructions. Instructions on sentence shall include:
> . . .
> (5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5).

Id. R.C.M. 1005.

ment.[259] In the case at bar, the government offered and admitted a Personal Data Sheet that reflected the appellant's three days in pretrial confinement.[260] Finally, the Discussion to RCM 1005(e)(5) states, in part, that the military judge's "tailored instructions should bring attention to [among other items], any pretrial restraint imposed upon the accused."[261] After discussing RCM 1005, the CAAF focused on *United States v. Davidson*,[262] holding "'the military judge's rote instructions' that omitted any instruction on considering pretrial confinement 'were inadequate as a matter of law.'"[263] Considering RCM 1005(e)(5)[264] and *Davidson*,[265] the CAAF held that an instruction that pretrial confinement is a matter the panel should consider in adjudging an appropriate sentence is a "mandatory"[266] instruction.

After finding the instruction was required, the court next examined the issue of waiver and its applicability, because the defense neither objected to the instructions given nor requested a specific instruction in this area.[267] Notwithstanding the waiver provision in RCM 1005(f),[268] the court held that waiver does not apply to this mandatory instruction.[269] "The military judge bears the primary responsibility for ensuring that mandatory instructions, including the pretrial confinement instruction mandated by the President in RCM 1005(e) and by this Court's decision in Davidson, are given and given accurately."[270]

The court next examined the failure to give the requested pretrial confinement credit instruction.[271] Failure to give a requested instruction is error if the following three-part test is met: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main charge'; 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.'"[272] The appellant met parts one and two; however, he failed with regard to part three because the requested instruction was not on such a vital point.[273] Therefore, the court agreed with the service court's opinion as it related to this instruction; the military judge did not err by failing to give the requested pretrial confinement credit instruction.

Despite finding error with the failure to give the general instruction regarding pretrial confinement, and assuming

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258. *Id.* R.C.M. 1001(b)(1).

259. *Id.* R.C.M. 1001(b)(2).

260. *Miller*, 58 M.J. at 268.

261. MCM, *supra* note 3, R.C.M. 1005(e)(5) (discussion).

262. 14 M.J. 81 (C.M.A. 1982).

263. *Miller*, 58 M.J. at 269 (citing United States v. Davidson, 14 M.J. 81, 86 (C.M.A. 1982)). "Contrary to the holding of the Air Force court, Davidson correctly reflects that where an accused has served pretrial confinement, the military judge must instruct the members that the pretrial confinement is a factor to consider in fashioning an appropriate sentence." *Id.*

264. MCM, *supra* note 3, R.C.M. 1005(e)(5).

265. *Davidson*, 14 M.J. at 81.

266. *Miller*, 58 M.J. at 270.

267. *Id.*

268. MCM, *supra* note 3, R.C.M. 1005(f). The waiver provision in question reads as follows:

> (f) *Waiver.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside of the presence of the members.

Id.

269. *Miller*, 58 M.J. at 270.

270. *Id.*

271. Pretrial confinement as something the court should consider in adjudging an appropriate sentence differs from pretrial confinement credit, which is merely day-for-day credit for time, spent in pretrial confinement.

272. *Id.* (citing United States v. Zamberlan, 45 M.J. 491, 492-93 (1997)) (quoting United States v. Eby, 44 M.J. 425 (1996)).

273. *Id.* at 270-71 (stating that the three days in confinement was a "negligible" part of the defense's sentencing case; the nature and duration of confinement were not highlighted by the defense; there was no evidence of the appellant's good behavior while confined; and the civilian confinement was not addressed in the defense counsel's argument).

arguendo error regarding the pretrial confinement credit instruction, the court found any such errors were harmless,[274] thus, affirming, albeit on different reasoning, the lower court's decision regarding the findings and sentence in the case.[275]

The next CAAF decision in the area of instructions is *United States v. Tschip*,[276] which involves an appellant's RCM 1001(c)(2)(C) right to make an unsworn statement.

In *Tschip*,[277] the appellant alleged that the military judge effectively "impaired" the appellant's unsworn statement when the judge instructed the members on the possibility of an administrative discharge in the event the court did not adjudge a punitive discharge.[278] The CAAF disagreed.

During the appellant's unsworn statement, the appellant stated, in part:

> 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. The worst punishment for me will be wondering every day for the rest of my life what my life would have been like if I would have just been able to stay in the Air Force.[279]

Before the sentencing argument, the military judge held an Article 39(a)[280] session in which he proposed the following instruction:

> 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 trial 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.[281]

The military judge provided the proposed instruction without objection from the defense. The CAAF, applying a plain error analysis, found no error, plain or otherwise.[282] Regarding the instructions given to the members, the court found that the military judge properly "placed [the] Appellant's statement in the appropriate context for purposes of their decision making process."[283] In reaching this conclusion, the court relied heavily on the nature of the appellant's statement, that is, the fact that the appellant made an "unfocused, incidental reference to an administrative discharge."[284] The court left for another day whether the instruction would be appropriate "in a case involving different references to an administrative discharge."[285]

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274. *Id.* at 271. The court found no prejudice because there was no evidence that the conditions of confinement were "unduly harsh or rigorous," the three days was "de minimis," the issue of pretrial confinement was "obviously of little consequence to either party," and the appellant's sentence was "favorable." *Id.*

275. *Id.* "Although we do not adopt the reasoning in the decision of the United States Air Force Court of Criminal Appeals, that decision is affirmed on the grounds set forth in this opinion." *Id.*

276. 58 M.J. 275 (2003).

277. *Id.* The appellant was convicted at a special court-martial of two specifications of dereliction of duty and dishonorable failure to maintain sufficient funds and sentenced to reduction to E-1 and a bad conduct discharge. *Id.*

278. *Id.* at 277.

279. *Id.* at 276.

280. UCMJ art. 39(a) (2002).

281. *Tschip*, 58 M.J. at 277.

282. *Id.* "Under the facts of this case, the instructions by the military judge did not constitute error, much less plain error." *Id.*

283. *Id.*

284. *Id.* The appellant did not ask the members to do anything with the information he provided. Furthermore, the defense counsel failed to mention or incorporate his client's reference to the commander's administrative discharge option in his sentencing argument, thus reinforcing the "passing . . . unfocused, incidental" nature of the statement. *Id.*

285. *Id.*

Miller is simple. Defense counsel should demand that the military judge affirmatively instruct the panel to consider, in arriving at an appropriate sentence, that the client spent time in pretrial confinement. More importantly, defense counsel should review RCM 1005(e) and demand that the "mandatory" instructions therein are given; when they are not, defense counsel should object.[286] *Tschip* should put both the government and the defense on notice that the CAAF will critically evaluate any instructions by a military judge that appear to limit or impair an appellant's right of allocution. Remember, the CAAF left for another day the propriety of the *Tschip* instruction in a case with a "focused" unsworn statement. Although the CAAF does not define what transforms a statement from "unfocused" to "focused," they provide some clues: the statement should be more than a "passing" thought; the statement should not be "vague," the statement should ask the members to take some sort of action or refrain from taking some action; and the defense counsel should reference or incorporate the statement in the sentencing argument.[287] Defense counsel–if it is important enough to mention in the unsworn statement, then use it in your sentencing argument!

Now that counsel for both sides and the military judge have decided on the appropriate instructions, it's time to argue.

Argument—Rule for Courts-Martial 1001(g)[288]

Argument is by definition meant to be persuasive.[289] Trials by their nature, whether guilty pleas or contested, are contentious. Unfortunately, the desire to be persuasive coupled with the contentious nature of criminal trials sometimes results in argument that cross the line from the proper to the improper.[290] The cases that will be discussed in this section are: *United States v. Barrazamartinez*,[291] *United States v. Melbourne*,[292] *United States v. Leco*,[293] and *United States v. Warner*.[294] The

286. *But see* United States v. Hopkins, 56 M.J. 393 (2002) (finding the military judge's refusal to give a tailored "expression of remorse" instruction was not error). "The military judge has considerable discretion in tailoring instructions to the evidence and law. The decision as to how that discretion should be applied to statements of an accused, such as remorse, regret, or apology, depends on the facts and circumstances of each particular case." *Id*. at 395 (citing United States v. Greaves, 46 M.J. 133, 139 (1997)).

287. *See Tschip*, 58 M.J. at 277.

288. MCM, *supra* note 3, R.C.M. 1001(g). Rules for Courts-Martial 1001(g) states:

> *Argument*. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directives relative to punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel, may however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Id.

289.

> 1. an oral disagreement; verbal opposition; contention; altercation . . . . 2. a discussion involving different points of view; debate . . . . 3. a process of reasoning; series of reasons . . . . 4. a statement, reason, or fact for or against a point . . . . 5. an address or composition intended to convince or persuade; persuasive discourse . . . .

RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed.1998). "2: a: a reason given in proof or rebuttal b: discourse intended to persuade 3 a: the act or process of arguing: ARGUMENTATION b: a coherent series of statements leading from a premise to a conclusion . . . ." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990). "1 orig., proof or evidence 2 a reason or reasons offered for or against something 3 the offering of such reasons; reasoning 4 discussion in which there is a disagreement; dispute; debate 5 a short statement of subject matter, or a brief synopsis of a plot; summary . . . ." WEBSTER'S NEW WORLD DICTIONARY (3d ed. 1988). "Argument to jury. Closing remarks of attorney to jury in which he strives to persuade jury of merits of case; generally limited in time by rules of court. The argument is not evidence." BLACKS LAW DICTIONARY 98 (5th ed. 1979).

290. *See, e.g.*, United States v. Baer, 53 M.J. 235 (2000) (stating that it was improper for trial counsel to ask members to place themselves in the shoes of the victim in a case in which the appellant plead guilty to robbery, aggravated assault, kidnapping, and murder; held no prejudice from improper argument considering trial counsel asked for a life sentence and the appellant was sentenced to twenty-five years).

> [I]t bears reiterating that in cases of improper argument, each case must rest on its own peculiar facts. Trial counsel who make impermissible Golden Rule arguments [i.e., asking members to place themselves in the shoes of the victim(s)] and military judges who do not sustain proper objections based upon them do so at the peril of reversal.

Id. at 239.

291. 58 M.J. 173 (2003).

292. 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

293. 59 M.J. 705 (N-M. Ct. Crim. App. 2003).

294. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

first three cases address the inappropriateness, through argument, of inflaming the passions of the sentencing authority;[295] the last case discusses the appropriateness of objecting to counsel's argument.

In *Barrazamartinez*,[296] during his sentencing argument in the appellant's drug case before a panel of Marine Corps officers,[297] the trial counsel made the following argument, without objection from the defense counsel:

> We in America are engaged in a war on drugs. You have heard from the President. You heard from the agents, and customs, that borders are being flooded . . . The drug cartels in Mexico are bringing drugs in this country and polluting our population. They're making money off our weak individuals. They do it because people like [Appellant] carry the drugs across the border.[298]

After advising the panel that the maximum punishment in the appellant's case was thirty years confinement, the trial counsel went on to say, again without objection from the defense counsel:

> The reason thirty years is authorized is because it's worth a lot. It's worth a lot of punishment because it is the type of activity we need to deter. Not just one individual but anyone who would think about doing it, tarnishing the Marine Corps' image of bringing drugs across this border. Almost a traitor to our country in that he's bringing in drugs when we are trying, as a nation, to stop them from coming in.[299]

On appeal, the appellant alleged that the trial counsel committed plain error during his sentencing argument by referring to America's "war on drugs" and referring to the appellant as "almost a traitor."[300] Applying a plain error analysis,[301] the CAAF found, in a 2-1-2 judgment, that the argument did not rise to the level of plain error.[302]

In addressing concerns raised by the first part of the trial counsel's argument referencing America's war on drugs, the court first noted RCM 1001(g)'s prohibition of references to: the convening or a higher authority; the views of such authorities; policies or directives regarding a certain punishment; or punishment greater than that authorized by statute.[303] After delineating the rule's prohibitions, the court noted that "comment on 'contemporary history or matters of common knowledge within the community'" is not prohibited by RCM 1001(g).[304] Applying this framework to the trial counsel's reference to America's war on drugs, the court found that the ref-

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295. *See, e.g.*, United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983); *Baer*, 53 M.J. at 237.

> When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul blows. *United States v. Edwards*, 35 MJ 351 (CMA 1992); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, L.Ed. 1314 (1935). It is appropriate for trial counsel–who is charged with being a zealous advocate for the Government–to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 MJ 235, 239 (CMA 1975).
>
> However, as noted by the Court of Criminal Appeals, "arguments aimed at inflaming the passions or prejudices of the court members are clearly improper." Unpub. op. at 4, *citing United States v. Clifton*, 15, MJ 26, 30 (CMA 1983).

Baer, 53 M.J. at 237.

296. *Barrazamartinez*, 58 M.J. at 173. The appellant was convicted at a general court-martial of conspiracy to wrongfully import and wrongful importation of over ninety pounds of marijuana into the United States and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for eleven years, and a dishonorable discharge. *Id*. at 174.

297. *Id*.

298. *Id*. at 175.

299. *Id*.

300. *Id*. at 175-76. The appellant also alleged that his sentence was inappropriately severe compared to that of his co-conspirator who received four years confinement and a bad conduct discharge. The court disagreed. *Id*. at 176.

301. The court applied a plain error analysis because of the defense counsel's failure to object to the allegedly improper argument. "In light of the defense counsel's failure to object, we review the trial counsel's argument for plain error." *Id*. at 175.

302. J. Gierke delivered the judgment of the court in which C.J. Crawford joined; J. Effron filed a separate opinion concurring in the result affirming the decision of the Navy-Marine Court; J. Baker filed a separate dissenting opinion in which J. Erdmann joined. *Id.* at 173.

303. *Id.* at 175. References to policies or directives create the appearance of unlawful command influence. *Id*. Counsel arguing policies "are well advised to tread lightly [in this area]." *Id*. (quoting United States v. Kropf, 39 M.J. 107, 109 (C.M.A. 1994)).

304. *Id.* (quoting *Kropf*, 39 M.J. at 108).

erence was not a reference to department or command policies and did not inject or appear to inject unlawful command influence into the sentencing proceeding; rather, it was a reference to a matter of "common knowledge."[305] Furthermore, the trial counsel made no reference to "the Commander-in-Chief's or any other commander's expectations regarding [the] Appellant's punishment."[306] Thus, the first part of the trial counsel's argument did not rise to the level of plain error.[307]

The court next focused on the trial counsel's reference to the appellant as "almost a traitor."[308] The court started its discussion by expressing some concern with the use of this term: "[t]rial counsel's reference to [the] Appellant as 'almost a traitor' gives us pause. The term 'traitor' is particularly odious, particularly in the military community."[309] Despite its concern over the phrase "almost a traitor," the court found no plain error in the use of the phrase. The court's rationale was based on the following three distinct points: first, the trial counsel only used the phrase once;[310] second, the trial counsel, in describing the appellant, used the word "almost" in conjunction with traitor;[311] and finally, the primary definition of "traitor" is "'one who betrays another's trust or is false to an obligation or duty.'"[312] Finding that the importation of over ninety pounds of marijuana into the United States is a clear betrayal of trust placed in a Marine by the U.S. Marine Corps, the court found the argument by counsel to be a fair comment on the evidence.[313]

The next case in which an appellant alleged improper argument by counsel is *United States v. Melbourne*.[314] In *Melbourne*,[315] the charges stemmed from an incident in which the appellant drove a borrowed vehicle off an airfield runway into the waters of a local bay resulting in the drowning of another sailor, Seaman W. McDowell.[316]

On appeal, the appellant alleged the trial counsel committed plain error in his sentencing argument by asking the sentencing authority, a military judge sitting alone, to imagine himself as the drowning victim.[317] The statement at issue, which was not objected to by the defense, was:

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305. *Id*.

306. *Id*.

307. *Id*. at 175-76.

308. *Id*. at 176.

309. *Id*.

310. *Id.*

311. *Id*.

312. *Id*. (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1252 (10th ed. 1993)).

313. *Id.* at 176.

> It was fair comment on the evidence for trial counsel to argue that the appellant had betrayed the trust placed in him as a member of the United States Marine Corps. Defense counsel did not consider the argument sufficiently offensive to warrant an objection. *See Nelson, 1 M.J. at 238 n. 6.* While we do not condone the trial counsel's use of this potentially inflammatory term, we hold that Appellant has not carried his burden of persuading this Court that the sentencing argument characterizing him as "almost a traitor" was plain error.

