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Military Justice Symposium

Foreword

Lieutenant Colonel Mark L. Johnson

**Practicing What the Court Preaches—2007 New Developments in Fourth Amendment
Search and Seizure Law**

Lieutenant Colonel Stephen R. Stewart, USMC

**If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It's Probably
Testimonial**

Lieutenant Colonel Nicholas F. Lancaster

**Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military
Justice and the Defense's Right to a Government-Funded Expert**

Major David Edward Coombs

Flying Without a Net: *United States v. Medina & Its Implications for Article 134 Practice*

Major Howard H. Hoeger III

**More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and
Voir Dire and Challenges**

Major Patrick D. Pflaum

Military Sentencing 101—Back to the Basics

Major Maureen A. Kohn

**The Lion Who Squeaked: How the *Moreno* Decision Hasn't Changed the World and Other
Post-Trial News**

Lieutenant Colonel James L. Varley

Professional Responsibility on the Edge

Lieutenant Colonel Kwasi L. Hawks

**Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle
Against the "Mortal Enemy" of Military Justice**

Lieutenant Colonel Mark L. Johnson

Annual Review of Developments in Instructions—2007

Lieutenant Colonel Edward J. O'Brien & Colonel Timothy Grammel

CLE News

Current Materials of Interest

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Military Justice Symposium

Foreword <i>Lieutenant Colonel Mark L. Johnson</i>	1
Practicing What the Court Preaches—2007 New Developments in Fourth Amendment Search and Seizure Law <i>Lieutenant Colonel Stephen R. Stewart, USMC</i>	2
If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It’s Probably Testimonial: Recent Developments in Sixth Amendment Confrontation Law <i>Lieutenant Colonel Nicholas F. Lancaster</i>	16
Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense’s Right to a Government-Funded Expert <i>Major David Edward Coombs</i>	28
Flying Without a Net: <i>United States v. Medina</i> & Its Implications for Article 134 Practice <i>Major Howard H. Hoege III</i>	37
More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges <i>Major Patrick D. Pflaum</i>	50
Military Sentencing 101—Back to the Basics <i>Major Maureen A. Kohn</i>	70
The Lion Who Squeaked: How the <i>Moreno</i> Decision Hasn’t Changed the World and Other Post-Trial News <i>Lieutenant Colonel James L. Varley</i>	80
Professional Responsibility on the Edge <i>Lieutenant Colonel Kwasi L. Hawks</i>	93
Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the “Mortal Enemy” of Military Justice <i>Lieutenant Colonel Mark L. Johnson</i>	104
Annual Review of Developments in Instructions—2007 <i>Lieutenant Colonel Edward J. O’Brien & Colonel Timothy Grammel</i>	113
CLE News	138
Current Materials of Interest	149
Individual Paid Subscriptions to <i>The Army Lawyer</i>	Inside Back Cover

Foreword

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Welcome to the thirteenth annual *Military Justice Symposium*, where the criminal law faculty discuss important cases and trends from the 2007 term of court. This year we are publishing the *symposium* in one issue of *The Army Lawyer*. It contains articles covering the Fourth and Sixth Amendments, as well as evidence, crimes and defenses, pretrial procedures, sentencing, post-trial, professional responsibility and unlawful command influence. This issue also contains an article on instructions co-authored by two sitting trial judges.

As in past *symposia*, the faculty identifies the most significant cases from the Supreme Court, the Court of Appeals for the Armed Forces and the service courts, rather than providing a complete review of every case in a particular subject area. Practitioners can find a complete review of each subject area by accessing our New Developments outlines on JAGCNET.¹ Along with many other course outlines, this site also contains the newest version of the Crimes and Defenses Deskbook. The publications offered at this site do not require a password and are available to all services. We hope that you find these materials and our articles helpful in your practice and, as always, welcome your questions and comments.

Of special note, this *symposium* marks the final appearance for two of our finest officers. Major (MAJ) Howard Hoegge is leaving active duty, and MAJ Dave Coombs is deploying to Iraq, followed by ILE/AOWC at Fort Leavenworth. I know that practitioners everywhere join me in recognizing their significant contributions to the *symposium* and the practice of criminal law throughout the Department of Defense.

¹ See CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 31ST CRIMINAL LAW NEW DEVELOPMENTS COURSE DESKBOOK (5-8 Nov. 2007), available at <https://www.jagcnet.army.mil/8525736A005BC8F9> (follow "TJAGLCS Publications" hyperlink).

Practicing What the Court Preaches¹—2007 New Developments in Fourth Amendment Search and Seizure Law

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*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.*²

Introduction

If last year's new developments in search and seizure law were one of anticipation, then this year's should be known as one of implementation.³ The implementation and impact of last year's decisions within the military justice system were pronounced within the service courts of criminal appeals⁴ and the Court of Appeals for the Armed Forces (CAAF)⁵ this term.⁶ In other words, the collective military courts were simply applying the rudder, and aligning the course,⁷ of Fourth Amendment jurisprudence in terms of a reasonable expectation of privacy in computers and digital media,⁸ as well as scope of consent.⁹ On the other hand, the U.S. Supreme Court avoided any "sharp rudder steers" in terms of defining Fourth Amendment jurisprudence, seeking refinement in its October 2006 term¹⁰ by addressing the issues of reasonableness—while executing a valid search warrant,¹¹ and standing—whether a vehicle passenger has standing to challenge a search incident to a lawful traffic stop.¹²

Therefore, this year's symposium article should, and needs to, be viewed as the next in a series of articles regarding the continuing evolution of Fourth Amendment law. In this regard, Part I addresses the two search and seizure cases the Supreme Court decided in its 2006 term of court.¹³ Part II addresses cases by the CAAF as it interprets precedent set in past

¹ A play on the common idiom meaning "do things the way you tell others to do them . . ." GoEnglish.com, *Practice What You Preach*, available at <http://www.goenglish.com/PracticeWhatYouPreach.asp> (last visited June 17, 2008). In this article, the Court of Appeals for the Armed Forces (CAAF) and the respective service courts have spent the term of court applying the law decided from the previous term of court in respect to Fourth Amendment law.

² U.S. CONST. amend. IV.

³ Last year's article focused on several pregnant issues, specifically regarding: reasonable expectation of privacy in Government e-mail (*Long II*); scope of consent by co-tenants (*Randolph II*). See Lieutenant Colonel Stephen R. Stewart, *Katy Bar the Door—2006 New Developments in Fourth Amendment Search and Seizure Law*, ARMY LAW., June 2007, at 1.

⁴ See generally UCMJ art. 66 (2008); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203 (2008) [hereinafter MCM].

⁵ See generally UCMJ art. 67; see also MCM, *supra* note 4, R.C.M. 1204.

⁶ The CAAF 2007 term of court began on 1 October 2006 and ended 30 September 2007. See U.S. Court of Appeals for the Armed Forces, Opinions & Digest, <http://www.armfor.uscourts.gov/2007Term.htm> (last visited June 19, 2008); *infra* sec. II, United States v. Larson (*Larson I*); 64 M.J. 559 (A.F. Ct. Crim. App. 2006); United States v. Rader, 65 M.J. 30 (2007); United States v. Gallagher, 65 M.J. 601 (N-M. Ct. Crim. App. 2007); United States v. Weston, 65 M.J. 774 (N-M. Ct. Crim. App. 2007).

⁷ One Fourth Amendment critic describes "Fourth Amendment case law [as] a sinking ocean liner—rudderless and badly off course." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

⁸ See *Larson I*, 64 M.J. 559.

⁹ See *Rader*, 65 M.J. 30.

¹⁰ The U.S. Supreme Court's October 2006 Term began on 2 October 2006 and ended 30 September 2007. See Supreme Court of the United States, 2006 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/06slipopinion.html> (last visited June 19, 2008).

¹¹ See *Los Angeles County, California v. Rettele*, 127 S. Ct. 1989 (2007).

¹² See *Brendlin v. California*, 127 S. Ct. 2400 (2007).

¹³ See *id.*; *Rettele*, 127 S. Ct. at 1989.

year's terms of court vis-à-vis *Georgia v. Randolph*,¹⁴ and *United States v. Bethea*.¹⁵ Finally, Part III looks ahead to the 2008 term of court and the impact *United States v. Long*¹⁶ will have on *United States v. Larson*.¹⁷

I. 2006 Term U.S. Supreme Court Cases—Refining the Concept of Fourth Amendment Reasonableness and Standing

A. Reasonableness

The touchstone of the Fourth Amendment is reasonableness.¹⁸ This foundational proposition has proven itself difficult to define and conceptually awkward.¹⁹ For example, what is a reasonable search when looking at the prohibition against unreasonable searches within the Fourth Amendment context? What about reasonableness in executing a warrant? Last year, the Supreme Court addressed the historic perception of reasonableness within the context of the common law “knock and announce” rule in *Hudson v. Michigan*.²⁰ The knock and announce rule describes “[t]he requirement that the police knock at the door and announce their identity, authority, and purpose before entering a residence to execute an arrest or search warrant.”²¹ In *Hudson*, the question addressed by the Court was whether a violation of the knock and announce rule, while police executed a lawful warrant, would result in the application of the exclusionary rule.²² While the court decided that a violation of the knock and announce rule, without more (i.e. egregious behavior), would not result in a per se application of the exclusionary rule, it did affirm that the rule remained a part of the reasonableness analysis in the execution of a search warrant.²³

This term of court, the Supreme Court again addresses the issue of reasonableness while executing a lawful search warrant. In *Los Angeles County, California v. Rettele*, the Supreme Court addresses the issue of whether law enforcement

¹⁴ *Randolph II*, 547 U.S. 103 (2006).

¹⁵ 61 M.J. 184 (2005).

¹⁶ 64 M.J. 57 (2006).

¹⁷ *Larson I*, 64 M.J. 559 (2006), *petition granted*, *United States v. Larson*, 65 M.J. 253 (2007).

¹⁸ The majority opinion in *Florida v. Jimeno* states that “[t]he touchstone of the Fourth Amendment is reasonableness.” 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)). See also the Court’s analysis in *Wyoming v. Houghton*:

In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

526 U.S. 295, 299–300 (1999) (citations omitted).

¹⁹ The Fourth Amendment can be reduced to two clauses: The Reasonableness Clause and Warrant Clause.

The first clause of the Fourth Amendment (the Reasonableness Clause) provides that ‘the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated.’ The Amendment’s second clause (the Warrant Clause) states that “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.”

JOSHUA DRESSLER & ALAN MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 167 (4th ed. 2006).

²⁰ 126 S. Ct. 2159 (2006). For further discussion of the knock and announce rule in the context of *Hudson*, see Stewart, *supra* note 3, at 4–7.

²¹ BLACK’S LAW DICTIONARY 876 (7th ed. 1999).

²² *Hudson*, 126 S. Ct. at 2162. The exclusionary rule is defined as “[a]ny rule that excludes or suppresses evidence obtained in violation of an accused person’s constitutional rights.” BLACK’S LAW DICTIONARY 587.

The deterrence of unreasonable searches and seizures is a major purpose of the exclusionary rule. . . . But the rule serves other purposes as well. There is, for example, . . . ‘the imperative of judicial integrity,’ namely, that the courts do not become ‘accomplices in willful disobedience of a Constitution they are sworn to uphold.’ . . . A third purpose of the exclusionary rule . . . is that of ‘assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in the government.’

Id. (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.1, at 107 (2d ed. 1992) (quoting *Elkins v. United States*, 364 U.S. 206, 222–23 (1960); *United States v. Calandra*, 414 U.S. 338, 576–78 (1974) (Brennan, J., dissenting)).

²³ *Hudson*, 126 S. Ct. at 2168; see also Stewart, *supra* note 3, at 7.

officers acted reasonably when they searched a house with a valid warrant, but were unaware that the criminal suspects had moved out several months ago.²⁴

This case represents an embarrassing case of mistaken identity. Here, the Los Angeles County deputies obtained a valid warrant to search a house for three criminal suspects who were African American.²⁵ It was reported that one suspect owned a registered handgun.²⁶ When the deputies entered the residence, they discovered Rettele and Sadler, who were Caucasian, naked in bed.²⁷ They were ordered out of the bed for one to two minutes as the deputies searched for suspects and the firearm.²⁸ Upon realizing their mistake, the deputies had Rettele and Sadler dress, and apologized.²⁹ Subsequently, Rettele brought suit against the city, the sheriff's department, and department officers, alleging that the officers conducted an unlawful and unreasonable search and detention.³⁰ The district court granted summary judgments to all named defendants.³¹ However, the Court of Appeals for the Ninth Circuit reversed, and concluded that the deputies violated the Fourth Amendment and were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects, and, therefore, a reasonable deputy would not have ordered respondents out of bed.³²

In reviewing the Ninth Circuit's decision under a grant of certiorari, the Supreme Court finds the test of reasonableness under the Fourth Amendment in the context of executing a search warrant is an objective one.³³ In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.³⁴ Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.³⁵

²⁴ 127 S. Ct. 1989 (2007).

²⁵ *Id.* at 1991. The warrant was obtained pursuant to a fraud and identity-theft crime ring investigation. Additionally, the warrant authorized a search of two houses in Lancaster, California where the sheriffs believed they would find the criminal suspects. *Id.* at 1990–91.

²⁶ *Id.* (“[Los Angeles County Sheriff’s Department Deputy Dennis] Waters informed [the deputies] they would be searching for three African-American suspects, one of whom owned a registered handgun.”).

²⁷ *Id.* at 1990.

²⁸ *Id.* at 1991.

The deputies’ announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room

Id.

²⁹ *Id.*

By that time the deputies realized they made a mistake. They apologized to Rettele and Sadler, thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them to search, where they found the three suspects. Those suspects were arrested and convicted.

Id.

³⁰ *Id.* Rettele and Sadler filed suit under 42 U.S.C. § 1983 for a violation of their Fourth Amendment right to be free from unreasonable search and seizure. *Id.*

³¹ *Id.*

³² *Id.* See *Rettele v. L.A. County*, 186 Fed. App’x. 765 (9th Cir. Cal. 2006). In this unpublished opinion the majority held that:

because (1) no African-Americans lived in [respondents’] home; (2) [respondents], a Caucasian couple, purchased the residence several months before the search and the deputies did not conduct an ownership inquiry; (3) the African-American suspects were not accused of a crime that required an emergency search; and (4) [respondents] were ordered out of bed naked and held at gunpoint while the deputies searched their bedroom for the suspects and a gun, we find that a reasonable jury could conclude that the search and detention were “unnecessarily painful, degrading, or prolonged,” and involved “an undue invasion of privacy.”

Rettele, 127 S. Ct. at 1991–92 (quoting *Franklin v. Foxworthy*, 31 F.3d 873, 876 (9th Cir. 1994)).

³³ *Id.* at 1992 (citing *Graham v. Conner*, 490 U.S. 386, 397 (1989)). *Graham* addresses the “reasonableness of a seizure of a person.” *Id.*

³⁴ *Id.* (citing *Muehler v. Mena*, 544 U.S. 93, 98–100 (2005)).

³⁵ *Id.* at 1993 (citing *Muehler*, 544 U.S. at 100).

In this analysis, the Court adopts a common sense approach in evaluating the law enforcement conduct. Consequently, the Court finds the “orders of the [deputies] to the occupants, in this context of the lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies.”³⁶ Underscoring this point, the Court acknowledges that blankets and bedding can conceal a weapon—especially since one of the criminal suspects reportedly owned a firearm.³⁷

However, in *Michigan v. Summers*, the Court recognizes that “special circumstances, or possibly a prolonged detention” might render a search unreasonable.³⁸ This was not the case here. There was no evidence indicating the deputies prevented Sadler and Rettele from dressing any longer than necessary to protect their individual safety—they were naked for less than two minutes.³⁹ In fact, the record indicates that Sadler testified that after the deputies searched the room “they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on.”⁴⁰ Ultimately, the Court recognizes a fact of life in law enforcement: “[o]fficers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here.”⁴¹

Objectively, the Supreme Court concludes that when officers execute a valid warrant and act in a reasonable manner, as in this case, the Fourth Amendment is not violated.⁴² The applicability of this case to military justice is to remind Judge Advocates and military law enforcement that the standard of reasonableness applied to search or seizure authorizations is an objective one, and one that is based on common sense.⁴³

B. Standing

Similar to *Rettele*, in *Brendlin v. California*, the Supreme Court focuses on the Fourth Amendment touchstone of reasonableness.⁴⁴ Reasonableness in whether a passenger is seized, as is a driver of a car, when a police officer makes a traffic stop and therefore has standing to challenge the constitutionality of the stop.⁴⁵ This issue of Fourth Amendment constitutional standing for a vehicle passenger, albeit inferred in dicta by the Supreme Court, remained unresolved.⁴⁶ Now, *Brendlin* seeks to clarify whether a vehicle passenger has constitutional standing.

The facts of this case arise from a simple, unjustified traffic stop. Police officers stopped a car to check its registration, as it had temporary registration tags properly displayed on the car, even though it was being operated lawfully.⁴⁷ As the officer questioned the driver, the passenger was recognized as one of the Brendlin brothers, Scott or Bruce, who had absconded from parole supervision.⁴⁸ During the inquiry, the passenger falsely identified himself as “Bruce Brown.” The officer returned to his police vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest.⁴⁹ Brendlin was placed under arrest.⁵⁰ During the search incident to arrest, police discovered drug

³⁶ *Id.*

³⁷ *Id.* The Court notes that “[t]he Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. . . . [R]eports are replete with accounts of suspects sleeping close to weapons.” *Id.* The Court cites several cases which are replete with accounts of suspects sleeping with weapons; e.g. “suspect kept a 9-millimeter Luger under his pillow while he slept” (citing *United States v. Jones*, 33 F.3d 245, 348 (.3d Cir. 2003); “officers ‘pulled back the bed covers and found a .38 caliber Model 10 Smith and Wesson revolver located near where defendant’s left hand had been” (citing *State v. Willis*, 843 So.2d 592, 595 (La. Ct. App. 2007)). *Id.*

³⁸ *See* 452 U.S. 692, 705 n.21 (1981).

³⁹ *Rettele*, 127 S. Ct. at 1993.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² “Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.” *Id.* (citing *Muehler v. Mena*, 544 U.S. 93, 100 (2005); *Graham v. O’Connor*, 490 U.S. 386, 396–99 (1989)).

⁴³ *Id.* (citing *Graham*, 490 U.S. at 397).

⁴⁴ 127 S. Ct. 2400 (2007).

⁴⁵ *Id.* at 2403.

⁴⁶ *Id.* at 2406 (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

⁴⁷ *Id.* at 2404 (“The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as [the police officer] admitted later, there was nothing unusual about the permit or the way it was affixed.”).

⁴⁸ *Id.* The driver was Karen Simeroth, and when the officer asked for her license he saw Bruce Brendlin sitting in the front seat. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

paraphernalia on him.⁵¹ A patdown search of the driver also yielded syringes and drugs, and a further search of the car produced methamphetamine-manufacturing paraphernalia.⁵² “Brendlin was charged with possession and manufacture of methamphetamine.”⁵³

Subsequently, Brendlin “moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop.”⁵⁴ The trial court determined that he had not been seized within the meaning of the Fourth Amendment until the police officer took him into custody, and therefore, lacked standing to suppress the items seized from the vehicle.⁵⁵ The California Court of Appeals reversed holding that a traffic stop necessarily results in detention, and hence a seizure.⁵⁶ The California Supreme Court reversed emphasizing that unless the passenger of a vehicle was the subject of the traffic stop investigation, or show of authority, he is not seized.⁵⁷

The Supreme Court granted certiorari to determine whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure. The Court looks to *Florida v. Bostick* in determining that a person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, “‘by means of physical force or show of authority’ terminates or restrains his freedom of movement.”⁵⁸ Therefore, a “traffic stop entails a seizure of the driver ‘even though the purpose of the stop is limited and the resulting detention quite brief.’”⁵⁹

The seminal question then becomes whether a reasonable person in Brendlin’s position when the car was stopped would have believed himself free to “terminate the encounter” between the police and himself.⁶⁰ The Court says no: “We think that it in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”⁶¹ The Court recognizes in their past opinions the “societal expectation of ‘unquestioned [police] command’ at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission.”⁶²

Therefore, Brendlin was indeed seized. The Supreme Court finds that “Brendlin was seized from the moment the [driver’s] car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest.”⁶³ For the military justice practitioner, this case highlights not only the holding of the case, but also the principle of reasonableness as the touchstone of the Fourth Amendment.⁶⁴ The Court articulates reasonableness in the form of the “societal expectations” which it considers in crafting their decision.⁶⁵ Although some

⁵¹ *Id.* Police found an orange syringe cap when they searched Brendlin. *Id.*

⁵² *Id.* The search of Simeroth “revealed syringes and a plastic bag of a green leafy substance.” *Id.* The search of the car found “tubing, a scale, and other things used to produce methamphetamine.” *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (“[Brendlin] did not assert that his Fourth Amendment rights were violated by the search of Simeroth’s vehicle, but claimed only that the traffic stop was an unlawful seizure of his person.”(citation omitted)).