Id. (Baker, J., & Erdmann, J., dissenting).

> [T]he lead opinion argues, trial counsel used the word traitor in its colloquial and descriptive sense, and not in its constitutional sense to describe someone who commits treason, like Benedict Arnold.
>
> I disagree. I think the better view is that trial counsel was appealing to the members' sense of duty and patriotism as Marines by suggesting that Appellant's offenses were the equivalent of treason as used in the Constitutional sense. To a panel of members sworn to uphold and defends the Constitution, such suggestion, in my view, is inflammatory and runs undue risk of drawing the members unfairly away from the evidence at hand.

Id. at 177.

314. United States v. Melbourne, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

315. *Id*. The appellant was convicted at a general court-martial of violating a lawful general order, reckless operation of a motor vehicle resulting in death, drunken operation of a motor vehicle resulting in death, negligent homicide, and false official statement and sentenced to reduction to E-1, forfeiture of all pay and allowances, twenty months confinement, and a bad conduct discharge. *Id.* at 683.

316. *Id*. at 684-86.

> Imagine what those minutes, the last minutes of [Seaman McDowell's] life, were like, gasping for air, struggling, choking, feeling the pressure in his chest building when he drowned, knowing–knowing during that one to two minutes that he was drowning, and he was going to die, and he'd never see his family again.[318]

Applying a plain error analysis to the counsel's argument, the service court disagreed with the appellant, finding no error, plain or otherwise.[319] While asking the sentencing authority to place itself in the shoes of the victim is improper,[320] asking the sentencing authority to imagine the victim's "fear, pain, terror, and anguish as victim impact evidence" is not.[321] The court noted:

> Taking the trial counsel's entire sentencing argument in context, we find no indication that the direction, tone, and theme of the argument were calculated to inflame the military judge's passions or possible prejudices. [citation omitted]. Instead, trial counsel was describing the tragic circumstances of Seaman McDowell's demise. Such circumstances were appropriate considerations bearing upon the sentence to be awarded.[322]

The next case addressing allegedly improper argument due to its overly inflammatory nature is *United States v. Leco*.[323] In *Leco*,[324] the appellant was convicted of knowingly possessing and receiving child pornography. In his sentencing argument, the trial counsel stated "the reason the appellant downloaded these images is '[b]ecause he has a sexual interest in children.'"[325] The defense counsel failed to object to the argument.[326]

On appeal, the appellant argued that the trial counsel's comment was improper because it implied that "the appellant would commit or had committed uncharged acts of child abuse."[327] The service court disagreed. Applying a plain error analysis to the argument, the court found no error whatsoever; rather, "[f]ar from constituting or causing plain error, the trial counsel's statement was entirely proper."[328] Evaluating the facts and circumstances surrounding the offense, to include the appellant's own admissions, the court found the trial counsel's argument to be "fair comment on the evidence."[329] Assuming arguendo that the counsel's argument was error, the court found no prejudice

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317. *Id*. at 689. The appellant also alleged his sentence was in appropriately severe. The court disagreed, finding his sentence was appropriate and to grant relief at this time "would be to engage in clemency, a prerogative reserved for the convening authority." *Id*. at 691 (citing United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988)).

318. *Id.*

319. *Id*. at 690.

320. *Id*.; *see also* United States v. Baer, 53 M.J. 235 (2000).

321. *Melbourne*, 58 M.J. at 690. In the case at bar, the testimony from the pathologist, a government witness was that:

> [O]nce Seaman McDowell became submerged, it took somewhere between one and two minutes for his instinctive need to breath to overtake his conscious fear of inhaling water. The presence of water in Seaman McDowell's lungs would have caused a coughing response, which in turn led to the intake of additional water. After struggling for approximately two minutes with water-filled lungs, Seaman McDowell most likely lost consciousness. Approximately two minutes later, Seaman McDowell was dead.

Id. at 685. Seaman McDowell was found twenty to twenty-five feet from the submerged vehicle. *Id.*

322. *Id*. at 690.

323. United States v. Leco, 59 M.J. 705 (N-M. Ct. Crim. App. 2003).

324. *Id*. The appellant was convicted of knowingly possessing and receiving child pornography in violation of 18 U.S.C. § 2252 and sentenced to reduction to E-1, one-year confinement and a bad-conduct discharge. *Id*. at 706. The appellant was actually charged with a Clause 3, Crimes and Offenses Noncapital, Article 134 Offense. *See* UCMJ art. 134 (2002); *see also* 10 U.S.C. § 934 (2000); 10 U.S.C. § 2252 (The Child Pornography Prevention Act, CPPA 2000)).

325. *Leco*, 59 M.J. at 710.

326. *Id*.

327. *Id*.

328. *Id*. at 711.

329. *Id*. The court considered the following: the evidence adduced at trial supported the claim that the appellant downloaded over 600 images of child pornography on to his computer; he carefully categorized these images on his computer; and the appellant's statements during the providence inquiry along with his NCIS statement, that included admission that he enjoyed looking at pictures of older children, supported the trial counsel's argument. *Id*.

since the trial was judge alone and "[a] military judge is presumed to know and follow the law.[330] Likewise, a military judge may be presumed to have disregarded any improper argument."[331]

Finally, the last arguments case is *United States v. Warner*,[332] in which the military judge sustained the trial counsel's objection to the defense's sentencing argument.

If readers recall the discussion of *Warner* in the earlier section entitled "Aggravation Evidence–Rule for Courts-Martial 1001(b)(4)," this case involved an appellant who was charged with aggravated assault upon his two and one-half month old infant son[333] and was convicted of assault and battery upon a child under sixteen years of age.[334] In addition to arguing the government presented improper aggravation evidence through its medical expert,[335] the appellant argued the military judge erred by improperly limiting the defense counsel's sentencing argument when he sustained the trial counsel's objection to that portion of the argument stating the appellant wanted to "be a good father."[336] The court disagreed noting, "Counsel must limit their sentencing arguments to evidence in the record and any fair inferences as may be drawn from them."[337] The evidence before the court, to include the appellant's unsworn statement, did not address the appellant's desire to be a "good father"; rather, the focus of the appellant's unsworn statement was his desire to "'get on with his life'" and "'better himself.'"[338] By objecting, the trial counsel "foreclose[d] the defense counsel from expanding her argument beyond what was contained in the unsworn statement."[339]

The lesson that counsel, both government and defense, should take from these argument cases is to listen to the adversaries argument and object! Inflaming the passion of the sentencing authority and arguing facts not in evidence are objectionable, therefore, object. Failing to object will result in the waiver of any issue absent plain error, therefore, object. Finally, although an accused's allocution is a broad, largely unfettered right, argument based on facts not contained in an accused's unsworn statement is objectionable, therefore, object.

Sentence Credit

Of all the potential sentencing issues lurking within the RCM 1000 series, the CAAF sent the strongest message in the area of sentence credit; defense counsel need to aggressively pursue every applicable type of sentence credit available to an accused or risk waiver of the issue.[340]

In 1999, the CAAF decided *United States v. Rock*,[341] a case addressing when sentence credit is taken off the adjudged versus the approved sentence. In 2002, the CAAF clarified its 1999 guidance with its decision in *United States v. Spaustat*,[342] establishing a bright line rule for all military justice practitioners to follow:

> [I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision [30 August 2002], this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by

330. *Id*. (citing United States v. Prevatte, 40 M.J. 396, 398 (C.M.A. 1994)).

331. *Id.* at 711 (citing United States v. Waldrup, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989)).

332. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

333. *Id*. at 574.

334. *Id*.

335. *Id*. at 581.

336. *Id*. at 583.

337. *Id*.

338. *Id.*

339. *Id*.

340. *See, e.g.*, United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (stating that *Allen* credit is day-for-day credit for time spent in legal pretrial confinement); United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (stating that *Mason* credit is sentence credit for restriction or other conditions on liberty tantamount to confinement); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (stating that *Pierce* credit is "day-for-day," dollar-for-dollar, "stripe-for-stripe" credit for prior Article 15 punishment for the same offense forming the basis of a court-martial conviction); United States v. Suzuki, 14 M.J. 491 (stating that *Suzuki* credit is credit for illegal pretrial confinement amounting to punishment, unusually harsh circumstances or conditions of confinement; codified in RCM 3of(k)); MCM, *supra* note 3, R.C.M. 305(k). Rule for Court-Martial 305(k) allows credit for pretrial confinement involving an abuse of discretion or unusually harsh circumstances (previously referred to as *Suzuki* credit). It is also allows credit for non-compliance with the procedural requirements of RCM 305(f),(h), (i), or (j). MCM, *supra* note 3, R.C.M. 305(f), (h), (i), & (k).

the convening authority, unless the pretrial agreement provides otherwise.[343]

This past term, the court provided further guidance in the area of sentence credit by addressing the following: can an appellant raise the issue of Article 13 or *Mason*[344] credit for the first time on appeal; does RCM 305 require a commander's pretrial confinement memorandum in restriction tantamount to confinement situations; and is an appellant, who spent time in legal pretrial confinement, entitled to sentence credit against an adjudged discharge or reduction when no confinement was adjudged in his case? The CAAF answered all three questions with NO, NO, and NO!

In *United States v. Inong*,[345] the appellant sought, for the first time, sentence credit from the CAAF for illegal pretrial punishment for thirty-seven days spent in maximum custody.[346] After reviewing the issue, and the action taken by the service court on remand,[347] the CAAF held that the NMCCA was correct in holding that the appellant was not entitled to sentence credit. This was because he made a tactical decision to raise the Article 13, UCMJ, pretrial punishment issue to the sentencing authority in the hopes of receiving a lesser sentence rather than presenting the issue to the military judge as a demand for sentence credit.[348] In other words, the appellant's actions were tantamount to a waiver of the Article 13 issue.[349] More importantly, the CAAF established the following prospective bright line rule regarding Article 13 credit: "in the future, failure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error."[350]

In *United States v. King*,[351] the CAAF was faced with a situation similar to that in *Inong*.[352] This time the question was whether an appellant could raise a demand for *Mason*[353] credit for the first time on appeal.

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341. 52 M.J. 154 (1999). The appellant was tried and convicted by a military judge sitting alone of two specifications of conspiracy to distribute drugs, eight specifications of use, possession with the intent to distribute, and distribution of drugs, and two specifications of absence without leave. At trial, the military judge awarded the appellant 240 days (i.e., eight months) of credit for restrictions on the appellant's liberties not amounting to confinement but amounting to pretrial punishment in violation of Article 13, UCMJ. The military judge sentenced the appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for fifty-three months, and a dishonorable discharge. In announcing the sentence, the military judge explained that the fifty-three months already took into account the previously awarded eight months of credit. At action, the convening authority, pursuant to a pretrial agreement, approved reduction to E-1, forfeiture of all pay and allowances, confinement for three years, and a dishonorable discharge. The convening authority also credited the appellant with three days of pretrial confinement credit for time spent in actual confinement.

On appeal, the appellant alleged that both the military judge and convening authority erred in applying the eight months of sentence credit to the adjudged, as opposed to the approved, sentence. The CAAF disagreed, addressing three distinct situations: first, when there is no pretrial agreement in the case; second, when a case involves a pretrial agreement but the adjudged sentence is less than the agreement; and third, when the adjudged sentence exceeds that contained in the pretrial agreement. In the first two situations, the credit is applied to the adjudged sentence. In the third, the court held in situations in which the appellant has served confinement, actually or constructively, credit for such confinement comes off the approved sentence. If credit is awarded for non-confinement situations, and the pretrial agreement does not state otherwise, there is no requirement to apply the credit awarded to the lesser of the adjudged or approved sentence. *Id*.

342. 57 M.J. 256, 263 (2002). "This case illustrates that, even after Rock, there is some confusion about the application of confinement credits when a pretrial agreement is involved." *Id.*

343. *Id*. at 263-64.

344. United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (stating that sentence credit may be awarded for restriction or other conditions on liberty tantamount to confinement).

345. 58 M.J. 460 (2003). The appellant was convicted at a general court-martial of conspiracy to commit larceny, desertion, larceny, making and uttering bad checks, and housebreaking and sentenced by a military judge to reduction to E-1, forfeiture of all pay and allowances, confinement for three years, and a dishonorable discharge. *Id*.

346. *Id*. at 461.

347. As a result of the request for relief, the CAAF set aside the prior decision of the NMCCA and "remanded the case to that court 'to consider this question initially and to take remedial action if necessary.'" *Id*. (citing United States v. Inong, 54 M.J. 375 (2000)).

348. *Id.* at 463.

349. *See* United States v. Southwick, 53 M.J. 412 (2000); United States v. Tanksley, 54 M.J. 169 (2000).

350. *Inong*, 58 M.J. at 461 (overruling United States v. Huffman, 40 M.J. 225 (C.M.A. 1994)). The court also overruled *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) to the extent that they established a "'tantamount to affirmative waiver rule' in the Article 13 arena." *Id*. at 465.

351. 58 M.J. 110 (2003).

352. *Inong*, 58 M.J. at 460.

353. 19 M.J. 274 (C.M.A. 1985).

In *King*,[354] the appellant's commander placed pretrial restrictions on the appellant's movements, restricting him to the Air Base, placing certain base establishments off-limits, and requiring the appellant to obtain prior permission before going to specified places on the base.[355] At trial, the appellant's defense counsel failed to move for any credit (i.e., *Mason*[356] credit) for restriction tantamount to confinement.[357] The CAAF found the pretrial conditions and limitations placed on the appellant did not amount to restriction tantamount to confinement; therefore, the appellant was not entitled to any credit.[358] More importantly, the court examined the applicability of waiver to *Mason*[359] credit holding that in the future, absent plain error, failure to seek *Mason*[360] credit at trial waives the issue for appellate review.[361]

In addition to applying waiver to situations involving pretrial punishment in violation of Article 13 and *Mason* credit, the CAAF reviewed, in *United States v. Rendon*,[362] the applicability of RCM 305(k) credit to situations involving restriction tantamount to confinement. In this decision, the CAAF addressed concerns raised by Judge Baker and Senior Judge Sullivan in their concurrences in *United States v. Chapa*.[363]

In *Rendon*,[364] the appellant sought *Mason*[365] credit for restriction that he alleged was tantamount to confinement.[366] The appellant also sought RCM 305(k) credit for the command's failure to follow the procedures in RCM 305 for reviewing pretrial confinement.[367] The military judge agreed, in part, awarding thirty-nine days of *Mason* credit for restriction tantamount to confinement; however, he denied the defense's motion for RCM 305 (k) credit.[368] Although not alleged as error on appeal and not requested by the appellant, the Coast Guard Court of Criminal Appeals, sua sponte, awarded the appellant an additional thirty-three days of RCM 305(k) credit related to the period determined by the military judge to be restriction tantamount to confinement.[369]

354. *King*, 58 M.J. at 110. The appellant was convicted at a general court-martial of disobeying a lawful order, two specifications of making a false official statement, and thirteen specifications of larceny and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-nine months, and a bad conduct discharge. *Id*. at 111.

355. *Id*.

356. *Mason*, 19 M.J. at 274.

357. *King*, 58 M.J. at 111.

358. *Id*. at 112.

359. *See Mason*, 19 M.J. at 274.

360. *See id*.

361. *King*, 58 M.J. at 114. "The purpose of the so called raise-or-waive rule is to promote efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." *Id*.

362. 58 M.J. 221 (2003).

363. 57 M.J. 140 (2002). In *Chapa*, J. Baker noted the following in his concurrence:

> Is R.C.M. 305 credit due for pretrial restriction tantamount to confinement? I am skeptical. First, if it is due, then it will likely be due in all cases of restriction tantamount to confinement. By definition, restriction tantamount to confinement presents the situation where the commander will not have applied RCM 305 because he or she believes an accused is in restriction and not in confinement–constructive or actual. Second, if it is always due, then why is it not obvious error for a military judge to grant *Mason* credit, but not address RCM 305? I think the better argument is that it is not due.

Id. at 144. S.J. Sullivan, writing separately, noted in his concurrence that "the Army Court's decision in Gregory is flawed and should not be followed by this Court." *Id*. at 147.

364. *Rendon*, 58 M.J. at 221. The appellant was convicted at a special court-martial of attempting to distribute lysergic acid diethylamide (LSD), attempting to use LSD and Ecstasy, five specifications of wrongful use of Ecstasy, two specifications of wrongful use of LSD, and wrongful possession of Ecstasy and sentenced to reduction to E-1, forfeiture of "'one-half pay for six months,'" confinement for sixty days, and a bad conduct discharge. *Id.* at 221-22. Rule for Courts-Martial 1003(b)(2) requires that absent total forfeitures, forfeitures adjudged shall be stated in whole dollar amounts per month for a specific number of months. In the case at bar, forfeitures of "one-half pay for six months" were adjudged and the promulgating order reflected forfeiture of $521 pay per month for six months. The Coast Guard Court of Criminal Appeals corrected the error by affirming a forfeiture of only $521 pay. *Id*.

365. *Mason*, 19 M.J. at 274.

366. *Rendon*, 58 M.J. at 222.

367. *Id*. at 222; *see also* MCM, *supra* note 3, R.C.M. 305.

368. *Rendon*, 19 M.J. at 223.

On appeal, the General Counsel for the Department of Transportation certified the issue of whether the lower court erred when it "sua sponte held that the military judge should have granted . . . R.C.M. 305(k) credit based on a violation of R.C.M. 305(i) for a period of pretrial restriction tantamount to confinement."[370] The CAAF, in reversing the service court's decision, held the service court erred in awarding RCM 305(k) credit for a violation of RCM 305(i) when the restriction "did not involve physical restraint, the essential characteristics of confinement."[371] In arriving at its decision, the court examined the plain language of RCM 305 and determined that, "[o]n its face, R.C.M. 305 applies to 'pretrial confinement.'"[372] Furthermore, RCM 305(k) is "limited by unambiguous language to 'confinement served' after noncompliance with R.C.M. 305(f), (h), (i), or (j)" and there is "no support . . . for applying R.C.M. 305(k) to any lesser forms of restraint."[373] The court concluded its opinion with clear guidance abrogating "any [suggestion] that R.C.M. 305 is per se applicable to restriction tantamount to confinement," clarifying that RCM 305 "applies to restriction tantamount to confinement only when the conditions and constraints of that restriction constitute physical restraint, the essential characteristic of confinement."[374]

The final case in the area of sentence credit is *United States v. Josey*,[375] a case in which the CAAF settled the issue of whether confinement credit must be applied against an adjudged discharge or reduction, an issue left open by its decision in *United States v. Rosendahl*.[376]

In *Josey*,[377] the appellant was a master sergeant in the Air Force convicted of, among other offenses, two specifications of wrongful use of cocaine and sentenced at a general court-martial to reduction to E-1, forfeiture of all pay and allowances, and confinement for eight years.[378] On appeal, the AFCCA set aside the findings regarding the two drug specifications and returned the case to the convening authority authorizing a rehearing on the drug specifications.[379] After determining that a rehearing would be impractical, the convening authority reassessed the sentence and approved only so much of the sentence as provided for forfeiture of $600 pay per month for four months and reduction to E-6.[380] At the time of the reassessment, the appellant already served almost thirty-one months in confinement.[381] On appeal for a second time, the appellant argued he was entitled to sentence credit for the time he served in confinement, that he should receive additional credit for his accumulated good time credit, and that the credit owed should be applied to his approved reduction.[382] The AFCCA disagreed, concluding that although the appellant is entitled to credit for his time spent in confinement, it "should only be applied against his approved sentence to forfeitures" and not his reduction.[383]

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369. *Id.* at 224. The service court relied on *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986) (holding that commanders must comply with RCM 305 in restriction tantamount to confinement situations, including the provision requiring preparation of a commander's memorandum when confining a Soldier), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition) in awarding the additional thirty-three days of RCM 305(k) credit.

370. *Rendon*, 19 M.J. at 222.

371. *Id.*

372. *Id.* at 224.

373. *Id.*

374. *Id.* at 225 (abrogating United States v. Gregory, 21 M.J. 952 (ACMR 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition)).

375. 58 M.J. 105 (2003).

376. 53 M.J. 344 (2000) (applying credit for confinement served against forfeitures but not reduction). In *Rosendahl*, the accused served 120-days of confinement. On appeal, the sentence was set aside and the rehearing sentence was reduction and a bad conduct discharge. On appeal, the appellant alleged he was entitled to credit for his 120-days of confinement against his adjudged reduction. The court disagreed, leaving for another day "whether a different result might be warranted in a case involving lengthy confinement." *Id.* at 348.

377. *Josey*, 58 M.J. at 105. The appellant, a master sergeant in the Air Force, was convicted at a general court-martial of two specifications of wrongful use of cocaine, violation of a general regulation, making and uttering eight checks and dishonorably maintaining sufficient funds in the account to cover the checks, and failing to go to his appointed place of duty and was sentenced to reduction to E-1, forfeiture of all pay and allowances, and confinement for eight years. *Id.* at 106.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at 107; *see also* United States v. Josey, 56 M.J. 720, 721 (A.F. Ct. Crim. App. 2002).

382. *Josey*, 56 M.J. at 721.

383. *Id.* at 722.

On appeal to the CAAF, the appellant renewed his argument that he was entitled to credit for time spent in confinement and that such credit should be applied against his adjudged reduction.[384] The CAAF disagreed, holding that "reprimands, reductions in rank, and punitive separations [personnel-related punishments] are so qualitatively different from other punishments that conversion is not required as a matter of law."[385] The court concluded by differentiating between credit required "as a matter of law" versus credit awarded as a matter of "command prerogative."[386]

> A convening authority has broad authority to commute a sentence into a different form so long as it involves a reduction in penalty. [Citation omitted]. Although a convening authority reviewing a case upon remand is not required as a matter of law to convert a reprimand, reduction in grade, or punitive separation to another form of punishment for purposes of providing former-jeopardy credit, the convening authority is empowered to do so as a matter of command prerogative under Article 60(c).[387]

In the appellant's case, he was not entitled, as a matter of law, to credit against his adjudged reduction for the thirty plus months he spent in lawful post-trial confinement.[388]

As noted at the outset of this section, the CAAF has made clear that defense counsel should raise the issue of sentence credit at trial or waive it for appellate review. Defense counsel should talk to the client and ask detailed questions about the client's pretrial treatment. For example: was the client treated differently after charges were preferred; was he continuing to perform duties commensurate with his grade and military occupational skill (MOS); was he free to go anywhere on or off post; assuming the client is of legal drinking age, could he consume alcohol pending the disposition of the charges; was anything, such as his civilian clothing or motor vehicle, taken from him; did the client acquire a "nickname" after charges were preferred; etc.? Once the defense counsel has gathered all the relevant facts, he should bring the appropriate motion for sentence credit. The days of litigating sentence credit for the first time on appeal are over!

The final area of discussion in the sentencing potpourri is sentence rehearings and the limits on sentences that may be approved after a rehearing.

Sentence Rehearings—Rule for Courts-Martial 810[389]

Rule for Courts-Martial 810[390] and Article 63, UCMJ,[391] lay out the general rule that after a rehearing, no sentence "in excess of or more severe than" the previously adjudged or approved sentence may be approved. Last term, the CAAF, in *United States v. Mitchell*,[392] addressed the meaning of "in excess of or more severe than" as it relates to punitive discharges.

In *Mitchell*,[393] the appellant was convicted at his original court-martial of five specifications of wrongful distribution of a controlled substance, among other offenses, and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for ten years, and a bad conduct discharge.[394] On appeal, the Army Court of Criminal Appeals (ACCA) found two of the five drug distribution specifications to be factually insufficient, set aside the sentence, and authorized a rehearing on sentence.[395] At the rehearing, the appellant was sentenced to reduction to E-1, confinement for six years, and a dishonorable discharge.[396] The ACCA, applying an objective standard—a reasonable person standard—affirmed the rehearing sentence holding that the combined rehearing sentence was not "in excess of or more severe" than the original sentence.[397] In essence, the court found that no reasonable person would view six years confinement and a dishonorable discharge as more severe punishment than the originally adjudged ten years confinement and a bad conduct discharge.

On appeal, the CAAF reversed the service court's decision as to sentence, affirming only so much of the sentence as provided for reduction to E-1, confinement for six years, and a bad conduct discharge.[398] In arriving at its decision, the court noted that a punitive discharge is "qualitatively different" than con-

384. *Josey*, 58 M.J. at 106.

385. *Id*. at 108.

386. *Id*.

387. *Id*.

388. Notwithstanding its holding that the appellant, as a matter of right, is not entitled to credit for time served against the adjudged reduction, the court set aside the lower court's decision and remanded the case for a new post-trial action in light of the convening authority's "ambiguous" action. The convening authority in the case, as part of his action, stated that the appellant "'will be credited with any portion of the punishment served from 5 November 1998 to 30 May 2001 under the [prior] sentence . . . .'" *Id*. As the CAAF pointed out, it is unclear whether the CA intended to credit the time served against forfeitures as a matter of law or against the adjudged reduction as a matter of command prerogative under Article 60, UCMJ. Additionally, it was unclear whether the CA complied with the sentence reassessment requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991). *Josey*, 58 M.J. at 108-09; *see also* UCMJ art. 60 (2002).

389. MCM, *supra* note 3, R.C.M. 810.

finement and between the two there is no "readily measurable equivalence."[399] The court concluded by holding "for the purposes of Article 63, [UCMJ and R.C.M. 810] a dishonorable discharge is more severe [than and in excess of] a bad-conduct discharge."[400]

As evident from the CAAF's decision in *Mitchell*,[401] discharges are different and when determining whether a rehearing sentence is "in excess of or more severe than" the original sentence, whether adjudged or approved, the court will compare discharges without consideration to the other components of the court-martial sentence such as forfeitures, reduction, confinement, or fine.[402] Stated differently, although a reasonable person might view a rehearing sentence to a dishonorable discharge and ten years confinement as less severe than a bad conduct discharge and sixty years, the *Mitchell* court disagrees.[403]

390. *Id.* Rule for Courts-Martial 810 states, in part:

> (d) Sentence limitations.
> (1) In general. Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening authority or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial" no sentence limitations apply if the original trial was invalid because a summary or special court-martial tried an offense involving a mandatory punishment or one otherwise considered capital.

Id. R.C.M. 810(d)(1). *See also* UCMJ art. 63. Article 63 states:

> Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

Id.

391. *Id.*

392. 58 M.J. 446 (2003).

393. *Id.*

394. *Id.* at 446-47.

395. *Id.* at 447.

396. *Id.*

397. United States v. Mitchell, 56 M.J. 936 (Army Ct. Crim. App. 2002).

398. *Mitchell*, 58 M.J. at 449.

399. *Id.* at 448 (citing United States v. Rosendahl, 53 M.J. 344 (2000); United States v. Josey, 58 M.J. 105 (2003)).

400. *Id.* at 449.

401. 58 M.J. 446 (2003); *see also* United States v. Josey, 58 M.J. 105 (2003).

402. *See, e.g.*, MCM, *supra* note 3, R.C.M. 1003.

403. *But see Mitchell*, 58 M.J. at 449 (Crawford, C.J., concurring). In her concurrence, Chief Justice Crawford states:

> The majority opinion sweeps a little too far, adopting a "discharge is different" rule that says Article 63, Uniform Code of Military Justice, 10 U.S.C. § 863 (2000), is violated any time an original sentence includes a bad-conduct discharge and a rehearing sentence includes a dishonorable discharge, "regardless of the overall sentence awarded at each sentence rehearing."

Id.

Conclusion

As should be apparent from the numerous cases discussed in this article, sentencing is a complex area of courts-martial practice with many pitfalls for trial practitioners. More importantly, the courts, both the CAAF as well as the service courts, are holding counsel accountable for their trial decisions and applying waiver in cases in which counsel should have objected yet remained silent. Government counsel should be creative in their sentencing cases, both in the evidence offered and the arguments made. Defense counsel, when something does not seem right, should object, object, and then, object again! They should make the trial counsel and judges, both at the trial and appellate level, earn their pay and make the difficult calls. Defense counsel should not throw the government and courts the "plain error" soft ball because of a failure to object. Silence is not a virtue when it comes to trial practice.

Recent Developments in Post-Trial: Failure to Demand Speedy Post-Trial Processing Equals Waiver of *Collazo* Relief for "Unreasonable" Post-Trial Delay

Major Jan E. Aldykiewicz
Professor, Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

"[P]ost-trial processing is not rocket science, and careful proof reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all concerned."[1]

Introduction

Unlike the 2001-2002 term of the Court of Appeals for the Armed Services (CAAF), which decided *United States v. Emminizer*[2] and *United States v. Tardif*,[3] the former addressing the proper processing of adjudged and automatic forfeitures and the latter differentiating between a service court's authority under Article 59, Uniform Code of Military Justice (UCMJ), and Article 66, UCMJ, to grant sentence relief for post-trial processing delay, this past term is best described as a relatively slow period in post-trial evolution. Both the service courts and the CAAF, however, continued to remain active in the post-trial arena, due in large part to inattention to detail by those responsible for post-trial processing. The most significant activity appears to be the Army court's decision to ratchet back its philosophy of granting *Collazo*[4] relief for dilatory post-trial processing, placing responsibility on the defense to demand speedy post-trial processing.

This article outlines the recent developments in post-trial activity, developments discussed under the following headings: the staff judge advocate's (SJA) recommendation, required contents and errors therein; service of the SJA's recommendation; new matter and the addendum to the SJA's recommendation; post-trial punishment; post-trial delay; the proper convening authority (CA); disqualification of the CA; post-trial assistance of counsel; and appellate court authority.

The SJA's Recommendation, Required Contents and Errors Therein—Rule for Courts-Martial (RCM) 1106(d)(3) and 1106(f)(6)[5]

Before taking action in a general court-martial (GCM) or a special court-martial (SPCM) in which the adjudged sentence includes a bad conduct discharge or confinement for one year, the CA's SJA is required to provide the CA with a written post-trial recommendation.[6] The SJA's recommendation (SJAR) must include the following:

> (A) The findings and sentence adjudged by the court-martial;
> (B) A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence;
> (C) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;
> (D) A statement of the nature and duration of any pretrial restraint;
> (E) If there is a pretrial agreement, a statement of any action the CA is obligated to take under the agreement or a statement of the reasons why the CA is not obligated to take specific action under the agreement; and
> (F) A specific recommendation as to the action to be taken by the CA on the sentence.[7]

In *United States v. Wellington*,[8] the SJAR stated, in part: "Prior Art. 15s: Field Grade Article 15 for underage drinking, assault consummated by a battery, and drunk and disorderly at

1. United States v. Suksdorf, 59 M.J. 544, 548 (C.G. Ct. Crim. App. 2003).
2. 56 M.J. 441 (2002).
3. 57 M.J. 219 (2002).
4. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).
5. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(3) and 1106(f)(6) (2002) [hereinafter MCM].
6. *Id.* R.C.M. 1106(a).
7. *Id.* R.C.M. 1106(d)(3)(A)-(F).

Travis Air Force Base. Punishment imposed on 24 Jul 98. Field Grade Article 15 for failure to obey lawful order. Punishment imposed on 14 Dec 98."[9] The SJAR also stated that the appellant was not subject to any pretrial restraint.[10] Both assertions were wrong; the appellant never received nonjudicial punishment and was restricted prior to trial, restriction the appellant argued at trial was tantamount to confinement.[11] Neither the appellant nor his defense counsel, after being served the SJAR,[12] mentioned the errors in their clemency submissions.[13] Their submissions did, however, renew the argument made at trial that the appellant's restriction was tantamount to confinement warranting sentence credit.[14] Despite the defense's allegation of an entitlement to *Mason*[15] credit, the SJA's addendum to the SJAR was silent regarding the appellant's restriction and failed to correct the errors in the SJAR.[16]

In reviewing whether the appellant was prejudiced by the defective SJAR, the CAAF looked to the waiver provision of RCM 1106(f)(6):[17] "Where, as in this case, the SJAR is served on the defense counsel and accused in accordance with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error."[18] Applying a plain error analysis, the court found that the errors were both "clear" and "obvious" and that the error prejudiced the appellant. The court noted that despite a service record lacking in any disciplinary action, the SJAR "portrayed [the appellant] as a mediocre soldier who had twice received punishment from a field grade officer."[19] The CAAF also found that the "[a]ppellant's 'best hope for sentence relief' was dashed by the inaccurate portrayal of his service record."[20] Finding plain error in the defective SJAR, the court affirmed the lower court's decision as to findings but set aside the sentence, remanding the case for a new SJAR and action.[21]

The next case involving a defective SJAR is *United States v. Scalo*,[22] a case in which the Army Court of Criminal Appeals (ACCA), applying waiver, found that the defect in the SJAR

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8. 58 M.J. 420 (2003). The appellant was convicted at a GCM of indecent assault, attempted rape, and attempted forcible sodomy and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge. *Id*. at 421.