⁵⁶ *Id.* See *People v. Brendlin*, 115 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004).

⁵⁷ *Id.* The California Supreme Court reversed by a narrow majority. See *People v. Brendlin*, 136 P.3d 845, 846 (2006).

⁵⁸ *Brendlin*, 127 S. Ct. at 2405 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

⁵⁹ *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

⁶⁰ *Id.* at 2406 (citing *Bostick*, 501 U.S. at 436).

⁶¹ *Id.* at 2406–07.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on “privacy and personal security” does not normally (and did not here) distinguish between passenger and driver.

Id. at 2407 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

⁶² *Id.* (quoting *Maryland v. Wilson*, 519 U.S. 408 (1997)).

⁶³ *Id.* at 2410. The court also finds solace in their conclusion since it “comports with views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on” this particular question. *Id.* at 2407–08.

⁶⁴ See *Katz v. United States*, 389 U.S. 347, 360 (1967).

⁶⁵ See generally *Randolph II*, 547 U.S. 103 (2006).

critics may see this as a loose foundation in which to consider Fourth Amendment decisions, the sum effect is a common sense approach to Constitutional law.⁶⁶

II. The 2007 CAAF Term of Court—Staying the Course by Using Precedent as a Rudder

A. Consent

The issue of societal expectations within the context of Fourth Amendment law gained prominence last year in the Supreme Court’s decision in *Georgia v. Randolph*.⁶⁷ In *Randolph*, the Court stated that “[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations. . . .”⁶⁸ This theme continues this term in the military courts over the issue of apparent consent.⁶⁹

The CAAF addresses the issue of apparent consent in a case that typifies modern military living arrangements.⁷⁰ In *United States v. Rader*, the appellant and two other servicemembers rented an apartment in an off-base apartment complex.⁷¹ As sometimes happens in these living arrangements—items and property were shared or purchased among roommates.⁷² In this case, Airman (Amn) Rader agreed to purchase a computer from his roommate, Airman First Class (A1C) Davis.⁷³ The computer was located in A1C Davis’s bedroom due to ventilation problems in Amn Rader’s room, and was left there with the knowledge and consent of Amn Rader after he purchased it.⁷⁴ Additionally, A1C Davis performed routine maintenance on the computer every two weeks as the computers owned by all the roommates were joined together by a local access network (LAN) for the purpose of playing games and sharing files.⁷⁵

While performing routine maintenance on Amn Rader’s computer, A1C Davis discovered child pornography.⁷⁶ Airman First Class Davis opened a folder entitled “My Music” where he noticed thumbnails that appeared to be images of children engaging in sex acts.⁷⁷ Neither the folder, nor the computer, was password protected.⁷⁸ Airman Rader never prohibited A1C Davis from accessing the computer or any files within it.⁷⁹ Subsequently, A1C reported what he had seen on Amn Rader’s computer to his first sergeant.⁸⁰ The Air Force Office of Special Investigations (AFOSI) began an investigation, and with a Judge Advocate from the local legal office, the agents gained voluntary consent from A1C Davis to enter and search the apartment and the computer.⁸¹ The AFOSI agents accessed the computer’s files and obtained the child pornography images.⁸²

⁶⁶ *Id.* at 129. See generally Justice Roberts and Scalia’s joint dissent regarding the criticism of using “societal expectations” as a foundation for deciding common authority consent cases. *Id.* at 127–42.

⁶⁷ *Id.* at 103.

⁶⁸ *Id.* at 111.

⁶⁹ *United States v. Rader*, 65 M.J. 30 (2007).

⁷⁰ *Id.* at 31.

⁷¹ *Id.* (“Between May and October 2003, Appellant and two other servicemembers, Airman Thacker and Airman First Class (A1C) Davis, rented an apartment in an off-base apartment complex in Layton, Utah.”).

⁷² *Id.* “In May or June, the Appellant agreed to purchase A1C Davis’ computer.” *Id.* “Both A1C Davis and Airman Thacker used Appellant’s computer to play computer games.” *Id.*

⁷³ Rader was in the process of purchasing the computer from A1C Davis but had not finished paying for it. *Id.* at 32.

⁷⁴ *Id.* at 31.

⁷⁵ *Id.* A local area network (LAN) is “[a] system that links computers and related equipment to form a network, as within an office.” AM. HERITAGE DICTIONARY 477 (4th ed. 2001).

⁷⁶ *Radar*, 65 M.J. at 31.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ “Although A1C Davis had never used the LAN to access the Appellant’s ‘My Music’ folder, A1C Davis believed that each of the roommates could access all of the files on the other roommates’ computers via the LAN.” *Id.* at 31–32.

⁸⁰ *Id.* at 32.

⁸¹ *Id.*

⁸² *Id.*

Airman Rader moved to suppress the child pornography images on the basis that A1C Davis had insufficient access over the computer to give valid consent to its search.⁸³ The trial judge denied the motion to suppress,⁸⁴ and Amn Rader conditionally pled guilty⁸⁵ and was convicted of three specifications related to the use of his computer and an interactive computer service to receive child pornography in violation of Uniform Code of Military Justice (UCMJ) Article 134.⁸⁶ The Air Force Court of Criminal Appeals (AFCCA) affirmed.⁸⁷ The CAAF reviewed the denial of a motion to suppress, and asks “whether Appellant’s roommate had sufficient access and control of Appellant’s computer to consent to the search and seizure of certain unencrypted files in Appellant’s non-password-protected computer.”⁸⁸

The issue of third party consent to search property is well-established in the law. Typically, the search of a home, to include items inside the home like a computer, is prohibited absent a warrant.⁸⁹ Military Rule of Evidence (MRE) 314(e)(2) recognizes that a third party “may grant consent to search property when the person exercises control over that property.”⁹⁰ The consent may even be valid in instances when the nonconsenting person with whom that authority is shared is absent.⁹¹ “Common authority” for purposes of validity to third party consent to search is “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to risk that one of their number might permit’ the search.”⁹²

The issue of whether A1C Davis had sufficient access and control of Rader’s computer to authorize consent to search is fact-specific.⁹³ The CAAF agrees with the military judge that it would be “difficult to imagine how there could have been a greater degree of joint access, mutual use, or control.”⁹⁴ Several factors considered by the court did not favor Rader’s assertion of A1C Davis’s limited access to his computer: (1) “the Appellant did nothing to communicate a restriction regarding access to his computer files”;⁹⁵ (2) any understanding “regarding restricted access to Appellant’s computer was tacit and unclear, as evidenced by A1C Davis and Airman Thacker’s use of the computer,” as well as, the lack of surprise by Appellant when (via telephone call) A1C Davis informed him that he had been looking at Appellant’s files and saw “porn”;⁹⁶ (3) that “neither the computer nor any of its files were password protected, encrypted, or subject to any other technological

⁸³ *Id.*

⁸⁴ *Id.* (“[T]he military judge’s conclusion of law was that the Government had established by clear and convincing evidence that A1C Davis had sufficient access over the computer to give valid consent to its search.”).

⁸⁵ See MCM, *supra* note 4, R.C.M. 910(a)(2).

With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on . . . appeal, the accused shall be allowed to withdraw the plea of guilty.

Id. See also *United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (discussing the policy reasons behind conditional guilty pleas).

⁸⁶ *Rader*, 65 M.J. at 30.

⁸⁷ *Id.* See *United States v. Rader*, No. ACM 36133, 2006 CCA LEXIS 164 (A.F. Ct. Crim. App. June 20, 2006).

⁸⁸ *Rader*, 65 M.J. at 30.

⁸⁹ *Id.* at 32 (citing U.S. CONST. amend. IV; *Randolph II*, 547 U.S. 103 (2006); *United States v. Conklin*, 63 M.J. 333, 337 (2006) (reaffirming expectation of privacy in the contents of a personal computer)).

⁹⁰ *Id.* See MCM, *supra* note 4, M.L. R. EVID. 314(e)(2).

⁹¹ *Radar*, 65 M.J. at 32. The court cites *United States v. Matlock*, 415 U.S. 164, 171 (1974), as well as *Randolph II*, 547 U.S. at 116. *Randolph II* “reaffirm[s] the constitutional sufficiency of third party consent absent the objection of a present, nonconsenting person with whom the authority is shared.” *Rader*, 65 M.J. at 32–33.

⁹² *Radar*, 65 M.J. at 33 (quoting *Matlock*, 415 U.S. at 171 n.7).

⁹³ *Id.* (“The control of a third party exercises over property or effects is a question of fact.”).

In this case, the findings of fact include the following: (1) Appellant’s computer was physically “located in [A1C] Davis’ bedroom,”; (2) “[N]either the accused’s computer nor the My Music folder on the accused’s computer was protected by a password”; (3) “[T]he accused never told Davis not to access his computer or any files within the computer”; (4) A1C Davis and Airman Thacker “used the accused’s computer to play computer games” with Appellant’s “knowledge and consent”; (5) A1C Davis “accessed the accused’s computer approximately every two week[s] to perform routine maintenance on that computer”; and (6) Appellant “never told Davis not to access his computer or any files within the computer.”

Id.

⁹⁴ *Id.* at 34.

⁹⁵ *Id.*

⁹⁶ *Id.*

impediment to review by a person at Appellant's computer";⁹⁷ and (4) simply, the record does not indicate that "Appellant never told his roommates not to access his computer or any of its files outside of his presence."⁹⁸

The CAAF conclusively agrees with the trial court and the Air Force Court of Military Appeals that the Government met its clear and convincing burden of persuasion: "AIC Davis had sufficient access to and control over the computer to give valid consent to its search, and that Appellant assumed the risk that he might do so."⁹⁹ This case stands out not so much for the affirmation of the principle of third party consent, but for the reminder how the Fourth Amendment analysis is fact-dependent. If any admonishment is to be interpreted from the CAAF to the military justice practitioner it is to develop your facts and place them on the record when addressing Fourth Amendment issues involving consent. Had the trial judge not recorded the comprehensive findings of fact, the CAAF would have been disadvantaged in their review of the record.

B. Probable Cause

The CAAF continues to refine and reinforce their holdings regarding the sufficiency of evidence to support probable cause for a search authorization. *United States v. Bethea* was the CAAF's most recent iteration on this issue in the 2005 term of court.¹⁰⁰ In *Bethea*, the court addressed whether a positive urinalysis result was sufficient evidence to establish probable cause for a search authorization "to seize a hair sample from Appellant to test it for evidence of drug use."¹⁰¹ The CAAF's decision "changed military jurisprudence with regard to the definition of probable cause."¹⁰² By refusing to be ambushed by a "semantic" analysis of the military judge's conclusion, the court provided military justice practitioners and judges assurance that the "totality of the circumstances"¹⁰³ test for probable cause really means a totality of the circumstances.¹⁰⁴ The CAAF boldly reasserted this by stating that probable cause is a "flexible, common sense standard"¹⁰⁵ and does not "require a showing that an event is more than 50% likely."¹⁰⁶ Now, two terms later, the CAAF readdresses the issue of probable cause in *United States v. Leedy*.¹⁰⁷

Where CAAF in *Bethea* addresses probable cause in the context of totality of the circumstances, the CAAF in *Leedy* addresses probable cause in the context of how a military magistrate develops and interprets the totality of the circumstances. Airman First Class Leedy appealed his conviction¹⁰⁸ for possessing and/or receiving child pornography, and the CAAF granted review of the following issue: "Whether the military judge erred in denying Appellant's motion to suppress the evidence seized from Appellant's computer where the affidavit in support of the search did not contain any description of the substance of the images suspected in to depict 'sexually explicit conduct.'"¹⁰⁹ In other words: "when, if at all, can computer file titles, absent further description of file contents, serve as probable cause to search for child pornography."¹¹⁰ Airman

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Matlock v. United States*, 415 U.S. 164, 171 n.7 (1974)).

¹⁰⁰ 61 M.J. 184 (2005).

¹⁰¹ *Id.* at 184.

¹⁰² Lieutenant Colonel M. K. Jamison, USMC, *New Developments in Search and Seizure Law*, ARMY LAW., Apr. 2006, at 9, 23.

¹⁰³ *Bethea*, 61 M.J. at 187 (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 239 (1983)).

¹⁰⁴ Jamison, *supra* note 102, at 23.

¹⁰⁵ *Bethea*, 61 M.J. at 187 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)).

¹⁰⁶ *Id.* (citing *United States v. Olson*, No. 03-CR-51-S, 2003 U.S. Dist. LEXIS 24607, at *16 (W.D. Wis. July 11, 2003)); *see also* *Ostrander v. Madsen*, Nos. 00-35506, 00-35538, 00-35541, 2003 U.S. App. LEXIS 1665, at *8 (9th Cir. Jan. 28, 2003) ("Probable cause is met by less than a fifty percent probability, so that even two contradictory statements can both be supported by probable cause."); *Samos Imex Corp. v. Nextel Commc'ns, Inc.*, 194 F.3d 301, 303 (1st Cir. 1999) ("The phrase 'probable cause' is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than 'more probable than not.'"); *United States v. Burrell*, 963 F.2d 976, 986 (7th Cir. 1992) ("Probable cause requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false.") (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

¹⁰⁷ 65 M.J. 208 (2007).

¹⁰⁸ *Id.* at 210. Leedy plead not guilty to "possessing and/or receiving child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ)." *Id.* He was "convicted and sentenced to a bad-conduct discharge, confinement for eight months, total forfeiture of all pay and allowances, and reduction to airman basic." *Id.* "The Air Force Court of Criminal Appeals affirmed the findings and sentence." *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

First Class Leedy contends that the computer file name “14 year old Filipino girl” listed in the probable cause affidavit was not enough, without a description of the file contents, to authorize a search of his computer.¹¹¹

The computer file name “14 year old Filipino girl” came to be recognized through the physical clumsiness of A1C Leedy’s roommate, A1C Winkler. Airman First Class Winkler claims to have bumped into Leedy’s computer which caused the screen saver to disengage.¹¹² The computer screen then displayed the Window’s Media Player that contained a list of recently played files with names that included “three white guys and one black girl” and “a 14 year old Filipino girl.”¹¹³ Based on the title of the files, A1C Winkler suspected these were pornographic files; and at least one of them he perceived to be child pornography.¹¹⁴ About a month later, A1C Winkler reports his suspicion to the AFOSI.¹¹⁵ Special Agent (SA) Spring investigates and is told by A1C Winkler that he suspected, but never saw any pornographic images on A1C Leedy’s computers.¹¹⁶

Despite the dearth of evidence beyond A1C Winkler’s statements, SA Spring sought a search authorization.¹¹⁷ He met with the chief of military justice who believed there was probable cause to search A1C Leedy’s computer.¹¹⁸ “The affidavit consisted of two primary sections.”¹¹⁹ The first section provided SA Spring’s background and expertise in the area of child pornography.¹²⁰ The second section provided the facts and circumstances supporting the search authorization, and a contextual explanation for them; to wit: SA Spring, based on his background and experience, identified a number of “characteristics” of people involved in viewing and collecting child pornography, and that the file names observed on Leedy’s computer by his roommate, A1C Winkler, comported with those characteristics.¹²¹

The military magistrate, Colonel Byers, found probable cause.¹²² Colonel Byers testified during the motion to suppress hearing that he based his probable cause on several factors.¹²³ First, he closely read the affidavit.¹²⁴ Second, he questioned SA Spring about the matter for more than twenty minutes (raising many of the questions that Leedy echoes in his appeal).¹²⁵ For example:

Col[onel] Byers voiced his trepidations about whether A1C Winkler could be trusted, the length of time between A1C Winkler’s finding of the files and his report to AFOSI, that no one had actually seen any pornography played on Appellant’s computer, and about whether the file names provided were actually pornographic.¹²⁶

¹¹¹ *Id.* at 211. He also contends that probable cause was not met for several reasons:

A1C Winkler was unknown to AFOSI and had no track record of providing any information to the office; the only evidence A1C Winkler provided the magistrate was stale (over a month had elapsed between A1C Winkler seeing Appellant’s files and his report to AFOSI); no one had ever seen any pornography of any sort on Appellant’s computer; the sole direct link between Appellant and child pornography was the title of a file: “14 year old Filipino Girl”, and there was nothing in the title, nor in A1C Winkler’s description of the other files, that necessarily suggested lasciviousness or portrayals of “sexually explicit conduct.”

Id.

¹¹² *Id.*

¹¹³ *Id.* at 215.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 211.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 214.

¹²⁰ *Id.*

¹²¹ *Id.* at 216.

¹²² *Id.* at 218.

¹²³ *Id.*

¹²⁴ *Id.* at 217.

¹²⁵ *Id.* at 218.

¹²⁶ *Id.*

Importantly, the magistrate “explicitly, and properly, relied,” but did not defer to, SA Spring’s expertise.¹²⁷ Third, “he proceeded to speak with others including AIC Winkler’s and Appellant’s commanding officer to gain further insight about whether there was any motive for AIC Winkler to fabricate charges against Appellant.”¹²⁸ Only after this investigation, did the magistrate issue the authorization.¹²⁹

In light of the magistrate’s authorization to search AIC Leedy’s computer, the CAAF focuses its analysis on the magistrate’s actions in order to reach a decision regarding its certified issue for review; i.e. the lack of a description of the substance of the images suspected to depict “sexually explicit conduct.”¹³⁰ The CAAF draws upon a broad range of federal precedent to lay the foundation in evaluating the magistrate’s conduct. The court attempts to “contain” the amorphous concept of probable cause by defining what it is not. For instance, probable cause “is not a ‘technical’ standard, but rather is based on ‘the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians act.’”¹³¹ Additionally, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator’s belief is more likely true than false.¹³² And, finally, “there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present.”¹³³

Therefore, in viewing the evidence under the totality of the circumstances as established by *Illinois v. Gates*, the CAAF sees three distinct points in support of the magistrate’s decision to find probable cause. First, the court is skeptical of Leedy’s narrow focus on the computer file title “14 year old Filipino girl” in his appeal. Although acknowledging the title could be innocent, the court notes that the title does not appear in isolation, and is not the sole predicate fact.¹³⁴ Moreover, the court seeks to view this in context of the “professional lens . . . presented to the magistrate.”¹³⁵

Hence, what illuminates the facts provided is the second point the court identifies: SA Spring’s training and experience.¹³⁶ Special Agent Spring’s experience was useful to the magistrate by filtering evidence not only through his experience, but skepticism toward AIC Leedy’s roommate. Through his professional judgment and common sense, he provided useful information and context to the magistrate to confirm probable cause to search AIC Leedy’s computer.¹³⁷ While noting that the “Supreme Court has repeatedly directed reviewing courts to apply common sense, and practical considerations” in probable cause cases, the CAAF concludes that the gloss SA Spring applied to AIC Leedy’s file titles was well founded.¹³⁸

¹²⁷ *Id.*

[S]tating, for instance, that he concurred with SA Spring’s assessment that there was a substantial basis to believe that the file names were pornographic based upon “[SA Spring’s] experience and some cases that he’s had and the evidence that those type [sic] of titles taken in context . . . was that [those files] could be pornographic in nature.”

Id.

¹²⁸ *Id.*

¹²⁹ *Id.* “Investigators searched Appellant’s computer and found pornographic files (video clips and still photos), more than thirty of which depicted sexually explicit acts involving minors.” *Id.* at 211.

¹³⁰ *Id.* at 210. This is a rather eclectic case that on first blush appears about the sufficiency of evidence to support probable cause, but closer scrutiny reveals the CAAF treatment focuses on the magistrate’s calculus in arriving at probable cause.

¹³¹ *Id.* at 213 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

¹³² *Id.* (citing *United States v. Burrell*, 963 F.2d 976, 986 (7th Cir. 1992)).

¹³³ *Id.* (citing *United States v. Bethea*, 61 M.J. 184, 187 (2005) (holding that the standard is a “flexible, common-sense” one)).

¹³⁴ *Id.* at 215. As an initial factor, the title is included on a sequential play list alongside titles that AIC Winkler (AIC Leedy’s roommate) understood to identify sex acts. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 216.

¹³⁷ *Id.* (“SA Spring stated that staleness concerns are usually misapplied in child pornography, that in his experience individuals who enjoy child pornography are invariably ‘collectors,’ almost always keeping their material permanently.”).

¹³⁸ *Id.* at 217.

We acknowledge that relying upon expertise too heavily, at the expense of hard facts, can be troubling and is open to abuse. However, such blind faith reliance is not present here, either by SA Spring or the magistrate. It is evident that SA Spring did not simply rest on his training, passively filtering any evidence through his experience. SA Spring was actively skeptical about AIC Winkler’s claims and did not immediately accept his concerns as legitimate. When AIC Winkler presented his information to the AFOSI, SA Spring performed an in-depth interview of the airman to assess his credibility. SA Spring questioned the airman about whether there was an ulterior motive behind his report and clearly established the limits of what was known and what was not. It was

The CAAF's third and final point is that ultimately, the law and the CAAF, do not want a magistrate to act as a "rubber stamp."¹³⁹ The court wants a magistrate that acts "in light of his own investigation of the facts, and pays heed to the circumstances in which he learned of the facts."¹⁴⁰ Such is the case here. The magistrate only expressed confidence in SA Spring's affidavit when, pursuant to his own inquiry, he was convinced that the requirements had been met.¹⁴¹

In conclusion, this case is less about defining totality of the circumstances for a probable cause determination, but more about what it means to be a neutral and detached magistrate who applies "common sense and practical considerations" to the facts of a search authorization request.¹⁴² The holding in *Leedy* is important for the proposition that:

[p]robable cause is founded not on the determinative features of any particular piece of evidence provided an issuing magistrate—nor even solely based upon the affidavit presented to a magistrate by an investigator wishing search authorization—but rather upon the overall effect or weight of all factors presented to the magistrate.¹⁴³

III. Looking Ahead to CAAF's 2008 Term of Court: Reasonable Expectation of Privacy in Government Computers

Last year's symposium article¹⁴⁴ focused considerably on the expectation of privacy in government e-mail communications as decided by the CAAF in *United States v. Long*.¹⁴⁵ In *Long*, the CAAF upheld the "Navy-Marine Corps Court of Criminal Appeals holding that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server, making it binding upon all service courts."¹⁴⁶ The significance of the *Long* case continues to reverberate not only within the Department of Defense,¹⁴⁷ but also within the CAAF as it prepares to hear *United States v. Larson* in its 2008 term of court.¹⁴⁸

The *Larson* (*Larson I*) case addresses the reasonable expectation of privacy in a government computer.¹⁴⁹ The court notes that in military jurisprudence, the focus of Fourth Amendment litigation involving computers has primarily been on the

only once SA Spring had assessed the information and was confident that AIC Winkler's concerns were bona fide and that he had no "axe to grind" against Appellant that SA Spring presented the collected material to the base Chief of Military Justice for her assessment as to the existence of probable cause. After obtaining a judge advocate's assent, SA Spring wrote up a comprehensive affidavit to be presented to the magistrate requesting search authorization. The affidavit included both information about AIC Winkler's claims and SA Spring's professional judgment (based on his education and experience) linking the claims to a likelihood that contraband would be present.

Id. at 216–17.

¹³⁹ *Id.* at 217.

¹⁴⁰ *Id.* at 218.

¹⁴¹ *Id.*

¹⁴² *Id.* "The constitutional propriety of SA Spring's behavior also comports with common sense." *Id.* at 217.

¹⁴³ *Id.* at 213. The CAAF also cites *United States v. Cravens*:

[The c]ourt adopted the military judge's finding that a magistrate appropriately fulfilled his role as a neutral and detached magistrate, and that his decision was clearly his own after he asked responsible questions, considered the views of the investigators and judge advocate advisor and only then made his decision.

Id. at 218 (citing *United States v. Cravens*, 56 M.J. 30, 373, 376 (2002)).

¹⁴⁴ See Stewart, *supra* note 3, at 7–17.

¹⁴⁵ *Long II*, 64 M.J. 57 (2006).

¹⁴⁶ See Stewart, *supra* note 3 (citing *United States v. Long (Long I)*, 61 M.J. 539, 541 (N-M. Ct. Crim. App. 2005)).

¹⁴⁷ *Id.* at 7–17.

¹⁴⁸ *Larson I*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006), *rev. granted*, *United States v. Larson (Larson II)*, 65 M.J. 253 (2007). The CAAF granted review of several issues, but the issue for review of interest to this article is: "[W]hether the Air Force Court of Criminal Appeals erred in holding that Appellant had no reasonable expectation of privacy in his government computer despite this court's ruling in *United States v. Long*, 64 M.J. 57 (2006)." *Larson II*, 65 M.J. at 253.

¹⁴⁹ *Larson I*, 64 M.J. at 559

expectation of privacy afforded e-mail.¹⁵⁰ However, the search here did not focus on that type of communications, and is therefore a case of first impression.¹⁵¹ The search focused on

certain data files, created as part of the ‘normal operation procedure’ of the Microsoft Windows operation system, which record the date, time and Internet address of web sites visited by the computer user, as well as information about the user account in use on the computer at the time the sites were visited.¹⁵²

Although the legal issue is one of first impression for the AFCAA, the facts are typical.¹⁵³ Major (MAJ) Larson was a thirty-six-year-old reserve officer on extended active duty at Schriever Air Force Base in Colorado Springs, Colorado temporarily filling in for a deployed officer.¹⁵⁴ Major Larson’s assigned office was the same one assigned to the deployed officer, and still contained that officer’s personal belongings.¹⁵⁵ It contained a government computer, connected to the government network, which included the Internet.¹⁵⁶ The computer displayed a logon banner “stating it was government equipment and that users consented to monitoring.”¹⁵⁷

Major Larson used his government computer to access the Internet.¹⁵⁸ He used an instant-messaging (IM) program from a commercial Internet company which permitted him to select a user “user name and to input data about [himself], including [his] real name, age, location, gender and hobbies.”¹⁵⁹ Accordingly, MAJ Larson: “identified himself as ‘Skeeler’ and his location as Colorado Springs.”¹⁶⁰ Major Larson did not use his real name but stated “his true age” and “his sole hobby as ‘Public sex.’”¹⁶¹

Through the IM program, MAJ Larson met someone on-line.¹⁶² He met “Kristin” who “was 14 years old, lived in Colorado Springs, and up until recently, owned a pet hamster.”¹⁶³ Their conversation turned to sex, and after a few days MAJ Larson asked if they could meet.¹⁶⁴ He suggested they go to a park where they could have sex without being seen.¹⁶⁵ Over the course of a week the conversation turned more explicit, and “Kristin” finally agreed to “hook up with him.”¹⁶⁶ The court wryly notes that “[a]s fate would have it . . . his duty schedule intervened and he was unable to meet [her] as planned.”¹⁶⁷ He apologized, and after more sexually explicit IM messages, arranged another meeting.¹⁶⁸

¹⁵⁰ *Id.* at 563 (citing e.g., *Long II*, 64 M.J. at 57; *United States v. Monroe*, 52 M.J. 326 (2000)).

¹⁵¹ *Id.*

¹⁵² *Id.* (“Such files are like a ‘documentary history of [the user’s] travels on the Internet.’”) (quoting *United States v. Romm*, 455 F.3d 990, 994 n.5 (9th Cir. 2006)).

¹⁵³ See, e.g., Associated Press, *Pastor: Minister Arrested in Sex Sting Resigned*, http://www.foxnews.com/printer_friendly_story/0,3566,356519,00.html (last visited May 18, 2008).

¹⁵⁴ *Larson I*, 64 M.J. at 561.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Over the course of the next week or so, the appellant urged Kristin to masturbate and to touch her anus, to describe those acts to him after the fact, and also to describe various aspects of her anatomy to him. As these discussions progressed, the appellant repeatedly discussed his desire to engage in sexual intercourse with Kristin, and asked if she would perform oral sodomy on him and allow him to anally sodomize her.

Id.

¹⁶⁷ *Id.*

Major Larson kept this rendezvous.¹⁶⁹ When he arrived, he was quickly apprehended by the local police, and arrested.¹⁷⁰ “Kristin” was not a fourteen-year-old girl, but instead an undercover Colorado Springs police officer.¹⁷¹ In the search incident to his arrest, the police “discovered in [his] pocket a receipt for a package of condoms purchased just 15 minutes prior to his arrest.”¹⁷²

After his arrest, the military authorities were notified and began their own parallel investigation.¹⁷³ Major Larson’s commander authorized the AFOSI to enter his locked office and seize his government computer.¹⁷⁴ During a forensic search of his computer, data files, stored automatically by the Microsoft Windows operating system during MAJ Larson’s Internet browsing sessions, were recovered indicating that he used the computer to search the Internet for sexually-related material and obtain sexually-explicit images.¹⁷⁵

At trial, MAJ Larson sought to suppress the results of the warrantless search of his government computer as it violated his reasonable expectation of privacy under the Fourth Amendment.¹⁷⁶ The military judge denied the motion and found that reasonable expectation of privacy was compromised by the fact his office was accessible by several others, to include his commander, various administrators, and other personnel assigned to the unit.¹⁷⁷ Additionally, it was not MAJ Larson’s office. The deployed officer, for whom MAJ Larson was filling in, would return to his office, which contained his computer, and his personal belongings.¹⁷⁸

The AFCCA reasonable expectation of privacy analysis focuses less on the issue of office accessibility, but rather on the data files on the government computer.¹⁷⁹ Citing precedent, the court concludes:

There is no evidence the appellant was aware the Internet history files existed, and we are unconvinced the appellant could entertain a subjective expectation of privacy in them without such knowledge. Moreover, we conclude such an expectation, even if it existed, would on these facts not be reasonable. The data in question was recorded automatically, not for law enforcement purposes, but as part of the computer’s operating system. The appellant could not expect to keep private automatically-recorded data stored on government property he would reasonably have known would be turned over to another officer on that officer’s return from deployment.¹⁸⁰

As identified earlier in this article’s analysis of *Larson I*, the CAAF finds this case attractive for further appellate review for its interest in re-addressing its decision in *United States v. Long*.¹⁸¹ The *Long* case has generated its share of controversy by upending conventional wisdom that in light of log-on banners, and government computer and a network’s inherent nature

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The police officer kept verbatim transcripts of all Larson’s IM conversations with “Kristin.” *Id.*

¹⁷² *Id.* at 562.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 563.

See, e.g. *United States v. Conklin*, 63 M.J. 333, 337 (C.A.A.F. 2006) (finding only a “limited” expectation of privacy in a government computer in a government office); *United States v. Tanksley*, 54 M.J. 169, 172 (C.A.A.F. 2000), *overruled in part on other grounds by United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003) (finding “at best” a “reduced” expectation in personal computer data kept in a government office).

Id.

¹⁸¹ *United States v. Long*, 64 M.J. 57 (2006).

as government property, that any servicemember would be able to demonstrate a reasonable expectation of privacy in it.¹⁸² So the question becomes whether the CAAF will expand their interpretation of reasonable expectation of privacy to include, as the AFCCA saw as a case of first impression, data files created as part of the “normal operating procedure” of the Microsoft Windows operating system.¹⁸³ The CAAF has therefore framed the issue for review as thus: “Whether the Air Force Court of Criminal Appeals erred in holding that appellant had not reasonable expectation of privacy in his government computer despite this court’s ruling in *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006).”¹⁸⁴

IV. Conclusion

This year’s term of court could definitely be described as one of yeoman’s work of implementing last year’s Fourth Amendment decisions and precedents. The Supreme Court, the CAAF, and the service court of criminal appeals remind us that the touchstone of Fourth Amendment law is: Reasonableness. It is reasonableness that guided their decisions in *Rettele*,¹⁸⁵ *Brendlin*,¹⁸⁶ *Rader*,¹⁸⁷ *Leedy*,¹⁸⁸ and *Larson*.¹⁸⁹ And, it is reasonableness that will guide their next term of court, and will “resupply” the continuing offensive for Fourth Amendment clarity.

¹⁸² See generally Stewart, *supra* note 3, at 7–17.

¹⁸³ *Larson I*, 64 M.J. 559, 563 (A.F. Ct. Crim. App. 2007).

¹⁸⁴ *United States v. Larson (Larson II)*, 65 M.J. 253 (2007). At the time of publication, CAAF has already ruled on this granted issue for review, and finds that the Air Force Court of Criminal Appeals did not abuse his discretion “in concluding that [Larson] had no expectation of privacy in the government computer.” *United States v. Larson (Larson III)*, 66 M.J. 212 (2008) (quoting *Larson I*, 64 M.J. at 563). The next symposium article will provide detail analysis on the CAAF’s holding.

¹⁸⁵ *Los Angeles County, California v. Rettele*, 127 S. Ct. 1989 (2007).

¹⁸⁶ *Brendlin v. California*, 127 S. Ct. 2400 (2007).

¹⁸⁷ *United States v. Rader*, 65 M.J. 30 (2007).

¹⁸⁸ *United States v. Leedy*, 65 M.J. 208 (2007).

¹⁸⁹ *Larson I*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006).

If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, then it's Probably Testimonial

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Introduction

The three most prominent current issues in Sixth Amendment jurisprudence in the military are determining whether a hearsay statement is testimonial or nontestimonial, whether lab reports should be considered testimonial, and whether nontestimonial statements implicate the Confrontation Clause at all. The Court of Appeals for the Armed Forces (CAAF) decided cases addressing the first two issues last term, and the Supreme Court clarified the third. This article addresses each issue in turn, after briefly describing the Sixth Amendment background.

Background

The Sixth Amendment Confrontation Clause landscape changed abruptly in 2004 with the Supreme Court opinion in *Crawford v. Washington*.¹ Prior to *Crawford*, the test for admitting a hearsay statement satisfying the Confrontation Clause was provided by *Ohio v. Roberts*.² Under *Roberts*, a hearsay statement could be admitted if the proponent could show that it possessed adequate indicia of reliability.³ Indicia of reliability could be shown in one of two ways. First, if the statement fit within a firmly rooted hearsay exception, it would satisfy the Confrontation Clause.⁴ Second, if it didn't fit within a firmly rooted hearsay exception, it could still satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.⁵ Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology.⁶ Most importantly, when analyzing particularized guarantees of trustworthiness, the proponent was limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted.⁷

Crawford divides hearsay statements into two categories, testimonial and nontestimonial.⁸ Testimonial statements can only be admitted if the declarant is unavailable and there has been a prior opportunity for cross examination.⁹ Nontestimonial hearsay statements by contrast can be admitted if they meet the requirements of the rules of evidence.¹⁰ The critical issue is determining whether a statement is testimonial or nontestimonial; however, the Supreme Court has never provided a comprehensive definition of these terms.¹¹ In *Crawford* itself the Court provided some clues, describing three types of core testimonial statements: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3)

¹ 541 U.S. 36 (2004).

² 448 U.S. 56 (1980).

³ *Id.* at 66.

⁴ *Id.*

⁵ *Id.*

⁶ *Idaho v. Wright*, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); *United States v. Ureta*, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

⁷ *Wright*, 497 U.S. at 819–24. This can be confusing, since this limit on extrinsic evidence only applies to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See Ureta*, 44 M.J. 290.

⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁹ *Id.* at 68.

¹⁰ The issue of whether the Confrontation Clause applies to nontestimonial statements at all in light of *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) is discussed later in this article.

¹¹ The Court specifically states in *Crawford*, “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68.

statements made under circumstances that would cause a reasonable witness to believe they could be used later at trial.¹² The Court also made it clear that statements made to law enforcement would likely be considered testimonial, whereas statements made to casual acquaintances would likely be considered nontestimonial.¹³

Approximately two years after *Crawford*, the Court decided *Davis v. Washington*, where it provided additional guidance for determining whether a statement is testimonial or nontestimonial, at least in the context of police interrogations.¹⁴ The Court in *Davis* held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁵

Davis and *Crawford* are the only Supreme Court cases that make any effort to explain the meaning of the terms testimonial and nontestimonial, therefore lower courts have spent considerable time and energy analyzing those two cases and attempting to develop workable definitions.

Testimonial v. Nontestimonial

This year there were three significant military cases decided on the issue of determining whether a statement is testimonial or nontestimonial. The most significant was *United States v. Rankin*, previewed in last year's symposium article, where the CAAF laid out three factors to consider when deciding if a statement is testimonial.¹⁶ The CAAF then used this new methodology in two subsequent cases to determine that a statement made to a sexual assault nurse examiner (SANE) was testimonial in *United States v. Gardinier*,¹⁷ and that a bank affidavit was nontestimonial in *United States v. Foerster*.¹⁸

United States v. Rankin¹⁹

Hospital Corpsman Third Class Rankin began a period of unauthorized absence in 1993, and did not return until more than seven years later.²⁰ He was convicted of violating Article 86, UCMJ,²¹ and sentenced to ninety-one days confinement and a bad conduct discharge (BCD).²² The government's case consisted of several personnel records documenting appellant's absence, and a single live witness who testified for the purpose of laying the foundation for admission of the documents.²³ There was no witness testimony by anyone with first-hand knowledge of the circumstances surrounding appellant's unauthorized absence.²⁴ The four documents at issue in this case were: Prosecution Exhibit (PE) 5, a letter from the command to the appellant's mother, notifying her that he was an unauthorized absentee; PE 6, a computer generated document known as a "page 6," that showed the date the unauthorized absence began; PE 10, a copy of a naval message informing recipients that appellant had been apprehended; and PE 11, a copy of a notice for civilian law enforcement to the effect that appellant was a deserter and asking for assistance in apprehending him.²⁵

The issue was whether the documents admitted against appellant at trial, over defense objection, to prove the unauthorized absence were testimonial hearsay under *Crawford v. Washington*.²⁶ The CAAF affirmed the lower court, finding that three of the four documents introduced by the government (PEs 5, 6, and 10) were nontestimonial, and that

¹² *Id.* at 51–52.

¹³ *Id.* at 53.

¹⁴ *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁵ *Id.* at 822.

¹⁶ 64 M.J. 348 (2007); Major Nicholas F. Lancaster, *The Framers' Sixth Amendment Prescriptions: Cross-Examination and Counsel of Choice*, ARMY LAW., June 2007, at 20, 28.

¹⁷ 65 M.J. 60 (2007).

¹⁸ 65 M.J. 120 (2007).

¹⁹ *Rankin*, 64 M.J. 348. For a discussion of the Navy-Marine Corps Court of Criminal Appeals opinion in this case, see Lancaster, *supra* note 16, at 24.

although the fourth (PE 11) may have qualified as testimonial, the information it contained was cumulative with information in the other three.²⁷

The court began its analysis by reviewing Confrontation Clause jurisprudence after *Crawford*, describing the Supreme Court's division of hearsay statements into two categories, testimonial and nontestimonial, and holding that testimonial statements may not be admitted unless the declarant is both unavailable and there has been a prior opportunity for cross examination.²⁸ The CAAF then reviewed two of its own Confrontation cases post-*Crawford*, *United States v. Scheurer*,²⁹ and *United States v. Magyari*.³⁰ In *Scheurer* the court reasoned that statements made unwittingly to a co-worker were nontestimonial.³¹ In *Magyari*, a random urinalysis case, the court determined that the lab report was a nontestimonial business record.³² The CAAF then reviewed the Supreme Court's opinion in *Davis v. Washington*, which said a statement was nontestimonial when made for the primary purpose of responding to an ongoing emergency rather than for the primary purpose of producing evidence with an eye toward trial.³³ Lastly, the CAAF cites a few federal immigration cases that stand for the proposition that documents simply containing routine unambiguous factual matters and that are not prepared in anticipation of trial, are nontestimonial.³⁴

After this background analysis, the CAAF identified three questions relevant in distinguishing between testimonial and nontestimonial hearsay:

First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?³⁵

Applying the three questions to the documents at issue in *Rankin*, the court reasoned that PEs 5, 6, and 10 were not created for the primary purpose of trial.³⁶ Prosecution Exhibit 5 simply notified appellant's parent that he was AWOL,³⁷ PE 6 attempted to account for appellant's whereabouts to his unit,³⁸ and PE 10 was a message to various administrative agencies interested in appellant's transition back to military control.³⁹ However, PE 11 is similar to an arrest warrant, and therefore arguably has the primary purpose of bringing appellant to trial.⁴⁰ Even if PE 11 were considered testimonial, it did not

²⁰ *Rankin*, 64 M.J. at 350.

²¹ UCMJ art. 86 (2008).

²² *Rankin*, 64 M.J. at 350.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 353.

²⁸ *Id.* at 351.

²⁹ 62 M.J. 100 (2005).

³⁰ 63 M.J. 123 (2006).

³¹ *Scheurer*, 62 M.J. at 105.

³² *Magyari*, 63 M.J. at 124.

³³ *Davis v. Washington*, 547 U.S. 813 (2006).

³⁴ *United States v. Rankin*, 64 M.J. 348, 352 (2007) (citing *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1074 (9th Cir. 2005); *United States v. Garcia*, 452 F.3d 36, 41 (1st Cir. 2006); *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006)).