9. *Id*. at 424.

10. *Id*.

11. *Id*.

12. *See* MCM, *supra* note 5, R.C.M. 1106(f)(1). Rule for Courts-Martial 1106(f)(1) states:

> *Service of recommendation on defense counsel and accused*. Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be attached to the record explaining why the accused was not personally served.

Id.

13. *Wellington*, 58 M.J. at 424.

14. *Id*.

15. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

16. *Wellington*, 58 M.J. at 424; *see* MCM, *supra* note 5, R.C.M. 1106(d)(4) (stating that when an allegation of error is made in the accused's clemency submissions, the SJAR or addendum thereto must note the error and whether corrective action is required; the SJAR or addendum need not provide an analysis of the error or rationale for the recommendation).

17. *See* MCM, *supra* note 5, R.C.M. 1106(f)(6). Rule for Courts-Martial 1106(f)(6) states: "*Waiver.* Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error." *Id*.

18. *Wellington*, 58 M.J. at 427.

19. *Id*.

20. *Id.* (quoting United States v. Jones, 36 M.J. 438, 439 (C.M.A. 1993)).

21. *Id.* at 427 (stating that in setting aside the sentence, the court noted it would not speculate as to what the convening authority would do had he been properly advised in the case).

22. 59 M.J. 646 (Army Ct. Crim. App. 2003).

was waived because of the defense's failure to comment on the error during post-trial processing of the case.

In *Scalo,*[23] the appellant's case was submitted "on its merits."[24] A footnote in the appellant's submission alleged that the SJAR was defective because it failed to properly advise the CA regarding pretrial restraint;[25] the appellant was restricted to Fort Stewart, Georgia for forty-four days before trial.[26]

In finding waiver, the Army court differentiated between two situations: first, cases in which error is alleged at either the trial level or appellate level; and second, cases in which no error is alleged and the case is submitted on its merit. In the first situation, the court will apply the plain error analysis enunciated in *United States v. Wheelus*[27] to determine if relief is warranted for a defective SJAR.[28] The appellant will have to demonstrate the following: error occurred regarding the preparation of the SJAR, either through a misstatement in or omission from the SJAR; the error was prejudicial; and what the appellant would do to resolve the error.[29] If the appellant meets these three requirements, he need only make a "'colorable showing of possible prejudice' to require a court of criminal appeals to either provide 'meaningful relief' or return the case for a new review and action."[30] In the second situation in which the SJAR is defective and error is not alleged at either the trial or appellate level, the court will apply a less appellant friendly plain error analysis[31] found in *United States v. Powell*.[32] The court will examine the record to determine the following: was there error; was the error plain and obvious; and does the error materially prejudice a substantial right of the appellant.[33] Applying *Powell's* "material prejudice" standard as opposed to *Wheelus'* "colorable showing of possible prejudice," the court found no material prejudice to a substantial right of the appellant and therefore, no plain error.[34] Absent plain error, any issue regarding the defective SJAR in the appellant's case was deemed waived.[35]

Wellington and *Scalo* are reminders to military justice practitioners that defects in the SJAR that are not noted prior to action will be reviewed under a plain error, waiver analysis. *Scalo* emphasizes the "raise or waive" point. Failure by Army trial defense or appellate defense counsel to raise defects in the SJAR will be scrutinized under the more rigid *Powell* analysis for plain error; a mere "colorable showing of possible prejudice"[36] will not result in a new SJAR and action. As a result, government counsel must understand RCM 1106(d)(3) and

23. *Id*. (stating an *en banc* decision with two judges concurring in the result, two judges dissenting, and one judge taking no part in the decision). The appellant was convicted at a GCM of four specifications of wrongful use of marijuana, three specifications of wrongful possession of marijuana, and two specifications of forgery and sentenced to forfeiture of all pay and allowances, fourteen months confinement, and a bad conduct discharge. *Id*. at 647.

24. *Id*. Cases submitted on the "merits" are sent to the appropriate service court without assignment of error by appellate counsel.

25. *Id*. Rule for Courts-Martial 1106(d)(3)(D) requires the post-trial recommendation to contain a "statement of the nature and duration of any pretrial restraint." MCM, *supra* note 5, R.C.M. 1106(d)(3)(D). Pretrial restraint is not limited to pretrial confinement.

> The failure to correctly note the pretrial restraint in the SJAR is an all-too-common error. It is clear from many of the records we review that there is a fundamental misunderstanding by some SJAs and counsel that R.C.M. 1006(d)(3)(D) requires the SJA to include in his or her recommendation concise information as to the nature and duration of any pretrial restraint. Rule for Courts-Martial 1106(d)(3)(D) does not mandate reporting only restraint that awards an appellant pretrial confinement credit and/or restraint that might rise to the level of requirement confinement credit analysis. Rather, the rule requires inclusion of all "moral or physical restraint on a person's liberty" imposed before and during disposition of charges.

Scalo, 59 M.J. at 648 n.4.

26. *Id*. at 647.

27. 49 M.J. 283 (1998).

28. *Scalo,* 59 M.J. at 650.

29. *Id*.

30. *Id*. (quoting *Wheelus,* 49 M.J. at 289).

31. *Id*. at 648-50. "Appellant and his detailed counsel at trial and on appeal, however, have elected not to object or claim error, and thus allege prejudice, as a result of the SJAR's misstatement of the pretrial restraint. Thus, the *Wheelus* analysis does not apply to the case at bar." *Id*. at 650.

32. 49 M.J. 460 (1998).

33. *Scalo,* 59 M.J. at 648-49.

34. *Id*. at 649-50.

35. *Id*.

36. *See* United States v. Wheelus, 49 M.J. 283 (1998).

comply with its requirements. Defense counsel must thoroughly read the SJAR and comment on any defects therein or risk waiving any allegation of error.

Service of the SJA's Recommendation—RCM 1106(f)[37]

The post-trial process requires service of the SJAR on both the accused and counsel, who then have ten days to submit written matters, commonly referred to as "clemency matters," for the CA's consideration before action.[38]

In *United States v. Lowe*,[39] the CAAF addressed the right to submit clemency matters prior to action by the CA. After trial, but prior to action, the appellant suffered a gunshot wound to his right arm which, according to his medical records, "[would] need very aggressive therapy to restore his motion."[40] The long-term prognosis for the appellant's recovery "[was] uncertain."[41] This information, however, was not included in the SJAR because the CA took action on the case before the appellant's defense counsel was served with the SJAR.[42]

On appeal,[43] the appellant asked the CAAF for a new review and action in his case.[44] The government argued that the appellant waived any objection he had to the government's failure to serve his counsel with the SJAR because he had over four and one-half months to advise the CA about his injury.[45] Additionally, the appellant could have asked the CA to recall and modify his earlier action based on post-action submissions by the appellant.[46] Finding both arguments to be without merit, the CAAF found error in the CA's action prior to service of the SJAR on the appellant's defense counsel as required by RCM 1106(f)(1). In reaching this decision, the court relied on the plain meaning of both RCM 1106(f)(1) and Article 60, UCMJ, which establish the requirement for service of the SJAR prior to action.

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37. MCM, *supra* note 5, R.C.M. 1106(f).

38. *See id.* R.C.M. 1105, 1106. Rule for Courts-Martial 1105(c)(1) states:

> *General and special courts-martial*. After a general or SPCM, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension.

Id. Rule for Courts-Martial 1106(f)(1) states:

> *Service of recommendation on defense counsel and accused*. Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be attached to the record explaining why the accused was not personally served.

Id. *See also* 10 U.S.C. § 860 (2000) (stating that prior to acting in a case requiring an SJAR (e.g., GCM or SPCM with an adjudged bad conduct discharge or confinement of one year), the SJAR will be served on the appellant who then has ten days to submit matters; the ten days can be extended by twenty additional days). *Id*.

39. 58 M.J. 261 (2003). The appellant was convicted at a SPCM of unauthorized absence and missing movement and sentenced to forfeiture of $650 pay per month for three months, ninety days confinement, and a bad conduct discharge. *Id*.

40. *Id*. at 262.

41. *Id*.

42. *Id*; *see also* MCM, *supra* note 5, R.C.M. 1106(f).

43. After the case was docketed with the Navy-Marine Corps Court of Criminal Appeals (NMCCA), but before any assignment of error, the appellant's defense counsel sought relief for the government's failure to serve the SJAR as required by RCM 1106(f). The defense counsel's motion was denied, the case was submitted for review without assignment of errors, and the NMCCA affirmed the findings and sentence in an unpublished opinion. United States v. Lowe, NMCM No. 200000956 (N-M. Ct. Crim. App. Aug. 30, 2001), *aff'd by* 58 M.J. 261, 262 (2003).

44. *Lowe*, 58 M.J. at 262.

45. *Id*. Although the opinion indicates the government argued the appellant had over four and one-half months to submit matters, the facts indicate that the appellant was shot on 21 January 2000 and the CA's action was dated 16 May 2000, giving the appellant less than four post-injury months to advise the CA about the nature of his injuries and his prognosis for recovery. *Id*. at 262-63.

46. *Id*. at 262; *see also* MCM, *supra* note 5, R.C.M. 1107(f)(2) (authorizing recall and modification of post-trial action before forwarding of the case for appellate review under Article 66, UCMJ).

> The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, anymore than the right to seek reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. "The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." [Citation omitted].[47]

The CAAF next looked to whether the appellant established some "colorable showing of possible prejudice" warranting relief in his case.[48] The court found prejudice in the denial of the appellant's opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided common sense guidance to military practitioners:

> Where there is a failure to comply with R.C.M. 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.[49]

As the *Lowe* court indicated, the issue is not whether an appellate court would have granted clemency; rather, "whether [the] Appellant had a fair opportunity to be heard on clemency before a convening authority, vested with discretion, acting in his case."[50]

New Matter and the Addendum to the SJAR—RCM 1106(f)(7)[51]

Once the SJA completes the SJAR and serves the accused and counsel, the government waits for the defense's clemency submissions.[52] Although not required,[53] most legal offices, after receiving the defense's submissions, will prepare an "addendum" to the SJAR.[54] If the addendum contains new matter, the government must serve the addendum on the accused and counsel for comment prior to action. Although undefined in the text of RCM 1106(f)(7), the discussion thereto defines new matter as: "[1] discussion of the effect of new decisions on issues in the case, [2] matter from outside the record of trial, and [3] issues not previously discussed."[55] These broad definitional categories of new matter, however, are often of little value to the practitioner in deciding whether the contents of an addendum constitute new matter. This issue was addressed by the Air Force court in *United States v. Gilbreath*.[56]

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47. *Lowe*, 58 M.J.*at* 263.

48. *Id*. (citing United States v. Chatman, 46 M.J. 321 (1997); United States v. Howard, 47 M.J. 104 (1997)).

49. *Id*. at 264.

50. *Id*. at 263-64.

51. MCM, *supra* note 5, R.C.M. 1106(f)(7). Rule for Court-Martial 1106(f)(7) states:

> *New matter in addendum to recommendation*. The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from the service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule.

Id. The Discussion to RCM 1106(f)(7) states, in part: "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed." MCM, *supra* note 5, R.C.M. 1106(f)(1) Discussion. Rule for Courts-Martial 1106(f)(1) allows for substitute service upon the accused's counsel if it is impracticable to serve the recommendation or addendum upon the accused. If substitute service is used, however, the record of trial will contain a statement explaining why the accused was not served. *See id.*

52. *See id.* R.C.M. 1105(b), 1106(f)(4). Rule for Courts-Martial 1105 addresses matters to be submitted by the appellant (e.g., accused) and RCM 1106 addresses matters submitted by the appellant's (e.g., accused's) counsel. Collectively, RCM 1105 and 1106 submissions from the defense (e.g., accused and counsel) are commonly referred to as the defense's clemency submissions.

53. *See id.* R.C.M. 1106(f)(7). An addendum is only required in those cases in which the defense alleges legal error in the proceedings, requiring comment by the staff judge advocate or legal officer. *See id.* R.C.M. 1106(d)(4).

54. *See id.* R.C.M. 1106(f)(7). An addendum is an excellent tool for memorializing those matters submitted by the defense, in their RCM 1105 and 1106 submissions, that the convening authority considered before action.

55. *See id.* R.C.M. 1106(f)(7). "'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." *Id*. Discussion.

56. 58 M.J. 661 (A.F. Ct. Crim. App. 2003).

In *Gilbreath*, a case before the Air Force court for a second time, the SJA prepared the required SJAR and properly served the appellant's defense counsel.[57] The appellant was not served because the SJA's office was unable to locate her.[58] The defense counsel, unable to locate her client, prepared a request for clemency and submitted it along with the appellant's original clemency request.[59] After receiving the defense's clemency submissions, the SJA prepared an addendum to the SJAR and submitted it to the CA without serving it on either the appellant's counsel or appellant. The addendum stated, in part:

> The defense counsel received a copy of the second SJA's recommendation on 7 Oct 02. In her 17 Oct 02 request, defense counsel, among other things, states that AB Gilbreath deserves clemency because she was a 19 year old girl at the time the offense took place, she had no prior disciplinary record, and she pled guilty and took responsibility for her actions without a pretrial agreement. *We attempted to serve AB Gilbreath a copy of the new SJA's Recommendation, but could not locate her.* In AB Gilbreath's original clemency request letter, however, she states, among other things, that she would like to have her BCD upgraded to a general discharge so that she can get a decent job and pay for college.[60]

After considering the SJAR, the addendum, and the defense's clemency matters, the CA approved the adjudged findings and sentence.[61]

On appeal, the Air Force court noted that the government failed to comply with RCM 1106(f)(1) because it failed to serve the appellant with the SJAR and failed to provide a statement of impracticability in the record of trial supporting substitute service on the appellant's counsel.[62] The court next noted that "the SJA's statement that they attempted to serve a copy of the SJAR on the appellant but couldn't locate her was new matter because it was information from outside the record of trial and it injected an issue not previously discussed."[63] The appellant and counsel, therefore, were entitled to service of the addendum along with a ten-day period to respond. Finding error, the court tested the error for prejudice by applying *United States v. Chatman*,[64] whereby an appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."[65]

In *Gilbreath*, neither the appellant nor her appellate defense counsel alleged what "would have been submitted to 'deny, counter, or explain' the new matter."[66] The court, however, focused on the possible adverse effect of the new matter on the CA's decision to grant clemency, noting that the inability to locate the appellant could be perceived by the CA as evidence of the appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave.[67] Additionally, the CA could view the new matter as an indication of how little the appellant cared about her case because she failed to provide a proper mailing address for issues associated with her case.[68] In light of the potential adverse impact of the new matter, the court found prejudice and ordered a new SJAR and action in the case.[69]

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57. *Id*. The appellant was convicted at a GCM of wrongful use of cocaine and sentenced to reduction to E-1 and a bad conduct discharge. *Id*. On the first appeal to the AFCCA, the service court affirmed the findings and sentence and the CAAF certified two issues for review. The first was whether it was error for the staff judge advocate not to serve the defense with an addendum that recommended the convening authority approve the adjudged jury sentence, when, in fact, the appellant was tried by a military judge alone. Finding prejudicial error in the failure to serve an addendum containing new matter, the CAAF set aside the CA's action and remanded the case for a new recommendation and action. *See* United States v. Gilbreath, 57 M.J. 57 (2002).

58. *Gilbreath*, 58 M.J. at 662.

59. *Id*. at 661, 662.

60. *Id*. at 662.

61. *Id*.

62. *Id*. at 663; *see also* MCM, *supra* note 5, R.C.M. 1106(f)(1).

63. *Gilbreath*, 58 M.J. at 664.

64. 46 M.J. 321 (1997) (establishing the standard for relief in cases in which new matter is inserted in the addendum).

65. *Gilbreath*, 58 M.J. at 664 (quoting United States v. Chatman, 46 M.J. 321, 323 (1997)).

66. *Id*.

67. *Id*.

68. *Id*.

69. *Id*. at 665.