³⁵ *Rankin*, 64 M.J. at 352.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 353.

contain any information not found in other documents properly admitted, therefore its admission was harmless beyond a reasonable doubt.⁴¹

After using the three questions to find that three of the four documents were nontestimonial, the court went on to conduct the Confrontation analysis from *Ohio v. Roberts*,⁴² to conclude that the documents were properly admitted under the business records exception to the hearsay rules.⁴³ This opinion is important for Judge Advocates because it provides the CAAF's framework for analyzing whether a statement is testimonial or nontestimonial. It is also the last case where CAAF affirmatively requires the *Roberts* analysis for nontestimonial hearsay. Shortly after laying out the three factors in *Rankin*, the CAAF used its framework to decide *United States v. Gardinier*.⁴⁴

United States v. Gardinier⁴⁵

The Sixth Amendment issue in *Gardinier* was whether statements a child sex abuse victim made to a SANE were hearsay testimonial under *Crawford*.⁴⁶ The CAAF held the child's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error.⁴⁷

Appellant was convicted of indecent acts and indecent liberties with a child under age sixteen and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1.⁴⁸ The victim was appellant's five-year-old daughter, KG.⁴⁹ The day KG reported the acts, she received a medical exam.⁵⁰ She was interviewed a couple of days later by a detective and a social worker, and then by a SANE in a second interview.⁵¹ The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the interview.⁵²

The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE.⁵³ The three factors include: (1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?⁵⁴ Taking the first and third factors together, the CAAF reasoned that the statements were made in response to government questioning designed to produce evidence for trial.⁵⁵ The SANE testified at trial that she conducts examinations for treatment, however, the form itself is called a "forensic" medical examination form.⁵⁶ She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators.⁵⁷ In addition, the examination was arranged

⁴¹ *Id.*

⁴² 448 U.S. 56 (1980).

⁴³ *Rankin*, 64 M.J. at 353.

⁴⁴ 65 M.J. 60 (2007).

⁴⁵ *Id.* The Sixth Amendment issue in the ACCA opinion in this case focused on the military judge's findings supporting a ruling that the child victim was unavailable to testify at trial. See *United States v. Gardinier*, 63 M.J. 531 (Army Ct. Crim. App. 2006).

⁴⁶ *Gardinier*, 65 M.J. at 64.

⁴⁷ *Id.*

⁴⁸ *Id.* at 61.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 62.

⁵² *Id.*

⁵³ *Id.* at 65–66.

⁵⁴ *United States v. Rankin*, 64 M.J. 348, 352 (2007).

⁵⁵ *Gardinier*, 65 M.J. at 65–66.

⁵⁶ *Id.* at 66.

⁵⁷ *Id.*

and paid for by the local sheriff's department.⁵⁸ The CAAF determined that the totality of the circumstances indicated the statements made to the SANE were testimonial.⁵⁹

After using its *Rankin* factors to analyze the testimony of the SANE in *Gardinier* and finding it to be testimonial,⁶⁰ the CAAF used the same factors to find an affidavit nontestimonial in *United States v. Foerster*.⁶¹

United States v. Foerster⁶²

Sergeant (SGT) Porter was deployed when he discovered somebody was using his identity to cash checks in his name.⁶³ When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation.⁶⁴ Specifically, the sworn affidavit contained the check numbers and amounts he believed were false.⁶⁵ This document was required by the bank in order for SGT Porter to get his money back.⁶⁶ During the MP and CID investigations, it was determined that Staff Sergeant Foerster had forged SGT Porter's checks while he was deployed.⁶⁷ When the time came for trial, SGT Porter had deployed again, and was not available to testify.⁶⁸ The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony.⁶⁹

The issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures and without law enforcement involvement in the creation of the document is admissible as a nontestimonial business record in light of *Crawford v. Washington* and *Washington v. Davis*.⁷⁰ The CAAF held that the affidavit was nontestimonial and properly admissible under the business records exception.⁷¹

The CAAF used the three factors previously identified in *Rankin*⁷² to analyze whether the bank affidavit in this case was testimonial.⁷³ First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial.⁷⁴ Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter's signature.⁷⁵ Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder.⁷⁶ The CAAF acknowledged that the Supreme Court opinion in

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 65 M.J. 120 (2007).

⁶² *Id.*

⁶³ *Id.* at 121.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 122.

⁷⁰ *Id.* at 121.

⁷¹ *Id.*

⁷² *United States v. Rankin*, 64 M.J. 348 (2007).

⁷³ *Foerster*, 65 M.J. at 123.

⁷⁴ *Id.* at 123–24.

⁷⁵ *Id.* at 124.

⁷⁶ *Id.*

Crawford uses the term “affidavit” several times to describe documents considered testimonial hearsay,⁷⁷ however the CAAF does not believe the Court intended for every document titled affidavit to be considered testimonial.⁷⁸ If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial.⁷⁹

Interestingly, after finding the affidavit to be nontestimonial, the CAAF did not conduct the *Ohio v. Roberts* analysis for admissibility under the Confrontation Clause, but instead proceeded directly to an evidentiary analysis under the hearsay rules. One possible explanation for this absence may be that where nontestimonial hearsay falls within a firmly rooted exception, the Confrontation Clause and hearsay analysis are identical.⁸⁰ Another explanation, the possibility that Confrontation Clause analysis may no longer apply to nontestimonial hearsay, will be discussed later in this article.⁸¹

Laboratory (Lab) Reports

Military courts continued to grapple last term with categorizing lab reports as either testimonial statements or nontestimonial statements admissible under the business records exception to hearsay. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the Army Court of Criminal Appeals (ACCA) each heard cases which presented fact patterns very similar to the situation described in dicta by the CAAF in *United States v. Magyari* as one where a lab report might be testimonial rather than a nontestimonial business record.⁸² The NMCCA found a lab report in *United States v. Harcrow* nontestimonial,⁸³ while the ACCA found a similar lab report in *United States v. Williamson* testimonial.⁸⁴ Fortuitously for practitioners, the service court split was short-lived, since CAAF has already overturned *Harcrow* this term.⁸⁵ The NMCCA also decided another case very similar to *Magyari*, involving a lab report based on results of a urinalysis.⁸⁶

The question in *Magyari* was whether lab reports from a random urinalysis should be considered testimonial or nontestimonial.⁸⁷ Appellant argued that the reports were testimonial, falling under the third *Crawford* category of testimonial statements made in preparation for trial, since the lab technicians would have known that the reports could be used later at trial.⁸⁸ The Government argued that the lab reports were business records, and by their nature, non-testimonial.⁸⁹ The CAAF found that under the circumstances of this case, i.e. random urinalysis, the lab reports were non-testimonial business records.⁹⁰ Importantly, the court refused to say that all lab reports would be considered non-testimonial.⁹¹ In dicta, the court laid out some scenarios where lab reports might be considered testimonial (e.g., where an accused is already under

⁷⁷ *Id.* at 124–25.

⁷⁸ *Id.*

⁷⁹ *Id.* at 125.

⁸⁰ Under the *Ohio v. Roberts* Confrontation Clause analysis, the first question is whether a statement fits within a firmly rooted hearsay exception. 448 U.S. 56 (1980). If so, then the Confrontation Clause is satisfied. In the case of such a firmly rooted hearsay exception, the Confrontation Clause and hearsay analysis would be identical. However, if the statement does not fit within a firmly rooted hearsay exception, then the proponent must show that it possesses particularized guarantees of trustworthiness, using nonexclusive factors from *Idaho v. Wright* and *United States v. Ureta*. 497 U.S. 805 (1990); 44 M.J. 290 (1996). When arguing a statement possesses particularized guarantees of trustworthiness, the proponent is limited to the circumstances surrounding the making of the statement, and cannot use extrinsic evidence of reliability. Once the proponent has satisfied the Confrontation Clause, then extrinsic evidence may be used to satisfy the hearsay rules, i.e. M.R.E. 807, Residual Hearsay. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MILT. R. EVID. 807.

⁸¹ Although this case was decided after *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), and although *Whorton* is cited for its retroactive effect, the CAAF does not mention the fact that the opinion contains language stating nontestimonial hearsay is no longer subject to Confrontation Clause analysis. *Foerster*, 65 M.J. at 122.

⁸² *United States v. Magyari*, 63 M.J. 123 (2006); see Lancaster, *supra* note 16, at 25.

⁸³ *United States v. Harcrow (Harcrow I)*, No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006).

⁸⁴ *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007).

⁸⁵ *United States v. Harcrow (Harcrow II)*, 66 M.J. 154 (2008).

⁸⁶ *United States v. Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

⁸⁷ *Magyari*, 63 M.J. at 124.

⁸⁸ *Id.* at 126. The Court did not provide a comprehensive definition of “testimonial v. non-testimonial,” however, it did identify three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used at trial. *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸⁹ *Magyari*, 63 M.J. at 126.

⁹⁰ *Id.* at 124–25.

⁹¹ *Id.* at 127.

investigation, and where testing is initiated by the prosecution to discover incriminating evidence).⁹² The court even cited civilian cases where lab reports were considered testimonial, including where the government sought to admit DNA evidence in a rape case, and an affidavit prepared by hospital personnel in a DUI case.⁹³ The *Magyari* dicta played a key role in two lower appellate court cases decided last term.⁹⁴

United States v. Harcrow⁹⁵

Lance Corporal Harcrow was found guilty of use and manufacture of various illegal drugs among other offenses.⁹⁶ The Navy Criminal Investigative Service and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence.⁹⁷ While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine.⁹⁸ The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and were found to contain heroin and cocaine residue.⁹⁹ The government introduced the lab reports against the appellant at trial.¹⁰⁰

The confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the Sixth Amendment.¹⁰¹ The NMCCA held the lab reports were nontestimonial hearsay admissible under the business records exception.¹⁰² The NMCCA primarily relied on a CAAF opinion from last term, *United States v. Magyari*, which holds that in the case of random urinalyses, the lab reports are nontestimonial.¹⁰³ The court also cites two cases from other jurisdictions in support of its holding that lab reports are nontestimonial.¹⁰⁴

Unfortunately, the CAAF opinion in *Magyari* doesn't say that lab reports are always nontestimonial. In fact, that opinion goes on to suggest circumstance where a lab report might be testimonial.¹⁰⁵ The circumstances suggested by the CAAF are similar to the circumstances in *Harcrow*. In *Magyari*, the CAAF wrote, "lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence."¹⁰⁶ In this case, the evidence was discovered as part of a search executed in conjunction with arresting the appellant, and was sent to the lab for the purpose of developing evidence to use against him at trial.¹⁰⁷

⁹² *Id.*

⁹³ *Id.* (citing *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004); *Las Vegas v. Walsh*, 91 P.3d 591, 595 (Nev. 2004), modified by 100 P.3d 658 (Nev. 2004)).

⁹⁴ *United States v. Harcrow (Harcrow I)*, No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006); *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007).

⁹⁵ *Harcrow I*, 2006 CCA LEXIS 285.

⁹⁶ *Id.* at *1–2.

⁹⁷ *Id.* at *4–5.

⁹⁸ *Id.* at *5.

⁹⁹ *Id.* at *15.

¹⁰⁰ *Id.* at *15–16.

¹⁰¹ *Id.* at *15.

¹⁰² *Id.* at *17.

¹⁰³ *United States v. Magyari*, 63 M.J. 123 (2006).

¹⁰⁴ *Harcrow I*, 2006 CCA LEXIS 285, at *17 (citing *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005); *People v. Johnson*, 18 Cal. Rptr. 3d 230 (Cal. Ct. App. 2004)).

¹⁰⁵ *Magyari*, 63 M.J. at 127.

¹⁰⁶ *Id.*

¹⁰⁷ *Harcrow I*, 2006 CCA LEXIS 285, at *15.

This case is unpublished, and therefore not useful as precedent, which is appropriate since it was recently overturned by the CAAF.¹⁰⁸ The ACCA faced similar facts this term in *Williamson*, with the additional benefit of the CAAF's *Rankin* framework for deciding whether a statement is testimonial or nontestimonial, and found a lab report testimonial.¹⁰⁹

United States v. Williamson¹¹⁰

Sergeant Williamson was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself while on leave in New Orleans.¹¹¹ He mailed the package from El Paso, where it was detected by DEA agents using a drug dog.¹¹² Agents effected a controlled delivery to the address on the package in New Orleans and executed a search warrant fifteen minutes later.¹¹³ After seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the substance contained in the three bundles was confirmed to be marijuana.¹¹⁴ At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules.¹¹⁵

The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constituted testimonial hearsay.¹¹⁶ The ACCA held the forensic lab report did constitute testimonial hearsay where the lab report was requested after local police had arrested appellant.¹¹⁷

The court, after briefly reviewing Supreme Court and CAAF caselaw on the Confrontation right since *Crawford*, analyzed the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*.¹¹⁸ First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?¹¹⁹ Clearly the testing was done and the report produced in response to a specific request by law enforcement.¹²⁰ The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial.¹²¹ The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence.¹²² Critical to the court's reasoning was the fact that the testing was done after appellant had been arrested.¹²³

In addition to *Harcrow* and *Williamson* discussed above, which involved language in *Magyari* suggesting that a lab report might sometimes be considered testimonial, another case was decided last term more directly addressing an issue left open by *Magyari*.¹²⁴ *Magyari* itself involved a lab report from a random urinalysis, and held that in the case of a random

¹⁰⁸ United States v. *Harcrow* (*Harcrow II*), 66 M.J. 154 (2008).

¹⁰⁹ United States v. *Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 707.

¹¹² *Id.* at 708.

¹¹³ *Id.* at 709.

¹¹⁴ *Id.* at 710.

¹¹⁵ *Id.* at 711.

¹¹⁶ *Id.* at 707.

¹¹⁷ *Id.* at 718.

¹¹⁸ *Id.* at 717–18.

¹¹⁹ United States v. *Rankin*, 64 M.J. 348 (2007).

¹²⁰ *Williamson*, 65 M.J. at 718.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 717.

¹²⁴ United States v. *Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

urinalysis, the lab report is a nontestimonial business record.¹²⁵ In *United States v. Harris*, the NMCCA considered a lab report from a urinalysis based on probable cause.¹²⁶

United States v. Harris¹²⁷

Aviation Electrician's Mate Second Class Harris was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts.¹²⁸ One of his explanations for his unusual behavior was that he was "digging for diamonds."¹²⁹ After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause.¹³⁰ His urinalysis result came back positive and was introduced against him at trial.¹³¹

The Sixth Amendment issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant constituted testimonial hearsay.¹³² The NMCCA held the lab report was nontestimonial, and its admission did not violate appellant's confrontation rights under the Sixth Amendment.¹³³ The court reasoned that although the CAAF opinion in *Magyari*¹³⁴ was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample.¹³⁵ More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested.¹³⁶ The lab employees do not know whether prosecution is anticipated or whether the sample is from a random urinalysis.¹³⁷ Therefore, urinalysis lab reports from testing processed in the way it is done at the Navy lab are nontestimonial hearsay admissible under the business records exception.¹³⁸

The first two current issues in military Confrontation Clause jurisprudence discussed in this article are focused on categorizing statements as testimonial or nontestimonial. The third and final issue addresses what analysis is required once a statement has been identified as nontestimonial.

Do Nontestimonial Statements Implicate the Confrontation Clause?

Crawford v. Washington clearly overruled *Ohio v. Roberts* where it applied to testimonial statements, however, the opinion left open its effect on nontestimonial statements.¹³⁹ Since *Crawford* was decided in 2004, the CAAF has used *Ohio v. Roberts* as the standard for Confrontation Clause analysis of nontestimonial statements.¹⁴⁰ This was based primarily on language in *Crawford* itself, interpreted as a favorable view of the continued vitality of *Ohio v. Roberts* in this situation.¹⁴¹

¹²⁵ *United States v. Magyari*, 63 M.J. 123 (2006).

¹²⁶ *Harris*, 65 M.J. 594.

¹²⁷ *Id.*

¹²⁸ *Id.* at 596.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 599.

¹³³ *Id.* at 600.

¹³⁴ *United States v. Magyari*, 63 M.J. 123 (2006).

¹³⁵ *Harris*, 65 M.J. at 600.

¹³⁶ *Id.*

¹³⁷ *Id.* There may also be administrative reasons for urinalysis unrelated to punitive action, e.g. fitness for duty examinations.

¹³⁸ *Id.*

¹³⁹ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹⁴⁰ *See, e.g., United States v. Scheurer*, 62 M.J. 100 (2005); *United States v. Rankin*, 64 M.J. 348 (2007).

¹⁴¹ "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68.

The next Supreme Court Confrontation case following *Crawford* was *Davis v. Washington* which again provided unclear guidance on whether nontestimonial statements require Confrontation Clause analysis.¹⁴² The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial, and found the statement in *Hammon v. Indiana* to be testimonial, while the statement in *Davis v. Washington* was nontestimonial.¹⁴³ For *Hammon*, that was the end of the line, the statement should not have been admitted; however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court.¹⁴⁴ In addition to its failure to analyze the nontestimonial statement in *Davis* under *Roberts*, there was language in the Court's opinion that would tend to the conclusion that the Confrontation Clause only applies to testimonial statements.¹⁴⁵

Following *Davis*, some courts required Confrontation analysis for nontestimonial statements and others did not.¹⁴⁶ The CAAF has stayed with the *Ohio v. Roberts* analysis for nontestimonial statements.¹⁴⁷ As recently as *United States v. Rankin*, decided in January 2007, the CAAF was clear in its direction that *Roberts* is the standard for Confrontation Clause analysis of nontestimonial hearsay.¹⁴⁸

Last year's symposium article¹⁴⁹ previewed *Whorton v. Bockting*, a Supreme Court case that contained language making it clear that nontestimonial statements do not implicate the Confrontation clause.¹⁵⁰ Even though the Supreme Court guidance seems clear, CAAF is not necessarily bound by the language in *Whorton*, meaning that until CAAF speaks on the issue, military courts may still engage in the *Ohio v. Roberts* Confrontation Clause analysis when faced with a nontestimonial hearsay statement.¹⁵¹ The CAAF has not directly addressed the issue since *Whorton* was decided in February 2007. However, there is reason to believe when the issue is squarely presented, CAAF will follow Supreme Court precedent.¹⁵²

Whorton v. Bockting¹⁵³

Mr. Bockting was convicted of sexual assault on his six-year-old step-daughter.¹⁵⁴ At trial, the court determined the child was too distressed to testify, and allowed her mother and a police detective to testify about her out-of-court statements

¹⁴² *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁴³ *Id.* at 822.

¹⁴⁴ *Id.* at 834.

¹⁴⁵ *Id.*

We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:

“The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” [*Crawford v. Washington*, 541 U.S. 36, 51 (2004)].

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.

Id. at 823–24.

¹⁴⁶ *See, e.g.*, *United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006) (*Davis*, 547 U.S. 813, holds that nontestimonial hearsay is not subject to the Confrontation Clause). *But see Harkins v. State*, 143 P.3d 706 (Nev. 2006) (nontestimonial statements are subject to analysis under *Ohio v. Roberts*, 448 U.S. 56 (1980)).

¹⁴⁷ *United States v. Rankin*, 64 M.J. 348 (2007).

¹⁴⁸ *Id.*

¹⁴⁹ Lancaster, *supra* note 16, at 28.

¹⁵⁰ *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

¹⁵¹ *See* H.F. “Sparky” Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 35.

¹⁵² *See id.*

¹⁵³ *Whorton*, 127 S. Ct. 1173.

¹⁵⁴ *Id.* at 1178.

regarding the assaults.¹⁵⁵ On direct appeal, the Nevada Supreme Court found admission of the child's statements constitutional under *Ohio v. Roberts*.¹⁵⁶ While awaiting decision by the 9th Circuit on a subsequent habeas petition denied by the district court, *Crawford v. Washington* was decided, changing the landscape of Confrontation Clause analysis.¹⁵⁷ The 9th Circuit ultimately reversed, holding that *Crawford* was a watershed rule requiring retroactive effect to cases on collateral review.¹⁵⁸ The Supreme Court thought otherwise, holding that *Crawford* is not retroactive to cases already final after direct review.¹⁵⁹

In its analysis of whether the procedural rule announced in *Crawford* is a watershed rule requiring retroactive application,¹⁶⁰ the Court stated:

Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.¹⁶¹

This seems like a pretty clear statement indicating nontestimonial statements no longer require Confrontation Clause analysis at all.

Nontestimonial Hearsay in the Military After *Whorton*

As stated above, the CAAF has not squarely addressed the applicability of confrontation analysis to nontestimonial statements since *Whorton* was decided. However, subsequent opinions provide clues to how it might decide the issue whenever it is squarely presented.¹⁶² In *Foerster*, after finding the bank affidavit to be nontestimonial, the CAAF proceeded directly to the evidentiary analysis for the affidavit's admissibility, without ever mentioning the Confrontation Clause analysis required for nontestimonial statements in line with *Rankin*.¹⁶³ This omission would be more telling, except that the Confrontation Clause and evidentiary analyses are identical for statements that qualify as firmly rooted hearsay exceptions. It is only hearsay statements that do not qualify as firmly rooted exceptions, thus requiring particularized guarantees of trustworthiness analysis, that require a slightly different analysis under the Confrontation Clause than under the rules of evidence.¹⁶⁴ Nonetheless, in contrast to its previous opinions involving nontestimonial hearsay statements,¹⁶⁵ there is no mention of Confrontation Clause analysis once the statement is found to be nontestimonial.¹⁶⁶

In addition to the CAAF opinion in *Foerster*, Judge Stucky, concurring in the result in a case called *United States v. Cucuzzella*, specifically cites *Whorton* and the fact that nontestimonial statements may be admitted even if they do not possess adequate indicia of reliability.¹⁶⁷ This means that nontestimonial statements do not require Confrontation Clause

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1178–79.

¹⁵⁷ *Id.* at 1179.

¹⁵⁸ *Id.* at 1180.

¹⁵⁹ *Id.* at 1184.

¹⁶⁰ The general rule on retroactivity of new rules comes from *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* says a new rule applies retroactively in a collateral proceeding only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding. *Id.* In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock elements essential to the fairness of a proceeding. *Id.*

¹⁶¹ *Whorton*, 127 S. Ct. 1173, 1183. *Crawford*'s impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis.

¹⁶² See *United States v. Foerster*, 65 M.J. 120 (2007); *United States v. Cucuzzella*, 66 M.J. 57 (2008).

¹⁶³ *Foerster*, 65 M.J. 120.

¹⁶⁴ See *supra* note 78.

¹⁶⁵ See, e.g., *United States v. Scheurer*, 62 M.J. 100 (2005); *United States v. Rankin*, 64 M.J. 348 (2007).

¹⁶⁶ *Foerster*, 65 M.J. at 125.

¹⁶⁷ *Cucuzzella*, 66 M.J. 57, *16–17 (2008) (Stuckey, J., concurring) (citing *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007)).

analysis before admission, but instead, only require analysis under the rules of evidence.¹⁶⁸ He also cites *Whorton* for the proposition that *Crawford* overruled *Roberts*.¹⁶⁹

Interestingly, the ACCA also seems to recognize Supreme Court guidance in this area; however when it says nontestimonial statements do not require Confrontation Clause analysis, it cites the language in *Davis* rather than the more clear language found in *Whorton*.¹⁷⁰ In both *United States v. Diamond* and *United States v. Crudup*, ACCA cites language from *Davis* indicating that nontestimonial hearsay is not subject to the Confrontation Clause.¹⁷¹

The fact that the last clear statement by the CAAF on the issue, contained in *Rankin*, even though decided before the Supreme Court's opinion in *Whorton*, is that nontestimonial hearsay statements require Confrontation Clause analysis under *Ohio v. Roberts* suggests that *Roberts* is still good law in the military. That said, however, it seems clear that CAAF will follow the Supreme Court and explicitly declare that the Confrontation Clause does not apply to nontestimonial statements whenever that issue is finally squarely presented for its decision. Military practitioners should be aware that the issue exists. However, they should analyze nontestimonial statements under the rules of evidence without undue concern for Confrontation Clause issues.

Preview: *Harcrow & Pack*

Two cases decided in the current term deserve brief mention in this symposium, although a more complete treatment will wait for next year. *United States v. Harcrow* was mentioned above as the CAAF case that overruled the NMCCA in finding a lab report nontestimonial despite the fact that the evidence in the report was sent to the lab after being seized at the appellant's home during his arrest.¹⁷² The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

United States v. Pack is a case involving remote live testimony by a child victim witness.¹⁷³ The CAAF held that the Supreme Court opinion in *Crawford* did not effect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims.¹⁷⁴

Conclusion

Last term was notable for both what it contained and what it omitted. The CAAF gave military practitioners factors to use when determining whether a statement is testimonial or nontestimonial, and then used its own analysis to find a statement to a SANE testimonial and a bank affidavit nontestimonial. The service courts continue to struggle with whether lab reports should be considered testimonial or nontestimonial, however it now seems clear that outside the urinalysis context, many lab reports prepared in anticipation of trial will be considered testimonial. While appellate courts provided guidance on when a hearsay statement may be considered testimonial, they did not address the appropriate analysis for statements found to be nontestimonial. Judge Advocates are still waiting for definitive guidance on following Supreme Court precedent making it clear that nontestimonial statements do not implicate the Confrontation Clause.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Diamond*, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007); *United States v. Crudup*, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008).

¹⁷¹ *Diamond*, 65 M.J. at 883 (citing *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006)); *Crudup*, 65 M.J. at 909 (citing *Davis*, 126 S. Ct. at 2274).

¹⁷² *United States v. Harcrow (Harcrow II)*, 66 M.J. 154 (2008).

¹⁷³ *United States v. Pack*, 65 M.J. 381 (2007).

¹⁷⁴ *Id.* at 385.

Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert

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Introduction

In trials by court-martial, the defense and the government have equal access to witnesses and evidence. The source for this right is Article 46 of the Uniform Code of Military Justice (UCMJ).¹ Under Article 46, an accused is entitled to an expert witness without regard to his ability to pay for those services.² However, before the government may be required to provide funding for an expert witness, the accused, under Rule for Court-Martial (RCM) 703(d), must show that the expert witness is relevant and necessary.³

Traditionally, the process of showing necessity in this context begins with the defense submitting a request for employment of an expert witness to the convening authority prior to trial.⁴ This request must be accompanied by a "statement of reasons why the employment of the expert is necessary."⁵ If the convening authority denies the defense's request, such a request may be renewed before the military judge.⁶ At trial, the defense will have to demonstrate necessity by showing that "a reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'"⁷ Applying this requirement to the defense in cases where the government does not have its own expert witness or when the government introduces objective expert testimony that is neutral and non-accusatory is appropriate. However, the requirement to show necessity should not apply when the government seeks the benefit of expert testimony that is inherently subjective or accusatory. An example of a subjective or accusatory expert would be one that gives conclusory opinions as to the cause of an injury or as to whether an alleged victim exhibits signs consistent with being abused. In these situations, the defense should be entitled to rebut the subjective expert testimony by relying on a government-funded expert without a specific showing of necessity. In other words, the defense should be able to "pass go, collect \$200, and hire itself an expert."

This article argues that the defense is entitled to a government-funded expert under both fundamental fairness and Article 46 of the UCMJ in order to rebut subjective or accusatory expert testimony offered by the government. It suggests that the traditional requirement of the defense showing "necessity" under RCM 703(d) for an expert witness should be presumed in situations where the government relies upon subjective or accusatory expert testimony in support of its own case. The article begins by examining the leading case on the defense's requirement to establish necessity before being entitled to a government-funded expert. It then details the ongoing efforts of military courts to clarify what is meant by the requirement to establish "necessity." Next, the article explores the difference between subjective and non-subjective expert testimony,

¹ Article 46 provides:

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

UCMJ art. 46 (2008).

² *Id.*; United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

³ Rule Court-Martial 703(d) provides in part: "[T]he military judge . . . shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2008) [hereinafter MCM].

⁴ *Id.* The defense must make this request *before* employing the expert. Under the *Manual for Courts-Martial (MCM)* there is no provision for the government to ratify previously accomplished employment.

⁵ *Id.*

⁶ *Id.*

⁷ United States v. Lee, 64 M.J. 213, 217 (2006) (quoting United States v. Bresnahan, 62 M.J. 137, 143 (2005)); *see also* MCM, *supra* note 3, R.C.M. 703; United States v. Freeman, 65 M.J. 451 (2008).

and why the defense should be entitled to rebut the former as a matter of right and without an explicit finding of necessity. Finally, it concludes by arguing that when the government secures a subjective or accusatory expert witness for its case, both fundamental fairness and Article 46 of the UCMJ should require that the defense be provided equal access to expert testimony through a government-funded expert.

Overview of the Requirement to Establish Necessity

The Federal System

Any discussion of the defense's requirement to establish necessity before being entitled to a government-funded expert inevitably begins with the Supreme Court's 1985 seminal decision in *Ake v. Oklahoma*.⁸ Ake was an indigent charged with first-degree murder.⁹ At his arraignment, Ake's behavior was so bizarre that the trial judge, sua sponte, ordered him to be examined by a psychiatrist.¹⁰ The examining psychiatrist determined that Ake was incompetent and suggested that he be committed rather than stand trial.¹¹ As a result, Ake was sent to a state mental hospital.¹² However, six weeks later, the same psychiatrist opined that Ake was now competent to stand trial on the condition that he continued to be sedated with an antipsychotic drug.¹³

Based on the psychiatrist's report, the State thereafter resumed the proceedings against Ake.¹⁴ At a pretrial hearing, the defense notified the court that it would rely upon the defense of insanity.¹⁵ In order to present this defense, Ake's attorney requested that the court order a state-funded psychiatric evaluation of his client to determine Ake's mental state at the time of the offense.¹⁶ Ake's attorney argued that the Federal Constitution entitled his indigent client to a state-funded evaluation.¹⁷

The trial court rejected the defense's argument that the Federal Constitution required the state to fund a psychiatric evaluation.¹⁸ Despite not having the benefit of a psychiatric evaluation, Ake continued to rely upon the defense of insanity.¹⁹ At trial, the court instructed the jurors that insanity at the time of the offense was a defense.²⁰ However, the court also instructed the jurors that Ake was presumed to be sane at the time of the offense unless he could present evidence to raise a reasonable doubt as to his sanity.²¹ Without a state-funded expert, Ake was unsuccessful in rebutting the presumption of sanity. The jurors found Ake guilty of the charged offenses and ultimately sentenced him to death.²²

⁸ 470 U.S. 68 (1985).

⁹ *Id.* at 70–71.

¹⁰ *Id.* at 71.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 71–72.

¹⁴ *Id.* at 72.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 72–73.

²² *Id.* at 73.

On appeal, Ake argued that as an indigent defendant, he should have been provided with a state-funded psychiatrist in order to adequately present his defense.²³ The Oklahoma Court of Criminal Appeals rejected Ake's argument, and affirmed the findings and sentence.²⁴ The Supreme Court granted certiorari and reversed, holding that the Due Process Clause of the Constitution afforded an indigent accused with the right to supplement his defense team with expert assistance whenever such assistance was necessary for a fair trial.²⁵

The Supreme Court in *Ake* thus recognized that the Constitution entitles an indigent defendant to expert assistance, but only after the defense establishes "necessity."²⁶ The Court in *Ake* neglected to provide guidance as to how a defendant would establish necessity. Instead, the Court presumed such a need whenever "the defendant is able to make an *ex parte* threshold showing [to the trial court] that his sanity is likely to be a significant factor in his defense"²⁷ Such a presumption, while perhaps applicable to cases involving the issue of sanity, provides little guidance to a court or practitioner in other instances where the defendant may need the assistance of an expert.

The Military System

A year after *Ake*, the United States Court of Military Appeals (CMA)²⁸ decided *United States v. Garries*.²⁹ In *Garries*, the court held that servicemembers were also entitled to expert assistance when necessary for an adequate defense.³⁰ *Garries* was charged with the murder of his pregnant wife. At trial, the defense requested the assistance of a government-funded investigator to aid the preparation of its case.³¹ Although the court did not require the defense to show indigency in order to be entitled to a government-funded expert, it did require the defense to show necessity.³² Unfortunately, as in *Ake*, the court in *Garries* failed to provide much guidance on what the defense must show in order to establish necessity.³³

Nearly a decade later, in *United States v. Gonzalez*,³⁴ the CMA was once again confronted with the issue of whether the defense was entitled to government-funded expert assistance.³⁵ In *Gonzalez*, the defense requested the assistance of a

²³ *Id.*

²⁴ *Id.* at 73–74.

²⁵ *Id.* at 74.

²⁶ *Id.* at 82–83.

²⁷ *Id.* The defense may be entitled to such a hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. See *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); see also *United States v. Kaspers*, 47 M.J. 176 (1997).

²⁸ The United States Court of Military Appeals was renamed the U. S. Court of Appeals for the Armed Forces pursuant to Pub. L. No. 103-337, § 924, Stat. 2663, on 5 Oct. 1994. Additionally, each court of military review was renamed court of criminal appeals.

²⁹ *Garries*, 22 M.J. 288.

³⁰ *Id.* The issue in *Garries* was whether the defense was entitled to expert assistance prior to trial. *Id.* In *United States v. Brenahan*, the court held that Article 46 of the UCMJ entitled an accused to not only expert testimony at trial, but also expert assistance "before trial to aid in the preparation of his defense upon a demonstration of necessity." 62 M.J. 137, 143 (2005); see also *United States v. Kreutzer*, 61 M.J. 293, 305 (2005).

³¹ Relying upon *Ake*, the court required *Garries* to demonstrate necessity for the government-funded investigator. *Garries*, 22 M.J. at 291. *Garries* refused to make a showing of necessity on the record. *Id.* Instead, he requested an *ex parte* hearing (a hearing without notice to or presence of the opposing party). *Id.* The military judge denied *Garries*' request. *Id.* *Garries* contended that the military judge's refusal to grant an *ex parte* hearing denied him the ability to demonstrate necessity without giving away defense trial strategy to the government. *Id.* The Court disagreed, stating that it is only in the most unusual of circumstances where an *ex parte* hearing was required to ensure a fair trial. *Id.*

³² The CMA noted that a military accused, after showing necessity, could access the resources of the Government under Article 46 of the UCMJ and Rule for Courts-Martial (RCM) 703(d). *Id.* at 290.

³³ *Id.* at 291 ("Because appellant's request for funds to obtain investigative services did not explain why an investigator was needed, what the investigator would do, and why appellant's two detailed defense counsel and their staff could not perform any additional investigative work needed, the military judge did not abuse his discretion in denying the request.")

³⁴ *United States v. Gonzalez*, 39 M.J. 459 (1994).

³⁵ *Garries* and *Gonzalez* both dealt with the issue of necessity in the context of expert assistance. Although there is some debate about whether the necessity standard for government-funded expert witnesses is the same as that for government-funded expert assistance (see *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991)), the better view is that the same standard applies to both. See Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

government-funded investigator to explore the defense theories surrounding the death of appellant's wife.³⁶ Unlike in *Garries*, the CMA gave clear guidance as to what would be required in order to establish necessity for expert assistance. The CMA adopted a three-part analysis first set forth by the Navy-Marine Court of Military Review in *United States v. Allen*.³⁷ Under this test, which is now commonly referred to as the *Gonzalez* analysis,³⁸ the defense must establish: (1) why the expert assistance is needed; (2) what the expert assistance would do for the accused, and; (3) why the defense is unable to provide the evidence the expert assistant would provide.³⁹ Therefore, unless the defense is able to fund the expert witness on its own,⁴⁰ it must be prepared to show "necessity."

In meeting the *Gonzalez* analysis, the defense should be prepared to answer several questions, including:

1. What have you done to educate yourself in the requested area of expertise?
2. What experts and government employees having knowledge in this area have you interviewed?
3. If the issue in question involves a laboratory analysis by the [Criminal Investigation Division] CID or the [Federal Bureau Investigation] FBI, have you requested the opportunity (using [Trial Defense Services] TDS funding) to visit the crime lab and to examine the procedures and quality control standards used in the laboratory in this or any other case?
4. What did you learn from the visit?
5. What do you need to learn that you still do not understand in order to defend the accused in this case?
6. What treatises have you examined?
7. Are there experts other than the one requested who would meet your needs? Have you talked with them? Would providing an Army employee as an expert consultant meet your needs? If not, why?
8. How many other cases involving this issue have you tried? As to military defense counsel with little or no expertise in this area:
 - (a) Have you requested that the senior defense counsel or regional defense counsel detail another defense counsel with greater familiarity in the area of expertise to help defend the accused? Have you advised the accused of his right to request an [Individual Military Counsel] IMC who has greater familiarity in this area?
 - (b) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel with training in this area?
 - (c) If this area of expertise is common to many cases in your jurisdiction, why have no such requests been made previously?
9. Have you requested through TDS channels any resource material in this area, if not readily obtainable from local sources?⁴¹

In general, the more prepared the defense is in addressing the aforementioned questions, the greater the likelihood it will be able to meet the *Gonzalez* necessity requirement for an expert witness. The necessity requirement under *Gonzalez* is appropriate in those cases where the government has not hired an expert or where the government's expert will present objective and non-accusatory testimony. However, in cases where the government hires an expert to offer subjective or accusatory testimony, the defense should not be required to meet the nine non-exhaustive factors listed above in assessing whether the defense is entitled to a government-funded expert.

³⁶ *Gonzalez* believed that his wife was part of a Spanish criminal drug element and had been robbed and killed by members of that drug element. *Gonzalez*, 39 M.J. at 460. In order to prove his belief, *Gonzalez* wanted a government-funded expert to investigate his wife's background and her known associates. *Id.*

³⁷ *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

³⁸ See generally *United States v. Washington*, 46 M.J. 477 (1997).

³⁹ *Gonzalez*, 39 M.J. at 461 (citing *Allen*, 31 M.J. at 623).

⁴⁰ Nothing prevents the defense from hiring an expert on its own. If the defense does so, it only need be concerned with Military Rules of Evidence 401, 403, and 702.

⁴¹ Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1, 16 n.160.

Toward a New Approach to Government-Funded Expert Witnesses

This article proposes that the nature of the expert testimony involved—and in particular, whether such testimony is objective or subjective or accusatory—is relevant in assessing whether a full *Gonzalez* analysis is called for prior to the defense being entitled to a government-funded expert witness. There is nothing in Article 46 of the UCMJ, R.C.M. 703(d), or any other provision of the *Manual for Courts-Martial (MCM)* that addresses the distinction between subjective and objective expert testimony. However, for the purposes of the defense's requirement to show necessity for a government-funded expert, this article proposes that there is a real distinction between the two.

Consider a sexual assault nurse examiner who opines that the alleged victim was sexually abused or a forensic psychologist that testifies that the accused could appreciate the wrongfulness of his actions at the time of the offense. In either case, the testimony offered by the government is subjective, accusatory, and will undoubtedly be used by the trier of fact as evidence of the guilt or innocence of the accused. The defense will obviously want to counter such evidence, not only through cross-examination of the government expert witness, but also by eliciting favorable testimony from an expert of its own. In a case where the government proffers expert testimony that is subjective or accusatory, there should be no need to require the defense to establish necessity for a government-funded expert by going through the *Gonzalez* inquiry.

Suppose instead that the government calls a toxicologist who testifies that the blood alcohol level of the victim at the time of her death was .12 or a meteorologist who testifies that it snowed in Chicago on 4 September 2007. The testimony of the toxicologist or meteorologist could just as easily be used by the trier of fact to determine the guilt or innocence of the accused. However, this testimony differs substantially from the previous examples in that the testimony is objective and non-accusatory. The testimony does not rely upon the interjection of subjective judgments by the expert witness. Thus, the necessity for an independent defense expert in this situation is not as obvious. That is not to say that the defense would not want to hire an independent expert in this regard or that an independent expert could not assist the defense. However, if the defense wishes to retain an expert at the government's expense, it should be required to demonstrate necessity in accordance with *Gonzalez*.

At least one military court has implicitly recognized the difference between subjective and objective expert testimony. In *United States v. Mann*, the government relied upon expert testimony to support the allegations of a four-year-old girl who alleged that Mann had digitally penetrated her vagina and anus while babysitting her.⁴² The government expert examined the girl and concluded that the medical evidence of her injuries was consistent with one-time digital or penile penetration of her vagina.⁴³ At trial, the defense requested the services of a government-funded expert to assist it in establishing that physical evidence from the girl's examination was in fact inconsistent with digital or penile penetration.⁴⁴

According to *Mann*, the testimony proffered by the government was “neither neutral nor non-accusatory, [was] inherently subjective, and differ[ed] in kind from that type of expert assistance, for example, provided by a chemist identifying the components of a substance.”⁴⁵ Although noting that the expert testimony at issue was accusatory and subjective, the court did not eliminate the need for the defense to meet the *Gonzalez* necessity test for a government-funded expert. The military judge ultimately denied the defense request, concluding that:

[T]here was no showing of materiality and necessity for the services of Dr. Strickland, because (a) the medical evidence was inconclusive; (b) expert opinion of chronic abuse would not have made out a defense for appellant because of his admitted opportunities to assault [the four-year-old] in the months preceding this alleged offense, even were Dr. Strickland to interpret the medical evidence that way; (c) there was no showing whatsoever, other than the unsubstantiated assertions of the trial defense counsel, that Dr. Strickland, if employed, would have rendered such an opinion of chronic abuse, or that [the four-year-old's] injuries were not consistent with a single act of digital and penile penetration of [the four-year-old's] vagina; the intimations of the defense that she would have were “pure speculation and wishful thinking . . . a fishing expedition, and the government is not required to provide the net”⁴⁶

⁴² *United States v. Mann*, 30 M.J. 639, 643 (N.M.C.M.R. 1990), *rev. denied*, 32 M.J. 45 (C.M.A. 1990).