New matter is not prohibited and *Gilbreath*[70] does not stand for the proposition of avoiding new matter whenever possible. Rather, serve the accused and counsel with the addendum and wait ten days before acting on the case if new matter is inserted in the addendum or when in doubt about whether something constitutes new matter. If unable to serve the accused, comply with the substitute service provisions of RCM 1106(f)(1). All the government needed to do in *Gilbreath* was omit the "unable to locate" language from the addendum and provide a statement in the record of trial, dated after the action, explaining why the appellant was not personally served. Alternatively, the government could have inserted a statement of impracticability in the SJAR, affording the appellant's defense counsel the opportunity to comment on the statement prior to action. Instead, the government inserted its statement of impracticability in the addendum, resulting in a finding of prejudice to the appellant because the government highlighted for the CA that they could not find the appellant to serve her with the post-trial documents in her case.[71]

Post-Trial Punishment

Another recent development in post-trial processing occurred in *United States v. Brennan*,[72] a case involving an allegation of post-trial punishment and the standard by which such an allegation is reviewed. *Brennan* also highlights for military justice managers, SJAs, and convening authorities the value of specifying, in cases in which clemency is granted, the specific reason or reasons for granting clemency.

During post-trial processing of the appellant's case, the appellant's counsel requested clemency based on seven separate grounds, one of which was abusive post-trial confinement.[73] The appellant alleged that while confined at the United States Army Confinement Facility, Europe, (USACFE), she was subjected to cruel and unusual punishment, to wit: repeated sexual harassment and sexual assaults by an E-6 cadre member, in violation of the Eighth Amendment and Article 55, UCMJ.[74]

In evaluating the appellant's Eighth Amendment claim, the CAAF noted that the test for post-trial cruel and unusual punishment has both an objective component, "whether there is a sufficiently serious act or omission that has produced a denial of necessities," and a subjective component, "whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety."[75] Additionally, "to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain."[76] The government did not dispute the appellant's factual assertions; rather, the government argued that the appellant failed to establish any harm, a prerequisite to a finding of an Eighth Amendment violation.[77] The CAAF disagreed, finding that under the facts of the appellant's case, it was clear that the appellant suffered harm at the hands of the cadre member.[78] Finally, the government argued that relief was not warranted in the appellant's case because the CA granted clemency, approving only nine months confinement instead of twelve months under the pretrial agreement.[79] The court disagreed because the reason the CA granted clemency

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70. *Id*. at 661.

71. Stated another way, had the government inserted the addendum language in question, to wit: "*We attempted to serve AB Gilbreath a copy of the new SJA's Recommendation, but could not locate her.*" in a statement of impracticability inserted in the record of trial after action, in compliance with RCM 1106(f)(1), as opposed to placing it in the addendum, there would be no "new matter" in the post-trial process and the case would not have been remanded for a third SJAR and action.

72. 58 M.J. 351 (2003). The appellant was convicted at a GCM of three specifications of use, possession, and distribution of marijuana and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for fifteen months, and a bad conduct discharge. The pretrial agreement in the case limited the period of confinement to twelve months. *Id*. at 352.

73. *Id*. at 355.

74. *Id*. at 352-53; *see* U.S. CONST. amend VIII; UCMJ art. 55 (2002).

75. *Brennan*, 58 M.J. at 353.

76. *Id*. at 354.

77. *Id*.

78. *Id*.

> The present case, however, involves more than occasional unwelcome advances and incidental contact. Virtually every day over a two-month period, the Guard Commander abused his position as a prison official to mistreat Appellant, a prisoner subject to his command and control. At one point, using graphic language, he brutally threatened her with anal sodomy. On another occasion, he isolated her in a locked room, trapped her in a corner, and physically assaulted her. This case involves a Guard Commander whose raw exercise of power over a prisoner transformed her lawful period of confinement into a different form of punishment by imposing repeated physical and verbal abuse over a two-month period. Under these circumstances, expert testimony is not needed to demonstrate that the harm inflicted upon Appellant was sufficiently injurious to establish that she was subjected to punishment in violation of Article 55 by the Guard Commander.

Id.

was unclear. Since the appellant's counsel raised seven separate bases for relief in the clemency submissions and because the SJAR and addendum were silent regarding the allegation of cruel and unusual punishment, the court was unable to determine whether the CA's three-month reduction in confinement was based on this allegation of error.[80] The court, therefore, affirmed the lower court's decision as to findings, set aside the decision as to sentence, and remanded the case to the service court with the option of either granting relief at their level or remanding the case back to the CA for remedial action.[81]

Brennan defines the standard by which appellate courts will review allegations of cruel and unusual punishment. Post-trial punishment and any resulting harm must be thoroughly established in defense submissions. Punishment, without harm, does not require relief. The client should submit an affidavit detailing the punishment and, if possible, corroborating statements from third parties should accompany the defense's submissions. If an investigation was conducted, the investigating officer's report should also be included with the defense's submissions.[82] If relief is granted for post-trial punishment, or for any other basis raised in the defense's submissions, the CA should document his decision, connecting the relief to the allegation(s) raised by the defense.[83]

Post-Trial Delay

United States v. Tardif[84] clarified the service courts' authority under Article 66(c), UCMJ, to grant relief for dilatory post-trial processing.[85] Post-*Tardif* decisions highlight the different approaches taken by the respective services in handling post-trial delay. The Navy-Marine Corps[86] and the Air Force[87] service courts continue to require prejudice before granting relief. The Army[88] and Coast Guard[89] service courts apply a more liberal standard, granting sentence relief absent any showing of

79. *Id*. at 355. The government argued that the issue of cruel and unusual punishment was "adequately addressed because the convening authority reduced [the appellant's] confinement from [12 months to nine months]." *Id*.

80. *Id*. "Under these circumstances, it would be inappropriate to conclude that the convening authority took corrective action to remedy Appellant's mistreatment in post-trial confinement." *Id*.

81. *Id*.

> Because the case in its present posture involves correction of a legal error rather than the provision of clemency, corrective action may be taken by the Court of Criminal Appeals. The Court of Criminal Appeals has discretion either to take corrective action with respect to the Article 55 violation, or remand the case for such action by a convening authority.

Id.

82. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

83. Before taking action, the convening authority must consider the result of trial, the recommendation of the staff judge advocate or legal officer, if applicable, and any matters submitted by the accused under RCM 1105 or 1106. The record of trial should be presented to the convening authority for his or her consideration, but is not required to be considered. *See* MCM, *supra* note 5, R.C.M. 1107(b)(3). The convening authority, in a document other than the formal action, should memorialize what he or she considered and why clemency, if any, was granted. Some jurisdictions have the convening authority sign a decision memorandum as well as the action. The action document should be a simple, one page document entitled ACTION with the formal action mirroring the action format contained in Appendix 16 of the *MCM*. *See id.* app. 16. For example, in *Brennan* the staff judge advocate and convening authority could have connected the relief granted to the allegation raised in the following manner:

> Option 1:
>
> Staff Judge Advocate's Addendum–The Defense alleges illegal post-trial punishment in violation of Article 55, UCMJ and the 8th Amendment. I disagree with the allegation therefore no corrective action is required. However, to moot any possible issue surrounding the accused's treatment while confined at Mannheim, I recommend you reduce her period of confinement by three months.
>
> Convening Authority's Decision–After having considered the defense's submissions, the post-trial recommendation dated [insert date], the report of result of trial, and the record of trial, the recommendation of the staff judge advocate is approved. Only so much of the sentence as provides for reduction to E-1, forfeiture of all pay and allowances, confinement for nine months, and a bad conduct discharge is approved. Were it not for the allegation of illegal post-trial punishment, I would have approved twelve months confinement in the accused's case.
>
> Option 2:
>
> Staff Judge Advocate's Addendum–The Defense alleges illegal post-trial punishment in violation of Article 55, UCMJ and the 8th Amendment. I agree with the allegation and corrective action is required. I recommend that you reduce her period of confinement by three months.
>
> Convening Authority's Decision–After having considered the defense's submissions, the post-trial recommendation dated [insert date], the report of result of trial, and the record of trial, the recommendation of the staff judge advocate is approved. Only so much of the sentence as provides for reduction to E-1, forfeiture of all pay and allowances, confinement for nine months, and a bad conduct discharge is approved. Were it not for the illegal post-trial punishment, I would have approved twelve months confinement in the accused's case.

84. 57 M.J. 219 (2002).

prejudice. Despite the liberal approach taken by two of the four service courts, the Army court has, in recent opinions, indicated it would hold the appellant and his trial defense counsel to a higher standard in evaluating claims of dilatory post-trial processing.[90]

In *United States v. Khamsouk*,[91] the appellant argued that his discharge should be disapproved because of the unreasonable twenty-month delay in the post-trial processing of his case.[92] The Navy-Marine Court of Criminal Appeals (NMCCA) disagreed, finding that there was a "reasonable, although not entirely satisfactory explanation for the delay in the CA's [convening authority's] action."[93] Over half of the twenty-month delay was attributed to the military judge who took thirteen months to authenticate the record of trial.[94] The court also addressed the lack of effort on the defense's part to demand speedy post-trial processing until after receiving the SJAR, noting that the defense counsel could have sought a post-trial 39(a) session to demand speedy post-trial processing since the military judge still controlled the case.[95] Considering all the facts and circumstances, the NMCCA found that the post-trial processing was not unreasonable and denied the appellant's request for relief.[96]

In *Wallace*,[97] the second of the NMCCA post-trial delay cases, the appellant alleged he was entitled to relief because it took the government 290 days to act in his guilty plea case.[98] The appellant, however, failed to cite any prejudice resulting from the delay. Again, the NMCCA declined to exercise its broad Article 66(c), UCMJ, power to grant relief, noting that

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85. *Id.* (holding that the service courts have authority under Article 66(c), UCMJ, to grant sentence relief for unreasonable post-trial delay absent any prejudice to an appellant resulting from the delay).

86. *See, e.g.*, United States v. Dezotell, 58 M.J. 517 (N-M. Ct. Crim. App. 2003) (stating that relief denied absent prejudice in a case in which government took nearly fourteen months to process the appellant's case through action); United States v. Khamsouk, 58 M.J. 560 (N-M. Ct. Crim. App. 2003); United States v. Wallace, 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

87. *See, e.g.*, United States v. Bigelow, 55 M.J. 531 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 64 (2002) (discussing the absence of prejudice to the appellant from the post-trial delay). As of the date of this article, there were no published post-*Tardif* Air Force opinions addressing post-trial delay. Several unpublished opinions existed. *See, e.g.*, United States v. Josey, 2004 CCA LEXIS 80, ACM 33745 (A.F. Ct. Crim. App., Mar. 23, 2004) (unpublished); United States v. Wolfer, 2003 CCA LEXIS 154, ACM 35380 (A.F. Ct. Crim. App. 2003 June 6, 2003) (unpublished); United States v. Zinn, 2003 CCA LEXIS 35, ACM 34434 (A.F. Ct. Crim. App. 2003, Jan. 22, 2003) (unpublished).

88. *See, e.g.*, United States v. Harms, 58 M.J. 515 (Army Ct. Crim. App. 2003); United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003).

89. *See, e.g.*, United States v. Tardif, 58 M.J. 714 (C.G. Ct. Crim. App. 2003).

90. *See* United States v. Bodkins, 59 M.J. 634 (Army Ct. Crim. App. 2004); s*ee also* United States v. Garman, 59 M.J. 677 (Army Ct. Crim. App. 2004).

91. 58 M.J. 560 (N-M. Ct. Crim. App. 2003). The appellant was convicted at a GCM of fraudulent enlistment, forgery, five specifications of larceny, and sixteen specifications of unauthorized use of another's credit card and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for five years, a bad conduct discharge, and a $2,500 fine. *Id.* at 561.

92. *Id*.

93. *Id*. at 562.

94. *Id*. In addressing the thirteen-month delay, the court noted:

> While this delay is not attributable to the appellant, it is nonetheless clear that responsibility for authentication lies solely with the independent military judge and not with the trial counsel, staff judge advocate, or CA. In our previous decision, we did not find it necessary to hold that the Government was not responsible for delay by the military judge. Khamsouk, 54 M.J. at 748 n.6. Nonetheless, the fact that the military judge held the record for about thirteen months [out of twenty months] does serve as a reasonable explanation for why the CA could not act in a more timely fashion.

Id. *But see* United States v. Garman, 59 M.J. 677 (Army Ct. Crim. App. 2004) (refusing to treat the time it took the military judge to authenticate the record as a separate category of time in evaluating post-trial processing delay; military judge's time treated as government time).

95. *Khamsouk*, 58 M.J. at 562 (citing United States v. Tardif, 57 M.J. 219, 225 (2002)).

96. *Id.*

97. United States v. Wallace, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). The CAAF granted review of this case to address the post-trial delay issue. On 30 August 2002, it remanded the record for reconsideration. The appellant was convicted at a GCM of unpremeditated murder, kidnapping and obstruction of justice and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for life without the possibility of parole, and a dishonorable discharge. *Id*. at 761. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged and suspended all confinement in excess of thirty years for the period of confinement plus twelve months. *Id*.

98. *Id*. at 774. The appellant requested that the service court reduce the period of suspension from twelve years to five years. *Id*.

"relief pursuant to Article 66(c), UCMJ [for post-trial delay] should only be granted under the most extraordinary of circumstances."[99] Of significance to trial practitioners was the court's focus on the appellant's silence during the post-trial processing of his case:

> [N]either Appellant nor trial defense counsel raised the issue of delay with the military judge or the SJA [staff judge advocate] or the CA [convening authority] during the entire post-trial processing period. Appellant raises it for the first time on appeal. . . . Appellant's lengthy silence is strong evidence that he suffered no harm and that this is not an appropriate case for this Court to exercise its Article 66(c), UCMJ authority.[100]

In *United States v. Tardif*,[101] the government took one-year to process the appellant's record from sentencing to dispatch to the appellate court. On appeal, the Coast Guard court noted:

> Although appellant did not suffer individualized prejudice, we feel relief may be granted to an appellant when post-trial delay is unreasonable and unexplained. In many cases, unexplained post-trial delay reduces an appellant's opportunity to obtain clemency from a convening authority or to receive meaningful relief if errors are found on appeal. It may also create a perception of unfairness within the military justice system.[102]

Finding unreasonable and unexplained delay, the court reduced the appellant's confinement from twenty-four months to nineteen months.[103] The court was unwilling, however, to mitigate the appellant's dishonorable discharge to a bad-conduct discharge as he requested.[104]

The next two cases in the area of post-trial delay are *United States v. Bodkins*[105] and *United States v. Garman*,[106] both Army court opinions highlighting the defense counsel's role in the pursuit of timely post-trial processing.

In *Bodkins*, a case submitted on the merits, the court noted the following regarding the post-trial processing of the appellant's case: the seventy-four-page record of trial was authenticated 165 days after trial; the SJAR was signed on day 173; the CA acted on the case on day 412; and the appellate court received the record of trial 475 days after sentencing.[107] Despite acknowledging its authority under Article 66(c), UCMJ, to grant sentence relief absent a showing of "actual or specific prejudice"[108] and a finding of "unreasonably slow"[109] post-trial processing, the court declined to grant sentence relief holding that the trial defense counsel and appellate counsel, respectively, waived the issue by failing to demand speedy post-trial processing or relief on appeal.[110] In denying the appellant relief, the court provided simple guidance to trial and

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99. *Id*. at 775.

100. *Id*.

101. 58 M.J. 714 (C.G. Ct. Crim. App. 2003). The CAAF granted review of this case to address the post-trial delay issue. On 30 August 2002, it remanded the record for reconsideration. The appellant was convicted of absence without leave and two specifications of assault on a child under the age of sixteen and sentenced to reduction to E-1, forfeiture of all pay and allowances, three years confinement and a dishonorable discharge; the CA only approved two years of confinement. *Id*.

102. *Id*. at 715.

103. *Id*.

104. *Id*.

105. 59 M.J. 634 (Army Ct. Crim. App. 2003). The appellant was convicted at a SPCM of two specifications of AWOL and sentenced to reduction to E-1, forfeiture of $695 pay per month for two months, confinement for two months, and a bad conduct discharge. *Id*.

106. 59 M.J. 677 (Army Ct. Crim. App. 2003). The appellant was convicted at a SPCM of wrongful use of methamphetamine and two specifications of wrongful distribution of methamphetamine and sentenced to reduction to E-1, "'forfeiture of two-thirds monthly pay,'" confinement for two months, and a bad conduct discharge. *Id.* at 677-78. The forfeitures in the appellant's case were stated as follows: "forfeiture of 'two-thirds monthly pay, which appears to be $737 per month a[t] the grade of E1, during [appellant's] term of confinement.'" *Id.* Because the announced forfeitures failed to comply with RCM 1003(b)(2) requiring partial forfeitures to be stated in whole dollar amounts per month, the adjudged forfeitures were deemed to be ambiguous and treated as forfeiture of $737 pay for one month. *Id*. at 683; s*ee also* MCM, *supra* note 5, R.C.M. 1003(b)(2).