⁴³ *Id.* at 641.

⁴⁴ *Id.* at 642.

⁴⁵ *Id.*

⁴⁶ *Id.* at 643.

The court concluded that the military judge acted within his discretion in denying the defense request for a government-funded expert because the defense failed to establish necessity in accordance with *Gonzalez*.⁴⁷ Nonetheless, *Mann* supports the position that there is an appreciable distinction between objective and subjective experts.

Why Is a New Approach to Government-Funded Defense Experts Warranted?

Article 46 of the UCMJ

Though it is generally the defense's burden to establish necessity under the *Gonzalez* analysis in order to be entitled to a government-funded expert, recent Court of Appeals for the Armed Forces (CAAF) opinions indicate that Article 46 of the UCMJ may be loosening this requirement in order to allow the defense to rebut subjective and/or accusatory expert testimony by a government witness.⁴⁸

In *United States v. Warner*,⁴⁹ the defense requested the services of a civilian expert witness. The defense's need for an expert witness was not disputed. What was in dispute was whether the government provided an adequate substitute to the defense requested civilian expert. Under military law, the government is not required to provide the defense with the particular expert it requested, but need only provide an adequate substitute to the defense.⁵⁰

After obtaining one of the Air Force's preeminent experts on shaken baby syndrome, the government denied the defense's request for a civilian expert of similar qualifications.⁵¹ The government then appointed a military expert whom they claimed was an adequate substitute for the civilian expert.⁵² The CAAF held that "[p]roviding the defense with a 'competent' expert satisfies the Government's due process obligations, but may nevertheless be insufficient to satisfy Article 46 if the Government's expert concerning the same subject matter area has vastly superior qualifications."⁵³ The court in *Warner* acknowledged that while the government may have satisfied the requirements of RCM 703(d), this did not mean that it met the requirements of Article 46.⁵⁴ As a congressional statute, the CAAF stated "[t]o the extent that Article 46 provides rights beyond those contained within R.C.M. 703, it is our judicial duty to enforce the statutorily-established rights."⁵⁵

The effect of the *Warner* decision is to ensure that the government is not able to exploit its opportunity to obtain an expert vastly superior to that of the defense. The government is now required to either provide the defense requested expert,

⁴⁷ The *Mann* court stated:

We conclude that the military judge acted within his discretion in denying the defense motion requesting government funding for the services of Dr. Strickland as an investigative assistant. There was no *evidence* presented to the military judge from which he could conclude that Dr. Strickland could determine that the medical evidence of [the 4-year-old girl's] injuries indicated chronic abuse as their cause, or that she could provide more specific expert investigative assistance to the defense than that which had already been provided by Dr. Wulfsberg.

Id. at 643. However, Dr. Wulfsberg had testified that he was not qualified to render a forensic medical opinion as to the cause of injuries. *Id.* at 644.

⁴⁸ See *United States v. Warner*, 62 M.J. 114 (2005); *United States v. Lee*, 64 M.J. 213 (2006).

⁴⁹ *Warner*, 62 M.J. 114.

⁵⁰ *Id.* at 118 (citing *United States v. Calhoun*, 49 M.J. 485, 487-88 (1998)).

⁵¹ *Id.* at 117.

⁵² If the defense believes the substitute expert provided by the government is not adequate, it bears the burden of demonstrating that the employment of the civilian expert is necessary. *United States v. Robinson*, 24 M.J. 649, 652 (N.M.C.M.R. 1987).

We believe that the Sixth Amendment right of an accused to have compulsory process for obtaining witnesses in his favor demands that an "adequate substitute" for a particular requested expert witness at trial not only possess similar professional qualifications as the requested witness, but also be willing to testify to the same conclusions and opinions. To find otherwise would be to effectively foreclose the accused from obtaining favorable expert testimony to counter Government experts testifying against him at trial and would surely amount to a denial of "raw materials integral to the building of an effective defense."

Id. (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)).

⁵³ *Warner*, 62 M.J. at 119.

⁵⁴ *Id.*

⁵⁵ *Id.* at 121.

or provide one whose “professional qualifications [are] at least reasonably comparable to those of the Government’s expert.”⁵⁶

Without a requirement for parity between government and defense experts, the court-martial system would be open to abuse. The government would always have a vested interest in seeking to obtain preeminent experts for itself, while providing the minimally required experts under RCM 703(d) to the defense. According to the CAAF, “Article 46 reveals that Congress intended a more even playing field.”⁵⁷

Similarly, in *United States v. Lee*, the CAAF decided that the playing field is “rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government’s expert.”⁵⁸ In *Lee*, the government granted itself an expert in computer forensic and digital photo analysis.⁵⁹ The defense requested, but was denied, a government-funded expert to assist in preparing its case.⁶⁰ The CAAF held that:

Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, *fundamental fairness* compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in preparation or presentation of his defense.⁶¹

It is likely that the CAAF will continue to expand the reach of Article 46 to ensure that the playing field is level between the government and defense. At the very least, *Warner* and *Lee* have opened the door to possibility of the defense not being required to satisfy the *Gonzalez* necessity requirement when requesting a government-funded expert.

Fundamental Fairness

If the defense is unable to meet its obligation to establish necessity for a government-funded expert, it has been asserted that a “fundamental fairness” standard may also exist for justifying expert assistance.⁶² The question of whether fundamental fairness could be a basis for justifying expert assistance originated in *United States v. Mosely*.⁶³ In *Mosely*, the CAAF reviewed the decision of a military judge to order a retest of Mosely’s urine sample.⁶⁴ Mosely had previously tested positive for cocaine in a random urinalysis.⁶⁵ The military judge cited RCM 703(f)(1) to support his decision to grant the defense retest request.⁶⁶ Despite the military judge’s cited authority, the CAAF determined that his ruling was actually primarily “keyed to the grounds urged by the defense: fundamental fairness, relevance, and the minimal burden on the Government.”⁶⁷

Although *Mosely* initiated the discussion of a possible fundamental fairness standard, the CAAF in that case never expressly adopted the doctrine. Rather, the court based its decision on the determination that the military judge did not abuse his discretion. As asserted by one author:

⁵⁶ *Id.* at 120.

⁵⁷ *Id.*

⁵⁸ 64 M.J. 213, 218 (2006).

⁵⁹ *Id.* at 214–15.

⁶⁰ *Id.* at 215.

⁶¹ *Id.* (emphasis in original).

⁶² Gunn, *supra* note 35 (noting, but dismissing the possibility that a new “fairness” standard exists for justifying expert assistance).

⁶³ 42 M.J. 300 (1995).

⁶⁴ *Id.* at 301.

⁶⁵ *Id.* at 300–01.

⁶⁶ Under RCM 703(f)(1), “each party is entitled to the production of evidence which is relevant an necessary.” MCM, *supra* note 3, R.C.M. 703(f)(1).

⁶⁷ *Mosely*, 42 M.J. at 303.

[R]ather than signaling the emergence of a new standard for receiving expert assistance, the case should probably be seen as merely reaffirming the fact that the military judge has broad discretionary power to order additional evidence and to provide or deny expert assistance at government expense.⁶⁸

Even though the court did not embrace fundamental fairness as support for its ruling, it also importantly chose not to question the military judge's decision to rely upon the doctrine. Fundamental fairness, as discussed in *Lee*, is at the heart of Article 46's mandate that both sides have equal access to witnesses and evidence.⁶⁹ A military judge should, in order to even the playing field, use this doctrine to support a determination that the defense is entitled to a government-funded expert whenever the government relies upon a subjective or conclusory expert in its case.

The Intuitive Appeal of "If You Get One, I Get One Too"

Aside from the strict legal basis for why the necessity requirement should be presumed in cases where the government has hired an expert to offer subjective and/or accusatory testimony, the author offer in addition a common sense basis for the proposed new approach: If the matter at issue was important enough for the government to have gone through the trouble to hire an expert, then by extension, it would appear necessary for the defense to hire an expert to rebut the government's witness. In other words, if the matter was so significant and complex that the government hired someone to opine on it, how can a defense expert be anything less than necessary? By definition, if it is "necessary" for the government to hire an expert to testify as to a subjective and/or accusatorial matter, then so too is it "necessary" for the defense to hire its own expert. It would be a rare case indeed where an issue was so vital that the government hired an expert witness to adduce testimony at trial, but where the defense would be sufficiently equipped to present rebuttal testimony by using solely the resources at its disposal.

A Bright Line Rule

Finally, a bright-line rule for military judges to apply in cases where the government has hired an expert to offer subjective and/or accusatory testimony has the benefits of certainty, predictability and ease of application. These benefits cannot be overstated. First, the defense will know where it stands in terms of the availability of government-funded experts. Second, the government will be encouraged to prepare its case on the understanding that if it retains a certain type of expert, it will be required to provide the benefits of expert assistance to the defense as well. This will motivate the government to use expert evidence judiciously and only where genuinely needed. Finally, with a bright-line rule, a military judge will not have to engage in a searching and comprehensive review of the case to ascertain whether the defense has demonstrated that a government-funded expert is necessary.

Colonel Henley's list of nine non-exhaustive factors⁷⁰ that courts could consider in assessing the necessity requirement suggests how burdensome the analysis can become for all involved. The resources of both the courts and the parties are more effectively utilized by eliminating the need for such a detailed review, especially where such a review should, in the vast majority of cases, lead to the conclusion that the defense is in fact entitled to a government-funded expert.

A Suggested Approach for Military Judges

The suggested approach for military judges to employ in considering whether to require the defense to meet the requirement of establishing necessity for a government-funded expert is one which focuses both on whether the government has secured the benefit of expert testimony for itself, as well as the nature of the expert witness' testimony. Where the government has determined that it is not necessary for it to secure an expert for trial, a military judge should require the defense to meet the *Gonzalez* necessity test. Where, however, the government secures an expert witness for trial, the court should then consider the nature of the expert witness' testimony in order to ascertain whether a necessity inquiry is required.

⁶⁸ Gunn, *supra* note 35, at 150 (citing *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994), as supporting the proposition that *Mosely* should be read as a case reaffirming the broad discretionary power of the military judge); *see also* *United States v. Washington*, 46 M.J. 477 (1997). *But see* *United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990), *rev. denied*, 32 M.J. 45 (C.M.A. 1990) (stating defense may be entitled to expert assistance in developing its case because the government had similar help).

⁶⁹ *United States v. Lee*, 64 M.J. 213, 218 (2006) ("Courts-martial must not only be just, they must be perceived as just.").

⁷⁰ Henley, *supra* note 41, at 16 n.160.

In cases where the expert's testimony is objective and non-accusatory, the court should apply the necessity test as traditionally understood. In situations where the government intends to elicit subjective or accusatory expert testimony, however, the court should permit the defense to rebut this testimony with a government-funded expert without the requirement to meet the *Gonzalez* necessity test. Fundamental fairness and Article 46 require nothing less.

There will be cases, of course, where the characterization of the expert witness' testimony cannot easily be classified as "objective" or "subjective." In such a case, it should be left to the sound discretion of the military judge whether a *Gonzalez* analysis is necessary. It is suggested that the closer the expert's testimony comes to opining on a central fact at issue—even if couched as a neutral opinion—the more likely an explicit necessity showing is not needed.

Conclusion

The time has come to re-think the requirement for an explicit showing of necessity in cases where the government has retained an expert who will offer subjective and/or accusatory testimony. In such circumstances, the requisite necessity should be presumed by the mere fact that the government has deemed it essential to hire an expert. The *Gonzalez* test for necessity, however, should be preserved for cases where the government has not hired an expert or where the government's expert will present objective and non-accusatory testimony.

This common sense approach to government-funded defense experts is supported by the idea of fundamental fairness that is beginning to develop in the military justice case law. Although not fully defined or accepted by military courts, there is a strand of case law that rests on the idea that the defense is entitled to a government-funded expert as a matter of fundamental fairness. The approach is further bolstered by Article 46 of the UCMJ, which is a clear statement of congressional intent that the defense should not be placed at a disadvantage in a court-martial.

The proposed solution will not only ensure just results in courts-martial, but will also enhance the perception of fairness in the military justice system. At the end of the day, government funding for defense experts is a small price to pay for a justice system that is fair and evenhanded.

Flying Without a Net: *United States v. Medina* & Its Implications for Article 134 Practice

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*It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3.*¹

And so it goes . . . Judge Stucky's frustration reflects a broader malaise within the military justice system regarding the scourge of child pornography cases. Judge Stucky's observation highlights the rather ad hoc charging decisions that surface in these types of cases absent a specific, statutory provision in the Uniform Code of Military Justice (UCMJ) to deal with child pornography. Unfortunately, child pornography cases do more than simply demonstrate difficulties with the charging decision. The body of child pornography cases also reveals a troubling trend of Article 134 jurisprudence generally and the disturbing impact of that trend on the military's "offense-relation" doctrines.

The military justice system recognizes several offense-relation doctrines that show how different offenses in the military operate relative to one another. Part I of this article describes the doctrines of multiplicity, lesser-included offenses, preemption, and closely-related offenses, highlighting their similarities and differences. These offenses often intersect in confusing and unpredictable ways. This article will show how changing Article 134 jurisprudence causes a substantial amount of the confusion in these offense-relation doctrines. Part II describes the traditional role of Article 134 in the military justice system, and Part III describes the metamorphosis of that role and the resultant impact on the offense-relation doctrines.

The changing Article 134 jurisprudence and its impact on the offense-relation doctrines provide the context for fully understanding the recent Court of Appeals for the Armed Forces (CAAF) opinion in *United States v. Medina*.² Part IV shows how *Medina* revisits the trends detailed in Parts II and III and restores a degree of order to both Article 134 jurisprudence and the offense-relation doctrines. In the end, this article concludes that practitioners should view *Medina* as an opinion in which the CAAF reestablishes itself as a steward of Article 134 jurisprudence.

Part V ultimately explores the implications of this thesis on the offense-relation doctrines. Inevitably, the CAAF's holding in *Medina* will serve to clean-up practice relative to the offense-relation doctrines. To begin, consider these doctrines.

Part I: Multiplicity, Lesser-Included Offenses, Preemption, and Closely-Related Offenses

Military justice practitioners use a variety of doctrines to describe the relationship between the many UCMJ offenses. Both at trial and on appeal, practitioners regularly navigate these related, yet distinct, offense-relation doctrines: multiplicity, lesser-included offenses, preemption, and closely-related offenses.³ Just as practice relies, to some degree, on some basic grasp of the offense-relation doctrines, assessing *Medina*'s implications requires some background knowledge of these doctrines.

¹ *United States v. Medina*, 66 M.J. 21, 25 n.1 (2008) (Stucky, J., dissenting).

² *Medina*, 66 M.J. 21.

³ Practitioners will note what appears to be a glaring omission from this list: the doctrine of unreasonable multiplication of charges. While regularly discussed in the same breath as the doctrine of multiplicity, the two doctrines are separate. See *United States v. Quiroz*, 55 M.J. 334, 337 (2001). While the CAAF is careful to point out that the doctrine of unreasonable multiplication of charges is not an equitable doctrine, it nonetheless grows out of fairness concerns. See *id.* at 339. So, to the extent that CAAF has established a case-by-case totality of the circumstances test to determine when the government has reached too far in prosecuting a given case, it has certainly not set out a test meant to define offenses relative to one another in every like case. See *id.* at 338-39. Because the four offense-relation doctrines do not employ a case-by-case analysis and instead define offenses relative to one another in a way that has precedential value, this article will only address them and places unreasonable multiplication of charges outside of the scope of this article.

Unfortunately, discussion on the tests and limits of the offense-relation doctrines inevitably devolves into frustration and confusion. Courts and commentators alike lament the disarray of this particular field of jurisprudence. In *United States v. Britton*, a CAAF case looking, in part, at the doctrine of multiplicity as applied to lesser-included offenses, Judge Effron writes in a concurring opinion, “Multiplicity litigation has been marked by instability in doctrine and *ad hoc* resolution of cases”⁴ Colonel James Young, the then-Chief Circuit Military Judge of the European Circuit (Air Force), calls the doctrine of multiplicity a “vexatious problem.”⁵ Then-Major William Barto likens the intersection of multiplicity and lesser-included offenses to the mythical “Gordian Knot.”⁶ To avoid this confusion at the outset, this article will initially ignore the nuanced application of each offense-relation doctrine and seek merely to draw rough borders around each doctrine.

The first offense-relation doctrine, multiplicity, protects an accused’s Fifth Amendment double jeopardy rights.⁷ According to the doctrine of multiplicity, a court may not convict an accused multiple times under different statutes for the same criminal act unless Congress intends it.⁸ This protection from double jeopardy applies both across successive trials and within the confines of a single trial.⁹

Defining the relationship between two offenses in the context of the multiplicity doctrine is important, then, as a tool to determine congressional intent. The seminal case on the military doctrine of multiplicity, *United States v. Teters*,¹⁰ establishes three ways to determine congressional intent to permit multiple convictions for a single criminal act. One method of determining congressional intent looks for express intent in the relevant statute or its legislative history.¹¹ Another method looks to other reliable sources of legislative intent, although the court does not describe these.¹² The third method looks to “the elements of the violated statutes and their relationship to each other.”¹³

The *Teters* test defines the extent to which statutory offenses are sufficiently separate to warrant separate convictions arising from a single criminal transaction.¹⁴ The heart of the test is the third method of determining congressional intent: a comparison of the elements of the violated statutes. *Teters* applies the elements test articulated by the Supreme Court in *Blockburger v. United States*:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.¹⁵

If, by looking to the competing statutes, a practitioner can point to an element in one that is not required by the other and vice versa, then the prohibited offenses are sufficiently distinct that one can infer congressional intent to permit multiple convictions for the same criminal act.¹⁶

⁴ *United States v. Britton*, 47 M.J. 195, 199 (1997) (Effron, J., concurring).

⁵ Colonel James A. Young, *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159, 159 (1996).

⁶ Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 2 (1996).

⁷ See *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993).

⁸ See *id.* The *Teters* court explains, “[A] constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct.” *Id.* (citing *Ball v. United States*, 470 U.S. 856, 861 (1985)).

⁹ See *id.* at 373.

¹⁰ *Teters*, 37 M.J. 370.

¹¹ See *id.* at 376.

¹² See *id.* at 377.

¹³ *Id.* at 376–77.

¹⁴ *Id.* at 376.

¹⁵ *Id.* at 377 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

¹⁶ This statement represents an instance where this article ignores the nuanced application of the multiplicity doctrine. In fact, the CAAF has expanded the *Teters* test to include a comparison of not only the statutory elements, but the elements alleged in the pleadings. See generally *United States v. Weymouth*, 43 M.J. 329 (1995). In practice, *Weymouth* has not been used to set aside convictions on multiplicity grounds, as courts tend to rely on the doctrine of

The second offense-relation doctrine, lesser-included offenses, performs at least two functions. First, the doctrine provides the accused with the benefit of giving the fact-finders in his case an option for a conviction that is less egregious than the greater offense with which he is charged.¹⁷ Second, the doctrine allows the government the flexibility to convict on a less-serious offense when its proof fails on the greater offense.¹⁸ Through operation of the doctrine in both contexts, the military justice system presumes that the accused is on notice of uncharged lesser-included offenses.¹⁹

Defining the relationship between offenses in the lesser-included offense context, then, is important as a tool to determine whether or not a fall-back position is available at trial to either the government or the defense. Unlike the doctrine of multiplicity, the doctrine of lesser-included offenses is codified in the UCMJ at Article 79.²⁰ Importantly, Article 79 defines lesser-included offenses as those “necessarily included” in the charged offense.²¹ The seminal case on the military doctrine of lesser-included offenses, *United States v. Foster*, adopts the *Teters* elements test to determine whether an offense is necessarily included in a charged offense.²²

While practitioners use the *Teters* elements test to determine if two offenses are sufficiently distinct from one another, they use the *Foster* elements test to determine if two offenses are sufficiently similar to one another. The Court of Military Appeals (CMA) uses different language to articulate the *Foster* elements test to reflect the different goals of the otherwise similar tests. *Foster* applies the elements test for lesser-included offenses established by the Supreme Court in *Schmuck v. United States*:

One offense is not “necessarily included” in another unless the *elements* of the lesser offense *are a subset* of the elements of the charged offense.²³

If, by looking at the two statutes, a practitioner can see that the greater offense accounts for all of the elements of the lesser offense, then the lesser offense is necessarily included within the greater offense. Military law on the doctrine of lesser-included offenses recognizes that by charging *only* the greater offense, the government places the accused on notice of *both* the greater and lesser offenses.²⁴ As a result, military law strongly discourages charging both the greater and lesser-included offenses.²⁵

The third offense-relation doctrine, preemption, prevents the government from dropping essential elements from the common-law crimes Congress codified in the UCMJ and prosecuting the remaining elements as an Article 134 offense.²⁶ The *Manual for Courts-Martial (MCM)* uses the example of a larceny-type offense under Article 121 to illustrate the preemption doctrine.²⁷ According to the *MCM*, practitioners cannot drop the specific intent element required for an Article 121 larceny and charge a larceny-type offense under Article 134.²⁸

unreasonable multiplication of charges to set aside convictions in cases where two offenses are statutorily distinct. *See, e.g., United States v. Quiroz*, 55 M.J. 334 (2001).

¹⁷ *See United States v. Foster (Foster II)*, 40 M.J. 140, 143 (C.M.A. 1994). The military judge has a sua sponte duty to instruct on lesser-included offenses in issue at trial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(2) (2008) [hereinafter MCM].

¹⁸ *See* UCMJ art. 79 (2008).

¹⁹ *See* MCM, *supra* note 17, Pt. IV, ¶ 3b(1).

²⁰ *See* UCMJ art. 79.

²¹ *Id.*

²² *See Foster II*, 40 M.J. at 142.

²³ *Id.* (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)).

²⁴ *See* MCM, *supra* note 17, Pt. IV, ¶ 3b(1).

²⁵ *See id.* R.C.M. 307(c)(4) discussion (“In no case should both an offense and a lesser included offense thereof be separately charged.”).

²⁶ *See United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953).

²⁷ *See* MCM, *supra* note 17, Pt. IV, ¶ 60c(5)(a).

²⁸ *See id.*

Defining the relationship between two offenses in the context of the preemption doctrine is important as a tool to determine whether Congress intended to foreclose an Article 134 prosecution in a specific case by its proscription of specific misconduct in Articles 80–132. The seminal case on the military doctrine of preemption, *United States v. Wright*,²⁹ establishes a two-part test to determine congressional intent. If Congress intended to foreclose an Article 134 prosecution for specific misconduct through its enactment of one of the enumerated offenses in Articles 80–132, then the Article 134 charge is preempted.

Like the *Foster* test, the *Wright* test defines the extent to which two offenses are sufficiently similar to one another. Because the military preemption doctrine is unique to the military justice system,³⁰ the CMA test does not draw on Supreme Court precedent for authority. *Wright* states:

[T]he applicability of the preemption doctrine requires an affirmative answer to two questions. The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of . . . Article . . . 134³¹

Since Congress seldom communicates an express intent to preempt Article 134 prosecutions,³² practitioners will inevitably consume themselves with the second *Wright* question. Notably, the second question that practitioners must answer in the *Wright* test appears very similar to the *Foster* elements test.

The final offense-relation doctrine, closely-related offenses, permits appellate courts to affirm an accused's conviction for a technically different offense than the offense alleged and found at trial. According to the closely-related offense doctrine, an accused's plea of guilty to an alleged offense and his admissions during his plea colloquy taken together may permit a slight "technical variance" between the offense alleged and the offense ultimately affirmed on appeal.³³ The closely-related offense doctrine has only been applied in appellate practice.³⁴

Defining the relationship between two offenses in the context of the closely-related offense doctrine is important as a tool to determine whether or not the accused was on notice of the offense ultimately affirmed on appeal.³⁵ The case establishing the closely-related offense doctrine, *United States v. Felty*, employs a totality of the circumstances test to determine whether or not two offenses are closely-related.³⁶ To that end, *Felty* and cases since have considered whether the two offenses are charged under the same Article, share the same maximum punishment, reflect a similar gravamen of each offense, and are proved by the accused's admissions during the providence inquiry.³⁷

Like the *Foster* and *Wright* tests, the closely-related offense doctrine's totality of the circumstances test defines the extent to which two offenses are sufficiently similar to one another. Despite the similar function of these three doctrines, the discussion above shows that each doctrine employs a different test for determining when two offenses are similar to one

²⁹ *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

³⁰ Federal criminal law employs a similar, but distinct preemption doctrine relative to the federal Assimilative Crimes Act. See *Lewis v. United States*, 523 U.S. 155, 164–65 (1998). The federal Assimilative Crimes Act permits federal prosecutors to try state crimes in federal courts given certain statutory conditions. *Id.* at 158. The federal preemption doctrine is used to determine whether federal law preempts the use of a given state statute in federal court. *Id.* at 164–65. *Medina* arguably does not have implications for the application of the federal preemption doctrine, rendering any further discussion of the federal preemption doctrine irrelevant.

³¹ *Wright*, 5 M.J. at 110–11.

³² See, e.g., *id.* at 111.

³³ See *United States v. Felty*, 12 M.J. 438, 442 (C.M.A. 1982).

³⁴ See generally *United States v. Bivins*, 49 M.J. 328 (1998) (affirming a conviction for dereliction of duty as a "closely-related" offense to the alleged violation of a lawful general order); *United States v. Epps*, 25 M.J. 319 (C.M.A. 1987) (describing the application of the closely-related offense doctrine on appeal).

³⁵ See *Felty*, 12 M.J. at 442.

³⁶ See *id.*

³⁷ See *id.* at 441–42.

another. The *Teters* multiplicity test adds a fourth method for defining the extent to which two offenses are related to one another.

While the discussion to this point in the article has attempted to cleanly distinguish between the military's four offense-relation doctrines, the full jurisprudence across these four doctrines seldom treats them cleanly. Instead, courts have consistently twisted and stretched the doctrines to a point where the doctrines are often conflated and lack internal consistency. Part III of this article will demonstrate how Article 134 jurisprudence is largely responsible for the morass of offense-relation doctrines.

Part II: An Original Understanding of Article 134's Role in Military Justice Practice

To fully understand the state of Article 134 jurisprudence today and its impact on the offense-relation doctrines, it is necessary first to understand where Article 134 has been. For starters, the UCMJ labels Article 134 the "General Article" because of its broad and vague language meant to capture misconduct "not specifically mentioned" elsewhere in the UCMJ.³⁸ The three clauses of Article 134 criminalize conduct that is prejudicial to the good order and discipline of the armed forces, is service-discrediting, or is in violation of a federal, non-capital crime.³⁹ The *MCM* acknowledges the potential for virtually limitless application of the General Article in its explanation of clause one: "Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense"⁴⁰

Despite its broad and vague language, Article 134 has withstood constitutional challenge at the Supreme Court. In *Parker v. Levy*, the Supreme Court considered Dr. Howard Levy's First Amendment overbreadth and Fifth Amendment vagueness challenges to the General Article.⁴¹ Captain (CPT) Levy, an Army physician stationed at Fort Jackson, South Carolina, was convicted at a court-martial of, among other things, violating Article 134.⁴² Charged and tried during the Vietnam War, the Article 134 specification alleged that CPT Levy made several comments to enlisted personnel designed to "promote disloyalty and disaffection" among them.⁴³ Captain Levy's comments condemned Special Forces Soldiers, criticized U.S. war policy in Vietnam, and encouraged African-American Soldiers both to refuse deployment to Vietnam and to refuse to fight if sent.⁴⁴

The Supreme Court handled the Fifth Amendment and First Amendment challenges in turn. Vagueness under the Fifth Amendment is concerning, said the Supreme Court, because every accused should enjoy fair notice of the offense charged and protection from arbitrary enforcement.⁴⁵ In holding that the General Article is not void for vagueness, the Supreme Court relied on three characteristics of the military justice system that both provide a military accused fair notice of the nature of

³⁸ UCMJ art. 134 (2008).

³⁹ *Id.*

⁴⁰ *MCM*, *supra* note 17, Pt. IV, ¶ 60c(2)(a).

⁴¹ *See generally* *Parker v. Levy*, 417 U.S. 733 (1974).

⁴² *See id.* at 735.

⁴³ *See id.* at 738.

⁴⁴ *See id.* at 739. The full Article 134 specification read:

In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statement to divers enlisted personnel at divers times: 'The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

Id. at 739 n.5.

⁴⁵ *See id.* at 752.

Article 134 misconduct and protect the military accused against arbitrary enforcement of Article 134. First, the Supreme Court noted that the *MCM* places limits on the scope of Article 134 through both the *MCM*'s explanation section and the more than sixty enumerated Article 134 offenses promulgated by the President.⁴⁶ Second, the Supreme Court relied on the history and custom of military law, tracing the roots of the General Article through the old British Articles of War and explaining that the values of good order and discipline captured in the General Article are integral in the military's "specialized society."⁴⁷ Third, the Supreme Court highlighted the body of military appellate authority that has interpreted and "narrowed the very broad reach" of Article 134.⁴⁸

The Supreme Court likewise held that Article 134 is not overbroad under the First Amendment. In a First Amendment expression context, the Court asks whether a more narrowly-drawn statute could have reached the accused's impermissible speech.⁴⁹ In CPT Levy's case, the Supreme Court answered with an emphatic "no."⁵⁰ Because of the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline" residing in the military, the General Article's admittedly broad language appropriately reaches speech that might otherwise be permitted in the civilian community.⁵¹ The Court declined to strike down Article 134 when it could conceive of "a substantial number of situations to which it might be validly applied" in order to support the unique command structure of the U.S. military.⁵²

Two valuable points from the Supreme Court's holding in *Parker v. Levy* set the starting point for an analysis of the metamorphosis of Article 134's role in military jurisprudence. First, the Supreme Court clearly perceived military appellate courts as stewards of Article 134 and as checks against its potentially over-expansive use. The Court expressly relied on the military courts performing these functions in its vagueness holding and invoked the limiting role of military courts in its overbreadth analysis.⁵³ Whether or not military appellate courts have continued to fulfill that stewardship role will figure prominently in this article's subsequent analysis.

Second, the Supreme Court's holding in *Parker v. Levy* deals entirely with clause 1 of the General Article: conduct that prejudices good order and discipline in the armed forces. Especially in the context of the Supreme Court's First Amendment analysis, the Court casts Article 134 as essentially a commander's tool to impose punishment for offenses that he could not have anticipated, but that nonetheless impact the good order and discipline of his unit. The Supreme Court's conception of Article 134 as the commander's tool to address indiscipline in his unit stands in stark contrast to the role Article 134 plays in modern military jurisprudence.

Part III: The Metamorphosis of Article 134's Role in Military Justice Practice

While commanders admittedly continue to use Article 134 as a tool to enforce discipline in the armed forces, the past fifteen years of military jurisprudence has defined a new role for Article 134: the catch-all lesser-included offense. As trial practitioners and military appellate courts look to Article 134 as a lesser-included offense more and more frequently, they have placed tremendous strain on the offense-relation doctrines outlined in Part I. As the following analysis will show, the evolution of Article 134 jurisprudence set the stage for *Medina* and foreshadows the implications of *Medina*.

Surprisingly, *Foster*, the seminal case on the military's modern doctrine of lesser-included offenses, launches the liberalization of Article 134 jurisprudence that has left the offense-relation doctrines in their current, confusing state. The government charged Technical Sergeant (TSgt) Foster, in relevant part, with a violation of Article 125, forcible sodomy of a female airman.⁵⁴ A general court-martial convicted TSgt Foster, inter alia, of a violation of Article 134, indecent assault,

⁴⁶ See *id.* at 753.

⁴⁷ See *id.* at 743–47.

⁴⁸ See *id.* at 754.

⁴⁹ See *id.* at 758–59.

⁵⁰ See *id.* at 757.

⁵¹ See *id.* at 758.

⁵² See *id.* at 759–61.

⁵³ See *id.* at 760–61.

⁵⁴ See *United States v. Foster (Foster II)*, 40 M.J. 140, 141 (C.M.A. 1994).

following instructions from the military judge that the indecent assault offense was a lesser-included offense of the sodomy offense.⁵⁵ On appeal, the Air Force Court of Military Review (AFCMR) held that indecent assault was not a lesser-included offense of sodomy because indecent assault included an additional element not fairly embraced by sodomy: that the victim is not the wife of the accused.⁵⁶ The AFCMR instead affirmed TSgt Foster's conviction as an indecent act, in violation of Article 134, holding that the elements of an indecent act are a subset of sodomy's elements.⁵⁷ The AFCMR did not discuss nor even mention prejudice to good order and discipline or service-discrediting as elements to either indecent assault or indecent act.

As discussed above, the CMA opens its *Foster* opinion by declaring that it adopts the *Teters* elements test for multiplicity and the Supreme Court's elements test for lesser-included offenses set out in *Schmuck v. United States*.⁵⁸ By adopting these similar elements tests, the CMA seems to predetermine its course. *Teters* expressly considered whether a court could rely on the pleadings or the facts proved at trial to conduct the elements test and rejected both in favor of a pure *statutory* elements test.⁵⁹ Likewise, the Supreme Court in *Schmuck* expressly rejected using evidence adduced at trial to guide the application of its elements test, opting instead for a pure *statutory* test.⁶⁰ When it considered whether the statutory elements of indecent acts are a subset of the elements of sodomy,⁶¹ the CMA concluded in *Foster* that, "charges prosecuted under Article 134 require proof of at least one element not required for proof of offenses arising under Articles 80 through 132 of the Uniform Code."⁶² The additional element, of course, is prejudice to good order and discipline or service-discrediting. *Teters* and *Schmuck* would seem to mandate setting aside TSgt Foster's conviction because the elements of the Article 134 indecent acts offense, by virtue of its additional element, is not a subset of the elements defining Article 125.

The *Foster* court did not set aside the conviction, though—it affirmed. By straining to affirm the use of Article 134 as a lesser-included offense, the *Foster* court condemned the offense-relation doctrines to more than a decade of confusion. To start, immediately after acknowledging that clauses 1 and 2 of Article 134 are not elements of Article 80 through 132 offenses, the CMA laments the fact that "the opportunity for instructions on lesser-included offenses" would be lost to the accused if clause 1 and 2 of Article 134 were not considered lesser-included offenses of the enumerated Articles.⁶³ Leaving aside the questionable "favor" the court provided Foster in this case,⁶⁴ the CMA declares without analysis, "To avoid these incongruous results, we hold simply that, in military jurisprudence, the term 'necessarily included' in Article 79 encompasses derivative offenses under Article 134."⁶⁵

⁵⁵ See *id.* at 145.

⁵⁶ See *United States v. Foster (Foster I)*, 34 M.J. 1264, 1267 (A.F.C.M.R. 1992).

⁵⁷ See *id.*

⁵⁸ See *Foster II*, 40 M.J. at 142.

⁵⁹ See *United States v. Teters*, 37 M.J. 370, 377–78 (C.M.A. 1993).

⁶⁰ See *Schmuck v. United States*, 489 U.S. 705, 716–17 (1989). The Supreme Court explains:

Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly.

Id. at 720.

⁶¹ Recall that this is the *Schmuck* test for whether or not an offense is "necessarily included" in another offense, making it a lesser-included offense. See *id.* at 716.

⁶² See *Foster II*, 40 M.J. at 143.

⁶³ See *id.*

⁶⁴ The government elected to prosecute TSgt Foster with a forcible sodomy in this case, requiring that the government prove "unnatural carnal copulation." See UCMJ art. 125 (2008). The Air Force court speculated, "Based on the testimony of Amn KLT and the questions of the court members, it appears they were not convinced beyond a reasonable doubt that appellant had 'physically penetrated the sexual organs of Amn KLT with his mouth' and, therefore, they could not find him guilty of sodomy." See *Foster I*, 34 M.J. 1264, 1265 (A.F.C.M.R. 1992). So, the opportunity for a lesser-included offense in *Foster* did not belong to the accused at all, but to the government when it apparently failed in its proof. Indeed, the CMA in *Foster* acknowledges "the Government's sloppy handling of the case." *Foster II*, 40 M.J. at 145 n.5.

⁶⁵ *Foster II*, 40 M.J. at 143.

This conclusory holding seems to implicitly reject the *Schmuck* elements test as applied in the specific field of Article 134 jurisprudence. Indeed, the *Foster* court's explanation cements this observation: "Thus we hold that an offense arising under the general article may, *depending on the facts of the case*, stand either as a greater or lesser offense of an offense arising under an enumerated article."⁶⁶ The practitioner should understand that the *Foster* opinion, while claiming to follow *Teters* and *Schmuck*, in fact rejects the statutory elements test of both in the case of Article 134 lesser-included offenses, and applies the same old case-by-case, factual analysis the court purports to reject.

The *Foster* court compounds its nonsensical approach with a virtual concession that it has unfaithfully applied a statutory elements test. *Foster* recommends as "sound practice" that the government alternatively plead both the greater offense and the lesser offense.⁶⁷ The CMA presumably recommends the practice of pleading both the greater and lesser offenses on the charge sheet out of notice concerns. Recall that as a matter of practice, the Rules for Courts-Martial (RCM) direct military justice practitioners to avoid pleading both the greater and lesser offenses.⁶⁸ Recall also that Article 79, because of the statutory elements test and the rationale in *Schmuck*, presumes that the accused is on notice of lesser-included offenses.⁶⁹ Again, *Foster* offers lesser-included offense language that runs directly counter to lesser-included offense doctrine.

Two other notes about the *Foster* opinion raise equally vexing questions about the CMA's abrogation of its stewardship role vis-à-vis Article 134 and obfuscation relative to the offense-relation doctrines. First, it bears repeating that *Foster*, like *Schmuck*, was not simply establishing some elements test anew. Instead, both opinions were rejecting lines of precedent that employed ad hoc and indeterminate "inherent relationship"⁷⁰ and "fairly embraced" tests.⁷¹ The *Foster* court nonetheless cites a concurring opinion in a case decided under the old fairly embraced test as its authority to declare Article 134 a lesser-included offense of all enumerated offenses.⁷²

Second, as it unleashed Article 134 as the lesser-included offense of last resort, the CMA did not account for the preemption doctrine. The CMA expressly invoked the history and relationship between Article 134 and the enumerated Articles in support of its position, but mischaracterized both. The CMA points to the Winthrop hornbook for the proposition that all common-law felonies were, under the Articles of War, prosecuted under the general article.⁷³ The CMA irresponsibly relies on Winthrop in this case because it implies that using the general article as a lesser-included offense is permissible because "we've always done it that way."

In truth, the legislative history of the UCMJ supports the exact opposite conclusion. In his testimony before Congress on the UCMJ, Professor Morgan, one of the drafters of the UCMJ, explained that the general article was "too vague and indefinite" to continue to use for common law crimes.⁷⁴ One of the goals of the UCMJ was to define common law crimes in the enumerated offenses, "leaving the general article pretty much only for military offenses."⁷⁵ The case that essentially memorialized the preemption doctrine, *United States v. Norris*, cites this legislative history in setting aside a conviction under Article 134 for a wrongful taking instead of prosecuting a larceny under Article 121.⁷⁶ The *Norris* court explained, "We

⁶⁶ *Id.* (emphasis added).

⁶⁷ *See id.*

⁶⁸ *See MCM, supra* note 17, R.C.M. 307(c)(4) discussion.

⁶⁹ *See id.* Pt. IV, ¶ 3b(1).

⁷⁰ *See Schmuck v. United States*, 489 U.S. 705, 708–09 (1989) (explaining, then rejecting the "inherent relationship" test for lesser-included offenses).

⁷¹ *See United States v. Baker*, 14 M.J. 361, 368 (C.M.A. 1983) (explaining the "fairly embraced" test, which relied, in part, on the "factual allegations of the . . . offense and established by evidence introduced at trial."). The Air Force Court of Military Review relied, in part, on the holding of *United States v. Duggan*, 15 C.M.R. 396, 399–400 (C.M.A. 1954), *Baker's* precedent for the "fairly-embraced" test. *See generally Foster I*, 34 M.J. 1264, 1267 (A.F.C.M.R. 1992) (citing *Duggan*); *see also* Lieutenant Colonel Michael J. Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99 (1998) (charting the history of the development of the doctrine of multiplicity in the military).

⁷² *See Foster II*, 40 M.J. at 143 (citing *United States v. Doss*, 15 M.J. 409, 415 (C.M.A. 1983) (Cook, J., concurring)).

⁷³ *See id.* (citing W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 720–21 (2d ed. 1920 Reprint)).

⁷⁴ *See Hearings Before S. Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong. 37, 47 (1949) (statement of Prof. Morgan).

⁷⁵ *See id.*

⁷⁶ *See United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953) (citing *Hearings Before S. Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong. 37, 47 (statement of Prof. Morgan)).

cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.”⁷⁷ The legislative history of the UCMJ and the preemption doctrine—both ignored by *Foster*—would seem to mandate a different conclusion in *Foster*.

The CAAF took another dramatic step toward liberalizing the use of Article 134 as a lesser-included offense nearly six years later in *United States v. Sapp*. Senior Airman (SrA) Sapp pled guilty to, and a general court-martial convicted him of, possessing child pornography in violation of Article 134, clause 3.⁷⁸ During the providence inquiry, the military judge inquired as to the service-discrediting nature of possessing child pornography and SrA Sapp admitted that possessing child pornography was service-discrediting.⁷⁹ The military judge accepted the accused’s plea to the clause 3 offense.