107. *Bodkins*, 59 M.J. at 635.

108. *Id*. at 636; *see also* UCMJ art. 66(c) (2002).

109. *Bodkins*, 59 M.J. at 636. The court specifically focused on the unreasonable delay between trial and initial action and the unreasonable delay between action and dispatch of the record of trial to the ACCA. *Id*.

110. *Id*. at 637.

appellate defense counsel: demand speedy post-trial processing at the trial level and raise the issue on appeal or risk waiver.[111]

In *Garman*, the appellant alleged he was entitled to relief because of "unreasonable delay in the post-trial processing of his case."[112] In evaluating the post-trial processing of the appellant's case, the court noted that action approving the adjudged sentence occurred 329 days after sentencing.[113] Of the 329 days, eighty-one days were attributable to the defense. More importantly, the first time the defense commented on the post-trial delay was in its RCM 1105 and 1106 submissions, submitted on day 324.[114]

In denying the appellant's claim for post-trial relief, the court, applying a totality of the circumstances approach, focused on five reasons: (1) trial defense counsel's "dilatory" objection to the post-trial processing on day 324, "well after" appellant's release from confinement; (2) after defense counsel objected, the CA acted on the case within five days; (3) the unexplained time attributable to the government did not exceed 248 days;[115] (4) the only error in the post-trial processing was the post-trial delay itself; and (5) the appellant did not allege or suffer any "real harm or legal prejudice due to the slow post-trial processing of his case."[116]

The *Garman* court reminded counsel that when applying a totality of circumstances approach, the court will look to two distinct periods: the time between the close of trial and action and the time from action to dispatch of the record to the appellate authority.[117] In evaluating whether there was a lack of diligence in the processing of a case, the court will continue to examine such factors as: the size of the record of trial, the number of post-trial errors in the case, the number and length of post-trial defense delays, the "'post-trial absence or mental illness of the [appellant]," the military justice section's workload and real-world operational requirements on the Office of the SJA.[118]

Finally, the court concluded its opinion by providing guidance similar to that provided in *Bodkins*; defense counsel should demand speedy post-trial processing in a timely manner or risk waiver of the issues or a finding of no relief warranted. Commenting on post-trial delay for the first time at action will not go unnoticed. The *Garman* court held, "[i]t was appellant's complete lack of effort to seek expeditious processing for 324 days that was the most critical factor in our resolution of this issue."[119]

The final post-trial delay case is the CAAF's decision in *United States v. Chisholm*.[120]

Last term, the Army Court of Criminal Appeals decided *Chisholm*,[121] a post-trial delay case in which the appellant complained of "dilatory post-trial processing."[122] The court agreed finding that a "sixteen-month delay from trial to action [in a

111. *Id.*

> In the absence of evidence to the contrary, and assuming the competency of trial and appellate defense counsel [footnote omitted], we find that appellant and his counsel were aware of the issue of dilatory post-trial processing. We have published ten opinions of the court and thirty-two memorandum opinions [footnote omitted] discussing this issue. Further, this topic has been emphasized at periodic conferences and training seminars at The Judge Advocate General's Legal Center and School. Accordingly, we conclude that trial and appellate counsel effectively waived any right to claim a reduction in appellant's sentence resulting from dilatory post-trial processing by failing to make a timely objection.

Id.

112. United States v. Garman, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003).

113. *Id*.

114. *Id*.

115. *Id*. Unlike the Navy-Marine court, the Army court refused to segregate the military judge's time into its own, non-government category for post-trial processing.

> The Government urges us to deduct the military judge's processing time, fifty days, from the overall post-trial processing time in appellant's case. That is, they urge us to deduct the time period from the date the ROT [record of trial] was mailed to the military judge to the date the military judge signed the authentication page. We disagree with this purely mathematical approach. The period of time for preparation of the ROT is attributable to the government when dilatory post-trial processing.

Compare id. at 679, *with* United States v. Khamsouk, 58 M.J. 560, 562 (N-M. Ct. Crim. App. 2003).

116. *Garman*, 59 M.J. at 678.

117. *Id*. at 681.

118. *Id*. at 682 (quoting United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)).

119. *Id.*

120. 59 M.J. 151 (2003).

case with an 849-page record of trial] was unexplained and excessive."[123] In addressing the issue of delay, the service court "emphasize[d] the responsibilities of the military judge in the timely preparation and authentication of the record of trial."[124] After discussing the military judge's oversight responsibilities regarding preparation of the record of trial,[125] the court suggested several "remedial actions" available to a military judge to ensure timely preparation of the record of trial:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.[126]

Thereafter, The Army Judge Advocate General certified two issues for review by the CAAF:

> I. Whether the United States Army Court of Criminal Appeals' opinion in *United States v. Chisholm*, Army No. 9900240 (Army Ct. Crim. App. January 24, 2003) improperly vested military trial judges with power to issue interlocutory orders and authority to adjudicate and remedy post-trial processing delay claims?
>
> II. Whether the United States Army Court of Criminal Appeals' decision concerning the role of the military judge in adjudicating and remedying post-trial processing delay claims constitutes an advisory opinion?[127]

In a Per Curiam decision, the CAAF first addressed Issue II, holding that the lower court's decision was not an impermissible advisory opinion, which was a proper holding since there was a valid issue before the Army court: whether the appellant's case warranted sentence relief under Article 66(c), UCMJ, for dilatory post-trial processing.[128] The CAAF, however, found the first certified issue premature for review.[129] Despite finding that Issue I was not ripe for review, the court perhaps tipped its hand when it noted that "'[t]he parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta.'"[130]

Trial counsel faced with a *Chisholm*-like remedial measure[131] affecting a lawfully adjudged finding or sentence should first argue that the service court's *Chisholm*[132] decision, as it relates to the authority of the military judge, is nothing more

121. 58 M.J. 733 (Army Ct. Crim. App. 2003). The appellant was convicted at a GCM of conspiracy to commit rape, conspiracy to obstruct justice, false official statement, and rape and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for four years, and a bad conduct discharge.

122. *Id*. at 734.

123. *Id*. at 739.

124. *Id*. at 734.

125. *See* UCMJ art. 38(a) (2002); MCM, *supra* note 5, R.C.M. 1103(b)(1)(A).

126. *Chisholm*, 58 M.J. at 738.

127. United States v. Chisholm, 59 M.J. 151, 152 (2003); *see also* UCMJ art. 67(a)(2).

128. *Chisholm*, 59 M.J. at 152. In the second paragraph of the service court opinion, after stating what the appellant was convicted of, the Army court addressed the post-trial delay.

> In his only assignment of error, appellant asserts that he is entitled to relief under *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), for dilatory post-trial processing. We agree. We also write to emphasize the responsibilities of the military judge in timely preparation and authentication of the record of trial.

Chisholm, 58 M.J. at 734. Everything after "we agree," however, is advisory in nature and dicta.

129. *Chisholm*, 59 M.J. at 153 (stating that neither party to the litigation challenged any action by the presiding military judge nor did any party had any "personal stake in the outcome" of any decision rendered by the court on the limits of a military judge's post-trial authority).

130. *Id.* at 152 (quoting United States v. Campbell, 52 M.J. 386, 387 (2000)).

131. Examples of remedial measures include the following: dismissal of a charge or specification; reduction in sentence; or a court order releasing a lawfully confined post-trial prisoner from confinement.

132. *See Chisholm*, 59 M.J. at 151.

than non-binding dicta. If the military judge disagrees, the trial counsel should ask the military judge to stay his or her order so that the government can appeal the order. Disobeying and ignoring the order are not options.[133]

Demands for post-trial relief based on "dilatory post-trial processing" are here to stay. The Navy-Marine Corps and Air Force continue to examine allegations of undue delay for prejudice and, absent prejudice, continue to deny relief. The Army and Coast Guard courts grant relief without any showing of prejudice; however, it now appears the Army will examine the actions of the appellant and his counsel in deciding whether to grant relief, action consistent with the Navy-Marine court.[134] Defense counsel should demand speedy post-trial processing as soon as a reasonable amount of time has elapsed for the preparation of the record of trial. A good court reporter can estimate the size of a record of trial in any given case based on the number of tapes used. Defense counsel should ask the reporter to estimate the size of the record, apply a thirty to forty pages per duty day standard for transcription and calculate the number of duty days it should take the government to transcribe the case. Once a tentative delivery date is established, defense counsel should demand speedy post-trial processing after that date, advising the government on how the defense arrived at its delivery date. A more proactive approach is to demand speedy post-trial processing in a documented format shortly after trial even if the tentative delivery date is several months away. Renew the demand periodically after the delivery date passes. Government counsel, especially chiefs of military justice, should document the post-trial processing of old cases, the reasons for delay, and consider attaching an affidavit to the SJAR documenting why the case took so long to process.

The Proper Convening Authority—RCM 1107[135]

Rule for Courts-Martial 1107(a) provides clear guidance on who can take action in a case: the CA who referred the case or, in cases of impracticability, another officer exercising GCM jurisdiction.[136] Notwithstanding this clear guidance, the Army court had the opportunity to address this issue in *United States v. Newlove*.[137]

In *Newlove*, the appellant, a 10th Mountain Division (Light) (the Division) Soldier, was scheduled to deploy with his brigade to Kosovo.[138] In an effort to avoid the movement, the appellant solicited two other Soldiers to assault him. At the hospital, the Soldiers who assaulted the appellant told civilian law enforcement officials that the appellant was "robbed and beaten by unknown assailants."[139] Eventually the appellant was charged and convicted of attempting to miss movement, simple disorder and neglect, and solicitation.[140] At the time the charges were referred, the Division was deployed, resulting in the creation of 10th Mountain Division (Light) (Rear) (the Division Rear). The Division Rear commander referred the appellant's case to a GCM. The Division re-deployed to Fort Drum, however, before the Division Rear commander took action on the case. Upon re-deployment, the Division commander "'resumed command of Fort Drum, NY, and the 10th Mountain Division (Light Infantry)' and 'adopt[ed] all responsibilities for all courts-martial cases previously referred.'"[141] Unfortunately, the commander of the Division Rear never transferred the appellant's case from the Division Rear to the Division in accordance with RCM 1107.[142] Absent a proper transfer, the commander who refers a case, or a successor commander, "must" act on the case.[143] Since the appellant's case failed to contain any documentation either transferring his case from the Division Rear commander to the Division commander, or documenting the Division commander as a "successor in command," the action was set aside and the case remanded for action by someone "shown to be properly authorized to act on the record."[144]

Newlove[145] stands for a relatively simple proposition: the CA who convenes a court-martial must act on the court-martial unless it is impracticable to do so. If action by the original CA

133. *See* United States v. Castillo, 59 M.J. 600, 603 (N-M. Ct. Crim. App. 2003).

134. *See, e.g.*, United States v. Wallace, 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

135. MCM, *supra* note 5, R.C.M. 1107.

136. *See id.* Rule for Courts-Martial 1107(a) states:

> *Who may take action*. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

Id. See also UCMJ art. 64 (2002).

137. 59 M.J. 540 (Army Ct. Crim. App. 2003).

138. *Id.*

139. *Id.* at 541.

140. *Id.* at 540. The appellant was sentence to reduction to E-1, confinement for ten months and eight days, and a bad conduct discharge. *Id.*

is impracticable, the government must comply with the transfer requirements of RCM 1107 and Article 60, UCMJ.[146]

Disqualification of the CA

The last section addressed situations in which units deploy, rear commands are established, and a CA other than the one who convened the court takes action in the case. This section addresses situations involving proper convening authorities who, through their actions, may be disqualified from taking action in a case. The two cases that will be discussed are: *United States v. Gudmundson*[147] and *United States v. Davis*.[148]

In *Gudmundson*, the appellant argued that the CA, Brigadier General (BG) Fletcher, was disqualified from acting on his case because he testified in the appellant's case on a controverted matter.[149] Specifically, the CA testified as a government witness in response to a defense motion to suppress the results of the urinalysis that formed the basis of the appellant's wrongful use charge.[150] The defense's suppression motion alleged that "Operation Nighthawk," an inspection authorized by BG Fletcher, was merely a subterfuge for an illegal search.[151] After hearing from the CA and considering four uncontroverted stipulations of expected testimony from members of the command, the military judge denied the motion.[152] The post-trial submissions by the appellant were silent regarding the inspection and the military judge's ruling on the motion.[153] Similarly, the submissions were silent regarding disqualification of the convening authority to act post-trial.[154] Instead, the submissions reminded the CA that he previously testified in the appellant's court-martial.[155]

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141. *Id*. at 541. A chronology of the pre- and post-trial processing of the appellant's case follows:

> 1. 12 April 2002–BG T.R.G., Commander, 10th Mtn (L)(R) refers the appellant's case to a GCM;
> 2. 29 May 2002–Appellant's trial held;
> 3. 29 July 2002–The staff judge advocate (SJA), 10th Mtn (L)(R) [MAJ J.H.R.II] prepares the Rule for Courts-Martial (R.C.M.) 1106 recommendation (SJAR) for BG T.R.G.;
> 4. 9 August 2002–MG F.L.H. resumes command of Fort Drum, NY, and 10th Mountain Division (Light Infantry) and assumes responsibility for all previously referred courts-martial cases;
> 5. 13 September 2002–The SJA, 10th Mtn (L) [LTC C.N.P.] prepared an addendum to the previously prepared SJAR in the appellant's case, an addendum prepared for the Commander, 10th Mtn (L), MG F.L.H.; and
> 6. 13 September 2002–The Commander, 10th Mtn (L), MG F.L.H. acted on the appellant's case.

Id.

142. *Id*. at 542. Rule for Courts-Martial 1107, *Army Regulation 27-10*, and Article 60, UCMJ, envision situations when it might be impracticable for one convening authority to act in a case, requiring transfer of the case to another GCM convening authority; however, if transfer occurs, the "memorandum, or other document, forwarding the case will contain a statement of the reasons why the convening authority who referred the case is unable to act on the record. A copy of the forwarding document will be included in the ROT [record of trial]." *Id. See also* MCM, *supra* note 5, R.C.M. 1107; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-32 (6 Sept. 2002) [hereinafter AR 27-10]; UCMJ art. 60 (2002).

143. *Newlove*, 59 M.J. at 542.

144. *Id*. at 543. Since there are no orders or other documents in the record reflecting that the Rear Commander, who referred appellant's case to court-martial, subsequently transferred post-trial jurisdiction for the appellant's case to the Division Commander, the purported action by the Division Commander is void. *Id*. at 542. *See also id*. n.8.

145. 59 M.J. 540 (Army Ct. Crim. App. 2003). *see also* United States v. Brown, 57 M.J. 623 (N-M. Ct. Crim. App. 2002).

146. *See* MCM, *supra* note 5, R.C.M. 1107; UCMJ art. 60 (2002); AR 27-10, *supra* note 142, para. 5-32.

147. 57 M.J. 493 (2002). The appellant was convicted at a SPCM of wrongful use of lysergic acid diethylamide and sentenced to reduction to E-1, confinement for three months, and a bad conduct discharge, a sentence approved by the convening authority (CA), BG Fletcher. *Id*. at 493-94.

148. 58 M.J. 100 (2003).

149. *Gudmundson*, 57 M.J. at 495.

150. *Id*. at 494.

151. *Id*.

152. *Id*. at 494-95.

153. *Id.* at 495.

154. *Id*. The appellant also failed to raise the disqualification issue at trial. *Id*.

155. *Id*.

In evaluating whether the CA was disqualified from acting in the appellant's case, the court distinguished between testimony by a CA indicating a "'personal connection with the case'" versus testimony of "'an official or disinterested nature only.'"[156] The former is potentially disqualifying, whereas the latter is not.[157] In situations in which the CA may have a personal interest in the case, failure to raise a timely objection may result in waiver of the disqualification issue. The focal point for waiver in "personal connection" situations is whether the appellant was aware of the "ground for disqualification." If unaware, waiver does not apply; if aware, the converse is true. In the appellant's case, the court held the issue was waived.[158] Not only was the appellant aware of the potential disqualification issue, he highlighted it in his post-trial submissions when he reminded the CA about his earlier testimony and involvement in the appellant's court-martial.[159]

In *Davis*,[160] the appellant was convicted of wrongful use of cocaine and marijuana.[161] As part of his clemency petition, the defense counsel submitted a memorandum objecting to the CA acting in the case, arguing that, based on prior command briefings, the CA was unwilling to impartially listen to clemency petitions from airmen convicted of illegal drug use.[162] The defense memorandum stated, in part: "During the briefings, [the convening authority] also publicly commented that people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[']', or words to that effect."[163] The SJA failed to address the disqualification issue in his addendum to the SJAR and the CA subsequently acted on the case.[164]

On appeal, the service court affirmed, in an unpublished opinion, finding that the CA's comments did not reflect an inelastic or inflexible attitude towards his post-trial duties.[165] The CAAF disagreed. In evaluating the CA's command briefing comments, the CAAF first noted that CA disqualification falls into two categories: (1) the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; (2) the CA exhibits or displays an inelastic attitude toward the performance of his or her post-trial duties or responsibilities.[166] The appellant's case involved category two.[167] The court noted that although CAs "need not appear indifferent to crime," they must maintain a "flexible mind" and a "balanced approach" when dealing with it.[168] The court found that the CA's comments reflect an inelastic or inflexible attitude toward his post-trial duties in drug cases.[169] The CAAF characterized Maj Gen [F's] comments as a "barrier to clemency appeals by convicted drug users" with the message being "'Don't come [to him with requests for relief].'"[170] The CAAF, finding that the CA lacked the "required impartiality with regard to his post-trial duties," disqualified him from acting in the appellant's case, reversed the lower court's decision, set aside the action, and remanded the case for a new review and action by a different CA.[171]

A defense counsel who cross-examines a CA should consider whether the CA is disqualified from taking action in the case, realizing that failure to seek disqualification prior to

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156. *Id.*

157. *Id*.

158. *Id*.

159. *Id*. "We hold that the issue was waived in this case. Appellant was aware of the convening authority's involvement, but he chose to not raise the disqualification issue at trial or in his post-trial submissions to the convening authority." *Id*.

160. 58 M.J. 100 (2003).

161. *Id*. at 101. The appellant was convicted at a SPCM of unauthorized absence, wrongful use of cocaine, and wrongful use of marijuana and sentenced to three months confinement and a bad conduct discharge. *Id*.

162. *Id*.

163. *Id*.

164. *Id*. at 101-02; s*ee* MCM, *supra* note 5, R.C.M. 1106(d)(4) (requiring the staff judge advocate to comment on allegations of legal error raised in the defense's RCM 1105/6 submissions).

165. United States v. Davis, ACM S30020, 2002 CCA LEXIS 68 (A.F. Ct. Crim. App. Mar. 7, 2002) (unpublished).

> [T]he convening authority's comments were made to general audiences on base, and his intent was to remind troops of the seriousness of drug use and its significant impact both on the military and his or her family. . . . We find no inelastic attitude by the convening authority in this case.

Id. at *3.

166. *Davis*, 58 M.J. at 102.

167. *Id*. at 103.

action may result in waiver of the issue on appeal.[172] Furthermore, trial counsel, chiefs of military justice, and SJAs need to be aware of the information conveyed by convening authorities at command briefings and via command policy memoranda. Flexible, balanced briefings and memoranda are fine; briefings and memoranda that reflect an inelastic attitude towards post-trial duties are not.

Post-Trial Assistance of Counsel

The next aspect of post-trial processing that will be discussed is an appellant's right to post-trial assistance of counsel. The two cases addressed in this section are *Diaz v. The Judge Advocate General of the Navy*[173] and *United States v. Brunson*,[174] highlighting the importance of ensuring that appellants receive timely post-trial appellate review of their cases.

In *Diaz*, the NMCCA received the petitioner's case on 25 February 2002 (451 days after trial).[175] The petitioner's first appellate defense counsel filed ten requests for enlargement of time to file his assignment of errors.[176] On December 3, 2002 (day 732), the petitioner filed a *pro se* petition for a Writ of Habeas Corpus with the NMCCA requesting release from confinement pending his appeal.[177] On 4 December 2003 (day 733) the NMCCA, while noting its concern with the post-trial and appellate delay in the petitioner's case, denied the petition.[178] The appellant thereafter filed a motion for reconsideration, which the NMCCA denied on 11 February 2003 (day 802).[179] The petitioner then filed a motion for appropriate relief with the CAAF, a motion treated by the CAAF as a petition for extraordinary relief.[180] On 16 June 2003 (day 927), the CAAF ordered the government to show cause why relief should not be granted in the petitioner's case.[181]

In response to the CAAF's order, the government asserted the following: the delay in the case was "'neither excessive nor has it amounted to a prejudicial violation of Petitioner's due process right'";[182] the "Petitioner has failed to show that this delay, 'in and of itself, is sufficient to characterize the delay as inordinate and excessive giving rise to a due process claim'";[183] and the petitioner "'has not even served one-third of his nine year sentence.'"[184] Regarding the over two years of confinement already served by the appellant, the CAAF noted that

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168. *Id*.

> 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. 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. Adopting a strong anti-crime position, manifesting an awareness of criminal issues within a command, and taking active steps to deter crime are consonant with the oath to support the Constitution; they do not per se disqualify a convening authority.

Id. The critical component of any policy letter, speech, communication, etc. is that it be "flexible" and "balanced" regarding options or ways of dealing with misconduct. *Id.*

169. *Id.* at 104.

170. *Id*.

171. *Id*.

172. Defense counsel need to know the convening authority and his or her views on clemency as well as his or her track record. If the convening authority never grants clemency, why not have him or her disqualified. Conversely, if the convening authority routinely grants clemency, having him or her disqualified may not be in the client's best interest. Bottom line–just because you can disqualify the convening authority does not mean you have to.

173. 59 M.J. 34 (2003). The petitioner was convicted at a GCM of multiple charges of rape and indecent assault of his twelve-year-old daughter and sentenced to reduction to E-1, forfeiture of all pay and allowances, nine years confinement, and a dishonorable discharge. *Id*. at 35.

174. 59 M.J. 41 (2003).

175. *Diaz*, 59 M.J. at 34.

176. *Id*.

177. *Id*.

178. *Id*.

179. *Id*.

180. *Id.*

181. *Id*.

182. *Id*.

"[t]his fact would seem to underscore rather than excuse the failure to initiate a legal and factual review that could conceivably alter Petitioner's conviction, sentence or both."[185]

The government made several specific arguments in support of its contention that the delay in the petitioner's case was not excessive:

> [1] Due to the unique rights accorded servicemembers in our court-martial system, this Court should acknowledge that a detailed appellate counsel's caseload can be an appropriate factor in deciding when the length of appellate delay becomes inordinate and excessive;
>
> [2] This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to the time it takes to perfect such an appeal when an appellant decides to hire his own private civilian counsel;
>
> [3] This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to civilian "public defenders" who are required to represent only indigent defendants, not all defendants, before the court;
>
> [4] The military justice system requires the mandatory review of a vast number of court-martial cases regardless of whether the servicemember files a notice of appeal, and it is therefore reasonable and not a violation of due process when an appeal takes longer to perfect and decide in the military justice system than in the civilian justice system;
>
> [5] This delay is not inordinate or excessive because of the size of the record of trial, the seriousness of the charges, the number of issues identified by Petitioner, and the "high volume of cases submitted to the lower Court."[186]

In evaluating the petitioner's claim and the government's response, the court focused on the petitioner's right to a full and fair review under Article 66, UCMJ,[187] which "embodies a concomitant right to have that review conducted in a timely fashion" and his "constitutional right to a timely review guaranteed him under the Due Process Clause."[188]

After noting the petitioner's Article 66, UCMJ, and Due Process rights to timely post-trial review, the court specifically addressed government's arguments one through four, finding they all lacked merit. First, the court found that nothing in Article 66, UCMJ, or its legislative history, supports the position that the rights afforded service members should be used to lessen their post-trial right to timely review. As for counsel's caseload, the court noted that heavy caseloads "are a result of management and administrative priorities and as such are subject to the administrative control of the Government."[189] Second, the court noted that "the standards for representation of service members by military or civilian counsel in military appellate proceedings are identical."[190] Third, the court noted that "[t]he duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians."[191] Finally, regarding reason four above, the court found that rather than justifying post-trial delay, the differences between the military justice system and the civilian system, to include the unique fact finding authority of military appellate courts, compel even "greater diligence and timeliness than is found in the civilian system."[192] As for the government's argument that the appellant failed to establish prejudice from the delay, the court found this argument unpersuasive, characterizing it as "circular and disingenuous" since "the system that the Government controls has to date deprived [the] Petitioner of the timely assistance of counsel that would

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 36.

187. UCMJ art. 66 (2002).

188. *Diaz*, 59 M.J. at 37-38 (referring to the Due Process Clause of the United States Constitution).

189. *Id.* at 38.

190. *Id.* at 38-39.

191. *Id.* at 39.

192. *Id.*

enable him to perfect and refine the legal issues he has asserted."[193]

The court held that the processing of petitioner's case lacked the required vigilance, institutional or otherwise, necessary to preserve the petitioner's post-trial rights. The court granted the petitioner's motion, in part, by remanding the case to the NMCCA, the "court which is directly responsible for exercising 'institutional vigilance' over this [petitioner's case] and all other cases pending Article 66 review within the Navy-Marine Corps Appellate Review Activity," with direction that the NMCCA "expeditiously review the processing and status of Petitioner's Article 66 appeal."[194]

Along the same lines as *Diaz* is *United States v. Brunson*,[195] another post-trial processing case with inexcusable delay. In *Brunson*, the issue before the CAAF was appellate defense counsel's "Motion to File Supplement to Petition for Grant of Review Out of Time."[196] In deciding whether to grant the appellant's motion, the court discussed the "serious pattern of delay in the appeal of decisions to [the CAAF] after review by the [NMCCA]."[197] The court discussed twenty-six cases in which petitions for grant of review were filed, but in which supplements thereto were not filed according to the court's timelines. In all twenty-six cases, petitions were filed for grant of review "out of time."[198] The court then addressed an additional seventeen cases in which timely petitions had not been filed by appellate division personnel.[199] Only one of forty-three cases analyzed by the court, which involved a "medical emergency," provided a basis for finding that relief [e.g., granting a motion to file out of time] was warranted by "'extraordinary circumstances.'"[200]

Despite finding only one of forty-three cases contained an adequate factual basis for excusing the omissions by appellate defense counsel, the court concluded that:

> Appellant Brunson and the remaining 42 appellants should not be penalized for the failure of attorneys and officials responsible for the provision of legal services under Article 70, UCMJ, 10 U.S.C. § 870 (2000) to ensure that appellate filings are made in a timely manner and to further ensure that motions for filings out of time contain adequate justification.[201]

In granting the appellant's motion, the court reminded counsel of their responsibility "to aggressively represent [their clients] before military trial and appellate courts."[202] Finally, the

193. *Id.*

194. *Id.* The CAAF further directed the service court to issue "such orders as are necessary to ensure timely filing of an Assignment of Errors and Brief on behalf of Petitioner and the timely filing of an Answer to the Assignment of Errors on behalf of the Government." *Id.*

195. 59 M.J. 41 (2003). The appellant was convicted at a SPCM of arson and sentenced to reduction to E-1, six months confinement, and a bad conduct discharge. *Id.*

196. *Id.* at 42. The relevant chronology of the post-trial processing of the appellant's case follows:

1. 31 October 2002–The NMCCA decides the appellant's case;
2. 9 January 2003–The NMCCA's decision is mailed to the appellant;
3. 18 March 2003–Appellate defense counsel files a Petition for Grant of Review with the CAAF;
4. 18 March 2003–The CAAF orders the appellant to file a Supplement to the Petition for Grant of Review on or before 17 Apr 2003;
5. 17 April 2003–Appellate defense counsel files a Motion for Enlargement of Time to File Supplement to the Petition for Grant of Review;
6. 22 April 2003–The CAAF granted the appellant's motion extending the deadline for filing to 19 May 2003;
7. 19 May 2003–Appellate defense counsel files a second Motion for Enlargement of Time to File Supplement to the Petition for Grant of Review;
8. 20 May 2003–The CAAF granted the second motion for enlargement with a new deadline of 5 June 2003;
9. 5 June 2003–The deadline for appellate filing lapsed without the filing of any supplement or request for enlargement; and
10. 20 June 2003–In response to an inquiry form the CAAF's Clerk of Court, the appellate defense counsel files a Motion to File Supplement to Petition for Grant of Review Out of Time [issue before the CAAF on appeal].

Id. at 41-42.

197. *Id.* at 42.

198. *Id.*

199. *Id.* The reasons proffered for missing deadlines and untimely post-trial processing included, in part: a medical emergency involving the Deputy Division Director, "departure of an administrative office manager," "temporary duty" of the Division director, "a 'disconnect' between active duty and reserve attorneys who review appellate cases," the use of a new database to track cases which "'reduced visibility'" over cases, "'administrative oversight'" by a Branch Secretary, and simply "'administrative oversight.'" *Id.*

200. *Id.* "All of the proffered bases for relief were within the administrative control of the attorneys and supervisory officials charged with the responsibility of providing legal services under Article 70." *Id.* at 42-43.

201. *Id.* at 43.

court warned that, although it granted the appellate defense counsel's motion, its opinion should not be misread to condone late filings, noting that it "shall consider appropriate sanctions in the event of 'flagrant or repeated disregard of [its] Rules.'"[203]

Appellate defense counsel and their supervisors should take note of the court's guidance in *Diaz* and *Brunson*. An appellant has a right under the UCMJ and the United States Constitution to timely post-trial review of his case. This right is arguably greater in the military by virtue of the unique fact-finding authority found in the service courts of appeal. In the future, appellate defense counsel and their supervisors who fail to safeguard this important right run the risk of facing "appropriate sanctions" levied by a service court or the CAAF.

Appellate Court Authority

The final area of discussion in the post-trial arena is appellate court authority. The cases addressed in this section are: *United States v. Perron*,[204] *United States v. Castillo*,[205] *United States v. Holt*,[206] *United States v. Rorie*,[207] and *United States v. Fagan*.[208]

In *Perron*, the issue before the CAAF was a service court's authority when confronted with a breach by the government of a material term of a pretrial agreement.[209] The appellant agreed to plead guilty and the CA agreed to "waive all automatic forfeitures and pay those to appellant's family during his confinement."[210] Unfortunately, neither the trial counsel nor the military judge noticed that the appellant reached his ETS (expiration of term of service) date before trial, placing him in a no pay due status at trial.[211] As a result, there was no pay for the CA to waive and direct to appellant's family. On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) set aside the CA's action due to a mutual misunderstanding regarding a material term of the pretrial agreement.[212] After remand, the CA only approved the reduction to E-3 and the bad-conduct discharge, resulting in a payment to appellant of $3,184.90 for time spent in confinement.[213] This amount is equal to what his family would have received had the government complied with the forfeitures provision of the pretrial agreement.

On appeal to the CGCCA for a second time, the appellant argued that notwithstanding the CA's action on remand, he bargained for payment to his family members while confined, not after his release; therefore, the only appropriate remedy was either withdrawal from the plea or disapproval of the bad-conduct discharge.[214] The CGCCA disagreed, holding that the court could provide alternative relief to the appellant, even if the relief was contrary to appellant's wishes.[215] The CGCCA affirmed the findings of guilty and the bad-conduct discharge, restoring the appellant's pay grade to his pretrial grade of E-5. In so doing, the CGCCA found that "[t]his difference in pay [restored to the appellant] should exceed any reasonable interest calculation."[216]

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202. *Id*.

203. *Id.* (citing United States v. Ortiz, 24 M.J. 323, 325 (C.M.A. 1987)).

204. 58 M.J. 78 (2003).

205. 59 M.J. 600 (N-M. Ct. Crim. App. 2003).

206. 58 M.J. 227 (2003).

207. 58 M.J. 399 (2003).

208. 59 M.J. 238 (2004).

209. *Perron*, 58 M.J. at 79. The appellant was convicted at a SPCM of one specification of wrongful possession of a controlled substance and two specifications of wrongful use and sentenced to reduction to E-3, confinement for ninety days, and a bad conduct discharge. At action, the convening authority approved the adjudged sentence but suspended all confinement in excess of sixty days. *Id*. at 79.

210. *Id*.

211. *Id*. at 80.

212. *Id*. The court remanded the case to the convening authority "to either set aside the findings of guilty and the sentence or determine whether some other form of alternative relief was appropriate." *Id*.

213. *Id*.

214. *Id.* at 80-81. The appellant argued his plea was involuntary because it was induced by a term in a pretrial agreement that the government could not comply with. *Id*. at 80.

215. *Id.* at 81.

216. *Id*.

The CAAF disagreed with the lower court, set aside the findings and sentence and authorized a rehearing. The CAAF held that "imposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a pretrial agreement violates the appellant's Fifth Amendment right to due process."[217]

> An appellate court may determine that alternatives to specific performance or withdrawal of a plea could provide an appellant with the benefit of his or her bargain – and may remand the case to the convening authority to determine whether doing so is advisable – but it cannot impose such a remedy on an appellant in the absence of the appellant's acceptance of that remedy.[218]

Faced with a situation in which the government cannot comply with a material term of a pretrial agreement, the appellant, not the appellate court, will ultimately control what happens in the case. The days of the appellate court fashioning an "appropriate remedy" are gone. As highlighted by the *Perron*[219] court, failure of the government to comply with a material term of a pretrial agreement calls into question the voluntariness of the plea itself.[220] Defense counsel representing clients faced with a *Perron*-like situation should demand specific relief in the post-trial processing of the case knowing that the government's option is either compliance with the request or allowing the appellant to withdraw his plea. Chiefs of military justice and SJAs should seriously consider the relief suggested by the appellant or suggest alternative relief that both sides can accept. If the government and defense can not agree on alternative relief, have the CA direct a post-trial 39a session in which the military judge can ask the appellant whether he wants to withdraw from his plea.[221] While the defense counsel and SJA are deciding what to do, the trial counsel should be preparing his case as if the appellant will withdraw from the plea. Stated differently, if the trial counsel prepares for a contested court-martial and the accused and defense counsel see the government ready to try the case, the accused may be less inclined to withdraw from the plea agreement.

The next post-trial, appellate court authority case worth noting is *United States v. Castillo*. In *Castillo*, the appellant, in her first appeal before the NMCCA, alleged that her sentence was inappropriately severe.[222] The service court agreed, setting aside the CA's action and remanding the case with the following direction: "The record will be returned to the Judge Advocate General for remand to the [CA], who may upon further consideration approve an adjudged sentence no greater than one including a discharge *suspended* under proper conditions."[223]

Upon remand, the CA's SJA prepared an SJAR that erroneously advised the CA that the appellate court recommended that the punitive discharge be set aside.[224] The SJAR further advised the CA to approve the sentence as adjudged, stating, in part: "In accordance with Navy-Marine Corps Court of Criminal Appeals (NMCCA) letter (sic) 200101326 of 31 July 02, NMCCA recommends you set aside the bad conduct discharge and upon further consideration approve an adjudged sentence no greater than one including a discharge suspended under proper conditions."[225]

Upon receipt of the SJAR, the appellant's trial defense counsel responded to the SJAR by indicating that the NMCCA's decision was directive in nature as opposed to advisory as portrayed by the SJAR.[226] After considering the defense's submission, the SJA prepared an addendum stating, "'nothing presented by the defense justifies clemency in this case, therefore, my original recommendation remains unchanged.'"[227] Following the SJA's advice and notwithstanding the NMCCA's remand decision, the CA approved the sentence as adjudged, including the bad conduct discharge.[228]

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217. *Id.* at 86.

218. *Id.*

219. *Id.* at 78.

220. *Id.* at 86.

221. *See* MCM, *supra* note 5, R.C.M. 1102(a).

222. United States v. Castillo, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted at a SPCM of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, fifty-one days confinement, and a bad conduct discharge. *Id.* at 600-01.

223. *Id.* at 601 (quoting United States v. Castillo, NMCM No. 200101326, 2002 CCA LEXIS 165 (31 July 2001) (slip op. at 10) (unpublished)).

224. *Id.*

225. *Id.* at 602.

226. *Id.*

227. *Id.*

On appeal for a second time, the appellant alleged that the CA erred by disregarding the NMCCA's previous decision, arguing that the court should approve a sentence of no punishment. The court agreed, in part, finding clear and obvious error in the CA's action.[229] "While we concur that the CA [convening authority] erred as asserted by the appellant, approving a sentence of 'no punishment' would afford the appellant a windfall to which she is not entitled."[230] In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only the reduction to E-1 and fifty-one days confinement and disapproved the bad conduct discharge.[231] As for the CA's decision to disregard the court's directive, the court noted that the advice he chose to follow was "misguided" and "clearly erroneous."[232] Finally, the court noted that its original decision was not a recommendation, providing obvious yet important guidance for military practitioners: "[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General]."[233]

United States v. Holt,[234] another appellate authority case, addresses the limitations on a service court in evaluating and considering evidence on appeal. On appeal, the appellant, tried for writing bad checks, alleged that the military judge erred by admitting prosecution exhibits (PEs) sixteen (victim's letter) and seventeen through thirty-four (copies of cancelled checks, debt collection documents, and a pawn ticket).[235] In affirming the findings and sentence,[236] the Air Force Court of Criminal Appeals (AFCCA) found that PE sixteen was admissible under Military Rule of Evidence (MRE) 807 as residual hearsay and that PEs seventeen through thirty-four [237] were admissible under MRE 803, evidence of appellant's state of mind.[238]

Among the issues certified by the CAAF was whether the lower court erred by depriving the appellant of a proper Article 66(c), UCMJ, review limited to the record of trial when the lower court considered the questioned prosecution exhibits for the truth of the matters asserted notwithstanding that the military judge ruled otherwise and instructed the members that the evidence was not to be consider for the truth of the matters asserted.[239] In evaluating the lower court's decision, the CAAF noted that:

> Article 66(c) limits the Courts of Criminal Appeals 'to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness' (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c).[240]

Resolving the issue in favor of the appellant, the CAAF set aside the lower court's decision and remanded the case for a proper review.[241] In so doing, the CAAF held that the lower court erred when it "altered the evidentiary quality of PEs 16-19, 21, 24, 26, 29, 30-32, and 34"[242] and that the AFCCA changed the evidentiary nature of the evidence in question by

228. *Id.*

229. *Id*. at 603.

230. *Id*.

231. *Id*. at 604.

232. *Id.* at 603. Contrary to the staff judge advocate's written advice, the NMCCA neither recommended a set aside of the punitive discharge nor approval of any specific sentence; rather, the court afforded the CA the opportunity to approve a sentence he deemed appropriate provided it did not contain an unsuspended bad conduct discharge. *Id*.

233. *Id.*

234. 58 M.J. 227 (2003). The appellant was convicted at a GCM of fifty-eight specifications of dishonorable failure to maintain sufficient funds for the payment of checks and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge. *Id*. at 228.

235. *Id*. at 228-29. In addition to Prosecution Exhibit 16, the appellant alleged that the MJ erred by admitting Prosecution Exhibits 17-19, 21, 24, 26, 29-32, and 34. *Id*. The allegation was that the MJ erred because: the Government had not laid a proper foundation for the evidence; the evidence was in inadmissible form; the defense had not sought a relaxation of the rules of evidence for sentencing purposes; and the evidence was inadmissible hearsay. *Id*.

236. ACM 34145, 2003 CCA LEXIS 190 (A.F. Ct. Crim. App. Apr. 15, 2002) (unpublished).

237. *Holt*, 58 M.J. at 233.

238. *Id.* at 231.

239. *Id.* at 228.

240. *Id*. at 232.

elevating them to evidence admitted for their truth, depriving the appellant of a "proper legal review."[243]

United States v. Rorie, another CAAF decision, deals with abatement *ab initio* in situations when an appellant dies pending review by the CAAF.[244] In *Rorie*, the appellant's conviction and sentence were affirmed in a memorandum decision by the Army Court of Criminal Appeals (ACCA) on 28 June 2002.[245] On 5 July 2002, the appellant and his appellate defense counsel were notified of the service court's decision.[246] On 31 August 2002, three days before expiration of the sixty-day period to petition the CAAF for review, the appellant died from injuries sustained in an automobile accident.[247] As a result, the appellate defense counsel filed a Petition for Grant of Review and Motion to Abate the proceedings, in effect seeking to nullify or eliminate the appellant's conviction on the grounds that he died prior to completion of appellate review in the case.[248]

In denying the motion, the CAAF distinguished between appeals as of right versus discretionary appeals, holding that an appeal under Article 67(a)(3), UCMJ, is a matter of discretion and not a matter of right.[249] As such, the court established a prospective policy of no longer granting abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953.[250] Finding that abatement *ab initio* is a "matter of policy in Federal courts," not mandated by the Constitution or statute and not part of the Rules of Practice and Procedures for the CAAF, the court did not feel constrained by its prior fifty-year policy (e.g., *stare decisis*) of routinely granting motions for abatement *ab initio*.[251]

The final post-trial appellate court authority case is *United States v. Fagan*, in which the CAAF makes crystal clear a service court's authority under *United States v. Ginn*[252] to resolve factual issues raised for the first time on appeal via affidavit by an appellant and which cannot be resolved by review of the record of trial.[253]

On appeal, Private Fagan submitted an affidavit alleging cruel and unusual post-trial punishment while serving confinement for his second court-martial conviction at the USACFE.[254] In response, the government submitted several affidavits contesting the allegations and requesting the court find that "the record as a whole demonstrates the improbability of appellant's assertions."[255] Alternatively, the government requested that the court order a *DuBay*[256] hearing to inquire into the allegations.[257]

241. *Id*. at 233.

242. *Id*.

243. *Id*.

244. 58 M.J. 399 (2003). The appellant was convicted at a GCM of three specifications of wrongful distribution of cocaine and sentenced to reduction to E-1 and two years confinement. *Id*. at 399-400.

245. *Id*. at 400.

246. *Id*.

247. *Id*.

248. *Id*.

249. *Id.* at 402-04.

250. *Id*. at 407.

251. *Id*. at 405-07. By reversing its policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled.

252. 47 M.J. 236 (1997).

253. United States v. Fagan, 59 M.J. 238 (2004). The appellant was convicted at a GCM, his second court-martial in four months, of wrongful use of marijuana, three specifications of wrongful distribution of marijuana, three specifications of larceny, and three specifications of forgery and sentenced to forfeiture of all pay and allowances, confinement for thirty months, and a dishnorable discharge. *Fagan*, 58 M.J. at 534-35.

254. 58 M.J. 534 (Army Ct. Crim. App 2003). The allegation was that a specific cadre member, SGT D, inflicted physical and mental pain when he, in the guise of a pat down search, "intentionally assaulted him in the testicles during searches without legitimate penal purpose." *Id*.

255. *Id*. at 535-36. In essence, the government argued that the case could be resolved by application of the fourth *Ginn* principle. *See infra* note 259.

256. United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

257. *Fagan*, 58 M.J. at 536. If unable to resolve the case applying the fourth Ginn principle, the government requested a *DuBay* hearing under *Ginn* principle six. *See infra* note 259.

Despite questioning the validity of the appellants' allegation,[258] the service court felt that its fact-finding authority was constrained by the CAAF's holding in *United States v. Ginn*,[259] wherein the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers and affidavit that expressly agrees with those facts, the Court can proceed to decide the legal issues on the basis of those uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.
>
> Sixth, the Court of Criminal Appeals *is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding.*[260]

Rather than follow the CAAF's guidance and order a potentially expensive *DuBay*[261] hearing, as requested by the government, the court elected to exercise its "'broad power to moot claims of prejudice' by granting appellant sentence relief," approving only forfeiture of all pay and allowances, confinement for nineteen months, and a dishonorable discharge.[262] Concerned by the "seriously and unfairly handicapped" position the government was placed in as a result of the CAAF's *Ginn* decision, the court took "the unusual step of recommending that The Judge Advocate General order this case be sent to the United States Court of Appeals for the Armed Forces for review under Article 67(a)(2)."[263]

The Judge Advocate General of the Army followed the service court's recommendation and certified three issues to the CAAF: (1) whether the Army court erred in concluding that *United States v. Ginn* provides the proper framework for analyzing the issues raised by the appellant's submission of a post-trial affidavit; (2) whether the Army court erred in concluding that it could not consider the government's rebuttal affidavits without ordering a *DuBay* hearing; and (3) whether the Army court erred in concluding it could grant sentence relief under

258. *Id*. at 535.

259. 47 M.J. 236 (1997).

260. *Fagan*, 58 M.J. at 537 (quoting *Ginn*, 47 M.J. at 248). The Army court noted that applying the six *Ginn* principles to a situation in which the appellant raises an issue for the first time on appeal in a post-trial affidavit places the government at a significant disadvantage because of its inability to respond via affidavit. *Id*. at 538. The Army court noted:

> The government is restricted to arguing to this court: (1) even if true, appellant's assertions do not warrant relief (first *Ginn* principle); (2) appellant's claim is speculative and should be rejected (second *Ginn* principle); or (3) the record as a whole compellingly demonstrates the improbability of appellant's asserted facts (fourth *Ginn* principle). However, the government may not submit affidavits containing conflicting rebuttal evidence that tends to prove one of these three points or contradict appellant's sworn assertion of fact unless the government is willing to hold an expensive and time consuming *DuBay* hearing to litigate the issue. Simply put, the Government must either withhold relevant affidavit evidence that might disprove an appellant's assertions and hope that the court rules against appellant, or submit the affidavits which may cause us to order a *DuBay* hearing.

Id.

261. 37 C.M.R. 411 (C.M.A. 1967).

262. *Fagan*, 58 M.J. at 538-39 (citing United States v. Wheelus, 49 M.J. 283, 288 (1998)) (reducing appellant's term of confinement by eleven months).

263. *Id.* at 538; *see also* UCMJ art. 67(a)(2) (2002).

United States v. Wheelus when it admitted the government's rebuttal affidavits.[264]

In evaluating the actions of the Army court and the certified issues, the CAAF found the Army court did not err with regard to the first two certified issues, determining that *Ginn* provides the proper framework for analyzing factual issues raised for the first time on appeal via a post-trial affidavit and a service court is precluded from considering government rebuttal affidavits without ordering a *DuBay* hearing.[265] With regard to the third certified issue, the court noted that the Army court erred when it exercised its Article 66(c), UCMJ, authority to "moot" any possible claims of prejudice.[266] In finding error, the court noted that the broad power referenced by the court in *Wheelus*[267] is to address "acknowledged legal error or [deficiencies] in the post-trial review process."[268] *Wheelus* does not empower a service court to grant relief without first ascertaining whether error occurred.[269] As a result, the CAAF remanded the case to The Judge Advocate General of the Army for a *DuBay* hearing on the appellant's claim of cruel and unusual punishment.[270]

All five cases touch upon the authority and limits on the service courts of criminal appeal and the CAAF in the post-trial arena. Post-trial practitioners should review all five and keep them in mind while shepherding a case through the post-trial process.

Conclusion

As noted at the outset, the past year has been a rather slow evolutionary period for post-trial. Having said that, however, some changes have been significant. For example, waiver has become a common term when addressing allegations of post-trial errors, errors ranging from defects in the required post-trial recommendations to action by a potentially disqualified CA. Perhaps more noticeable is the Army court's application of waiver in cases of unreasonable post-trial delay, holding the defense accountable for failing to demand speedy post-trial processing. One thing is certain—compliance with the 1100 series of the RCM coupled with timely post-trial processing should do away with many of the post-trial issues that the courts continue to deal with year-in and year-out. Stated differently, attention to detail goes a long way in the post-trial arena.

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264. United States v. Fagan, 59 M.J. 238, 239-40 (2004).

265. *Id.* at 244.

266. *Id.*

267. 49 M.J. 283 (1998).

268. *Fagan*, 59 M.J. at 244.

269. *Id.*.

> In terms of Fagan's claim, he may be entitled to relief if he did in fact suffer a violation of the rights guaranteed him by the Eight Amendment and Article 55. However "broad" it may be, the "power" referred to in *Wheelus* does not vest the Court of Criminal Appeals with authority to eliminate that determination and move directly to granting sentence relief to Fagan. Rather, a threshold determination of proper factual and legal basis must be established before any entitlement to relief might arise.

Id.

270. *Id.*

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	
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)
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)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
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)
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)

16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
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	
5th JA Warrant Officer Advanced Course	12 - 30 July 04	(7A-270A2)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
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 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2005 Hawaii Income Tax CLE	10 - 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)
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)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)
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	* Military Exempt
Wisconsin*	1 February biennially	** Military Must Declare Exemption
Wyoming	30 January annually	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-

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Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel Lavering@hqda.army.mil.

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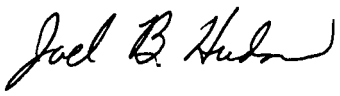

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