On appeal, the Air Force Court of Criminal Appeals determined that the military judge did not adequately establish that SrA Sapp’s child pornography appeared in three “matters” as required by the statute.⁸⁰ The court set aside SrA Sapp’s clause 3 conviction, but affirmed a clause 2 conviction as a lesser-included offense of the failed clause 3 offense.⁸¹ The CAAF affirmed the Air Force court because the military judge inquired about and SrA Sapp admitted the service-discrediting element during the providence inquiry.⁸²

Again in the *Sapp* opinion, the CAAF makes a mess of offense-relation doctrines by forcing the expansive use of Article 134. In affirming the clause 2 conviction as a lesser-included offense of the failed clause 3 conviction,⁸³ the CAAF curiously asserts that neither is really a separate offense, but merely “alternative ways of proving the criminal nature of the charged misconduct.”⁸⁴ According to the CAAF, these alternative ways of proving criminality are nonetheless composed of distinct elements,⁸⁵ leading to the question: what is an alternative way of proving criminality, if not an offense? Elements define offenses and the CAAF cites no authority for creating the alternative way to defining criminal misconduct.

Additionally, the CAAF expands the use of Article 134, clauses 1 and 2 as lesser-included offenses to Articles 80 through 132 to include Article 134, clause 3 without explanation. The CAAF concedes that the clause 3 specification did not require the government to prove the service-discrediting nature of the conduct.⁸⁶ The CAAF nonetheless relies on *Foster* for the proposition that clauses 1 and 2 are implicit in a clause 3 offense, explaining, “we noted that the elements of prejudice to good order and discipline and discredit to the armed forces are implicit in every enumerated offense under the Uniform Code of Military Justice.”⁸⁷ Again, the CAAF merely concludes and does not explain what makes federal crimes charged under clause 3 so similar to the enumerated offenses charged under Articles 80 through 132 that the elements of prejudice and discredit are implicit in the entirety of Title 18.

Like the *Foster* court, the *Sapp* court appears to sense it has overreached and piles on more analysis attempting to explain the expansion of Article 134 jurisprudence. Like *Foster*, *Sapp*’s attempt to clarify only obfuscates further. Rather than explaining and applying the *Foster* elements test to determine a lesser-included offense, the *Sapp* court cites *United States v. Bivins*, a “closely-related offense” doctrine case, to support its conclusion that clause 2 is a lesser-included offense

⁷⁷ *Id.*

⁷⁸ See *United States v. Sapp*, 53 M.J. 90, 90 (2000). The government relied on the Federal Child Pornography Prevention Act, 18 U.S.C. § 2252 (2000). *Id.*

⁷⁹ See *Sapp*, 53 M.J. at 91.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.* at 92.

⁸³ See *id.* at 92 n.2.

⁸⁴ See *id.* at 92.

⁸⁵ See generally *Sapp*, 53 M.J. 90 (describing the “elements” as they appear in the federal statute for clause 3 and the “elements” of service-discrediting and prejudice to good order and discipline).

⁸⁶ See *id.* at 92.

⁸⁷ See *id.*

of clause 3.⁸⁸ So, instead of laying the statutory elements of the clause 3 offense—specifically, the elements of the Federal Child Pornography Prevention Act (CPPA)—next to the statutory elements of Article 134, clause 2, the CAAF applies the closely-related offense doctrine’s totality of the circumstances test.⁸⁹ Again, the confusion that results from conflating the two doctrines grows from stretching the use of Article 134 as a lesser-included offense where errors at trial cause the greater offense to fail.

Part IV: *United States v. Medina*: The Liberalization of Article 134’s Role Revisited

Following *Foster* and *Sapp*, a sizable line of cases has developed where the CAAF has remedied problems at trial by affirming convictions on the lesser-included offenses of Article 134, clause 1 or 2.⁹⁰ The practice of using Article 134 as the lesser-included offense of last resort has infested trial practice, as well. The case of *United States v. Mason* illustrates just how much the conception of Article 134’s role in the military justice system has changed since the Supreme Court considered it in *Parker v. Levy*.

In *Mason*, like *Sapp*, the military judge led the accused through a providence inquiry on an Article 134, clause 3 child pornography offense.⁹¹ After advising the accused of the elements of the Federal Child Pornography Prevention Act, the military judge added an element:

Fourth—and I instruct on this only in this case if it is determined that your plea is improvident on the charged offense, since the crime has been charged as an other crime or offense not capital—such conduct was of a nature to bring discredit upon the armed forces or was to the conduct [sic] of good order and discipline in the armed forces.

. . . .

Now, it’s my position with the charged offense as it is charged in Charge III, that is not an element of the charged offense. However, in the abundance of caution, I add that as an element in case for some reason the appellate courts, if this case goes to the appeals system, determines your plea to the . . . [CPPA] charge is improvident, it would find that it was service discrediting or armed forces discrediting. That is why I have added that element.⁹²

Gone from the military judge’s explanation are the ideas supporting the constitutionality of Article 134 in *Parker v. Levy*. In *Mason*, the prohibition against conduct that is prejudicial to good order and discipline does not operate as the commander’s flexible tool to discipline misconduct he could not anticipate but nonetheless impacts his unit. Instead, the military judge sua sponte adds an element not found in the statute or pleadings of the charged offense for the express purpose of saving the case on appeal should something go wrong.

With the state of Article 134 jurisprudence essentially captured in *Mason*, this term the CAAF considered *United States v. Medina*.⁹³ A general court-martial convicted Staff Sergeant Medina, like *Sapp* and *Mason*, of a clause 3 child pornography offense.⁹⁴ Like *Sapp* and *Mason*, Medina admitted all elements of the CPPA violation during a providence inquiry pursuant to his guilty plea.⁹⁵ Like the military judges in *Sapp* and *Mason*, the military judge in *Medina* “gratuitously added” an additional element of service-discrediting conduct to the providence inquiry.⁹⁶ The Army Court of Criminal Appeals set

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See, e.g.,* *United States v. Martinelli*, 62 M.J. 52 (2005); *United States v. Reeves*, 62 M.J. 88 (2005); *United States v. Mason*, 60 M.J. 15 (2004).

⁹¹ *Mason*, 60 M.J. at 16.

⁹² *Id.* at 17–18.

⁹³ *United States v. Medina*, 66 M.J. 21 (2008).

⁹⁴ *Id.* at 22.

⁹⁵ *See id.* at 23.

⁹⁶ *See id.*

aside Medina's clause 3 conviction but, following *Sapp* and *Mason*, nonetheless affirmed a clause 2 conviction as a lesser-included offense to clause 3.⁹⁷ The CAAF's subsequent grant on *Medina* seemed unremarkable given the familiar procedural history of the case.

The CAAF made *Medina* remarkable, however, when it set aside Medina's conviction of the Article 134, clause 2 lesser-included offense. *Medina* represents the first check on the expansive field of Article 134 jurisprudence in recent memory. Flowing from this more conservative approach to Article 134's role in the military justice system, the *Medina* court's analysis does much to restore clarity to the offense-relation doctrines.

To start, the CAAF's certified question in *Medina* asks whether or not the Army Court of Criminal Appeals, when it changed Medina's clause 3 conviction into a clause 2 conviction, added an element to the greater clause 3 offense in contravention of *Schmuck*.⁹⁸ The question focuses exclusively on the doctrine of lesser-included offenses and the *Medina* court handles its analysis accordingly. *Medina* applies a pure, statutory elements test, expressly invoking *Schmuck*'s language that rejects a case-by-case, evidence-adduced-at-trial approach.⁹⁹ The *Medina* court holds that the elements of Article 134, clauses 1 and 2 are not "textually contained" in the CPPA.¹⁰⁰

The CAAF confronts its demons when it completes the application of its elements test by asking whether any offense arising under clause 3 implicitly includes the elements of Article 134, clauses 1 and 2.¹⁰¹ The *Medina* court acknowledges that *Sapp* "suggested" prejudice to good order and discipline and service-discrediting were implicit in clause 3 offenses.¹⁰² The *Medina* court quickly distances itself from *Sapp*, however, acknowledging *Sapp*'s conflated analysis of the doctrine of lesser-included offenses and the closely-related offenses doctrine (discussed above).¹⁰³

After distancing itself from *Sapp*'s conclusion that the elements of clauses 1 and 2 are implicit in clause 3 offenses, *Medina* considers arguments strongly against the *Sapp* holding. For example, a related line of CAAF cases holds that violations of state law, assimilated through clause 3, are not *per se* service-discrediting.¹⁰⁴ Additionally, the CAAF finds, "there is no indication that Congress codified any of the numerous offenses contained in the United States Code with the concepts of service discrediting conduct or good order in the military in mind."¹⁰⁵ These two arguments, taken with *Medina*'s textual analysis, allow the *Medina* court ultimately to hold that clauses 1 and 2 are not necessarily lesser-included offenses of clause 3.¹⁰⁶

Through this holding, *Medina* accomplishes two important bits of house-cleaning within the military justice system. The CAAF, for the first time in over a decade, constrains the role of Article 134 in the military justice system. For the first time since Article 134's transition from commander's tool to safety net, the CAAF considers the very real ramifications for fair notice in the field of Article 134 jurisprudence, as the doctrine of lesser-included offenses dictates.¹⁰⁷ The *Medina* court casts its opinion not as one dealing with the factual sufficiency of Medina's plea, but as one considering the knowing and voluntary nature of the plea.¹⁰⁸ As such, the *Medina* court expresses concern about whether Medina understood that he did not have to admit service discrediting as an element of the clause 3 offense of which the court-martial convicted him.¹⁰⁹

⁹⁷ See *United States v. Medina*, No. 20040327 (Army Ct. Crim. App. Aug. 31, 2006).

⁹⁸ See *Medina*, 66 M.J. at 22.

⁹⁹ See *id.* at 24–25.

¹⁰⁰ See *id.* at 25.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 26.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 27.

¹⁰⁹ See *id.*

Likewise, the record did not demonstrate that the accused understood the implications of pleading the additional element on appeal¹¹⁰—namely, that he, himself, was securing the clause 2 safety net underneath the government’s clause 3 case.

The other direct consequence of *Medina* pertains to the offense-relation doctrines. By discontinuing the strained analysis in cases like *Foster* and *Sapp* that allowed Article 134 to become the lesser-included offense of last resort, the CAAF restores some clarity to offense-relations doctrines. The *Medina* opinion suggests that CAAF determined, as a threshold matter, that the same concerns about fair notice that informed the Supreme Court’s decision in *Parker v. Levy* would feature predominately in *Medina*. As a result, the *Medina* court was free to apply a true elements test and signal to the field that it would no longer “conflate” the doctrine of lesser-included offenses with other offense-relation doctrines like the closely-related offenses doctrine.¹¹¹

Finally, while *Medina* expressly upholds the *Sapp* line of cases,¹¹² the CAAF intimates that, in the future, it will only recognize clauses 1 and 2 as lesser-included offenses of clause 3 if the government puts the clause 1 or 2 language in the pleadings.¹¹³ Of course, adding the clause 1 and 2 language to a clause 3 specification arguably converts the specification into a clause 1 or 2 offense and moots the whole lesser-included offense question. Regardless, where trial counsel fear a failure of proof on a clause 3 offense, the *Medina* opinion offers a “best practice” to remove a given specification from litigation over lesser-included offenses.¹¹⁴

Part V: Implications of *United States v. Medina* for Military Justice Practice

Medina is more than a “put it in the pleadings” case. The analysis and holding, taken together, raise an interesting question for defense counsel and military judges as well. If the government fails to allege clause 1 or 2 language in a clause 3 specification, it seems that *Medina* militates against permitting a military judge to “gratuitously” add the clause 1 or 2 language during a providence inquiry. If clauses 1 or 2 are “not inherently a lesser-included offense,” as *Medina* holds, then seemingly a defense counsel would properly object to the military judge adding the clause 1 or 2 language to a providence inquiry. Strategically, this approach raises other concerns—such as the government simply withdrawing and re-preferring the questionable specification—but *Medina* seems to support the defense counsel’s objection. Likewise, evidence or argument at a contested court-martial that goes to the elements of prejudice to good order and discipline or the service-discrediting nature of misconduct should receive objections if the government fails to plead clause 1 or 2 language.

The *Medina* opinion expressly limits itself to the relationship between clauses 1 and 2 to clause 3, entirely internal to Article 134.¹¹⁵ The holding and analysis clearly has implications both for the relationship between Article 134, clauses 1 and 2, and the enumerated offenses and for other offense-relation doctrines. First, consider what the *Medina* opinion forecasts for the future viability of *Foster* and its holding that Articles 80 through 132 are per se prejudicial to good order and discipline or service-discrediting. If the CAAF grants review on a case similar to *Foster* and applies the same, rigorous analysis of *Medina*, one might predict that the court will walk away from *Foster* just as it walked away from *Sapp* in *Medina*. Specifically, when the CAAF conducts its textual analysis of Articles 80 through 132, it will obviously conclude that

¹¹⁰ *See id.*

¹¹¹ *See id.* at 26.

¹¹² *See id.* at 27.

¹¹³ *See id.* at 26. The CAAF explains, “[W]e conclude that clauses 1 and 2 are not necessarily lesser included offenses of offenses alleged under clause 3, although they may be, depending on the drafting of the specification.” *Id.* (emphasis added). The CAAF, in three decisions without published opinions, has set aside three convictions based on its rationale in *Medina* and the absence of clause 1 or 2 language in the pleadings. *See United States v. Donnelly*, No. 07-0148/AR, 2008 CAAF LEXIS 460 (Apr. 16, 2008); *United States v. Frank*, No. 07-0363/NA, 2008 CAAF LEXIS 475 (Apr. 16, 2008); *United States v. Bolsins*, No. 07-0553/NA, 2008 CAAF LEXIS 476 (Apr. 16, 2008). In a fourth case, the CAAF analyzed an Article 134 clause 1 and 2 specification as a lesser-included offense to an Article 134 clause 3 offense because, in part, the specification had been pled by incorporating the clause 1 and 2 language. *See United States v. Navrestad*, 66 M.J. 262 (2008).

¹¹⁴ Counsel should note that MCM states, “A specification alleging a violation of Article 134 need not expressly allege that the conduct was a ‘disorder or neglect,’ [or] that it was ‘of a nature to bring discredit upon the armed forces’” *See MCM, supra* note 17, Pt. IV, ¶ 60c(6)(a). Given that the clause 1 or 2 language establishes the criminality of the conduct in a clause 1 or 2 offense, however, the *Medina* best practice of alleging the clause 1 or 2 element should be followed. *See generally United States v. Sell*, 11 C.M.R. 202 (C.M.A. 1953) (holding that a legally sufficient specification must: (1) allege all elements of the offense, (2) provide notice, and (3) give sufficient facts to prevent re-prosecution).

¹¹⁵ *See Medina*, 66 M.J. at 25.

prejudice to good order and discipline and service-discrediting are not textually included in the enumerated offenses.¹¹⁶ Continuing, *Medina* considered whether or not the clause 1 and 2 elements were implicitly included in clause 3. The *Foster* court essentially held that Article 134 clauses 1 and 2 were implicit in Articles 80 through 132, but on this point, *Medina* again signals a shift.

Recall in the discussion above that the preemption doctrine prohibits the use of Article 134 to prosecute offenses already made criminal by Articles 80 through 132. It is difficult to reconcile the preemption doctrine with the holding in *Foster* that Article 134 is a lesser-included offense to all Article 80 through 132 misconduct. The *Medina* court's willingness to cast doubt on the rationale of *Sapp* and its conflation of the doctrine of lesser-included offenses and the closely related offenses doctrine signals a potential shift in the context of *Foster* as well. Specifically, post-*Medina*, one might anticipate a CAAF court more receptive to an argument that the *Norris* court's holding—and not the *Foster* holding—should govern any future cases on point. In other words, the CAAF should not grant the government authority to eliminate elements from Article 80 through 132 offenses and try the remaining elements as an Article 134 offense.

In the end, *Medina* represents precisely the type of stewardship the CAAF can and should provide in the field of Article 134 jurisprudence. Allowing Article 134 to previously devolve into the ultimate safety net for the government—to the point where military judges explain to the accused that the only reason they include a clause 1 or 2 element is to gird the accused's conviction from a successful appeal—gives life to the accusation that Article 134 is “the Devil's Article.”¹¹⁷ The good news from *Medina* is that military justice practitioners may look forward to much cleaner practice both in the realm of article 134 and the breadth of offense-relation doctrines.

¹¹⁶ Indeed, the *Foster* court conceded this point. See *Foster II*, 40 M.J. 140, 143 (C.M.A. 1994).

¹¹⁷ Major General Kenneth J. Hodson, *The Manual for Courts-Martial*, 57 MIL. L. REV. 1, 12 (1972).

More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges

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Introduction

The 2007 term for the United States Court of Appeals for the Armed Forces (CAAF) and the service courts of criminal appeals yielded a bumper crop of cases in the area of pretrial procedures. As has been a recent trend, the courts continued to handle a steady volume of cases addressing all aspects of the guilty plea.¹ The CAAF decided two very significant cases this term involving guilty plea procedure—*United States v. Tippit*² and *United States v. Tate*.³ In *Tippit*, the CAAF held that an Article 10, Uniform Code of Military Justice (UCMJ),⁴ violation not litigated at the trial level is waived for appellate review, answering a question left open since the 2005 *Mizgala* case.⁵ In *Tate*, the CAAF held that the accused may not waive consideration for clemency or parole as a pretrial agreement term.⁶ Additionally, in *United States v. Shaw*, the CAAF clarified the quantum of evidence required for the accused to raise a lack of mental responsibility defense in the context of a guilty plea.⁷ Aside from guilty pleas, the courts also reviewed a significant number of cases addressing the impartiality of the military judge.⁸

While these cases have continued to develop the law of military pretrial procedure, the focus of this article is on three areas of the pretrial procedure where the military courts offered specific and instructive guidance for military judges and trial practitioners during this term. First, the CAAF and the Army Court of Criminal Appeals (ACCA) each published an opinion addressing the improper use of the guilty plea inquiry during the contested portion of a mixed plea case.⁹ The first section of this article discusses these two cases and the lessons these opinions offer for trial practitioners. Next, the CAAF provided critical guidance regarding procedural errors in Article 32 hearings.¹⁰ The second section of this article discusses *United States v. Davis*, which clarifies, to some extent, the law involving the resolution of procedural errors in the Article 32 investigation at the trial level, and how appellate courts will review such issues.¹¹ Finally, using the implied bias theory, the CAAF overturned three cases for error in denying challenges for cause.¹² The third section of this article briefs the facts of those cases, describes CAAF's decision based on the facts, and outlines the lessons that these three cases offer to trial practitioners.

¹ See, e.g., *United States v. Carr*, 65 M.J. 39 (2007) (holding that the accused provided sufficient factual basis to affirm his guilty pleas); *United States v. Pena*, 64 M.J. 259 (2007) (holding that a plea is knowing and voluntary even if the military judge does not discuss terms of "mandatory supervised release" during the guilty plea inquiry); *United States v. Caudill*, 65 M.J. 756 (N-M. Ct. Crim. App. 2007) (addressing a situation where the military judge failed to advise the accused of the elements and definitions of the offenses in a guilty plea).

² 65 M.J. 69 (2007).

³ 64 M.J. 269 (2007).

⁴ UCMJ art. 10 (2008).

⁵ *Tippit*, 65 M.J. at 69; see also *United States v. Mizgala*, 61 M.J. 122, 127 (2005) (holding that a litigated Article 10 motion is not waived by an unconditional guilty plea, but leaving open the issue of whether an Article 10 motion that is not raised at the trial level is waived). In the interim, the Navy-Marine Corps Court of Criminal Appeals answered the question in a manner consonant with *Tippit*. See *United States v. Dubouchet*, 63 M.J. 586 (N-M. Ct. Crim. App. 2006).

⁶ *Tate*, 64 M.J. at 269 (holding that a term prohibiting the accused from requesting clemency or parole for a period of twenty years violated R.C.M. 705(c)); see also *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c)* (2008) [hereinafter MCM].

⁷ See *United States v. Shaw*, 64 M.J. 460 (2007) (holding that, on the facts of the case, the accused's reference to his head injury and bi-polar disorder "at most raised only the mere possibility of a conflict with the plea.").

⁸ See *United States v. Foster*, 64 M.J. 331 (2007); *United States v. Green*, 64 M.J. 289 (2007). There were also numerous unpublished cases this term on this issue. See *CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, 31ST CRIMINAL LAW NEW DEVELOPMENTS COURSE DESKBOOK H-32-34* (5-8 Nov. 2007).

⁹ See *United States v. Resch*, 65 M.J. 233 (2007); *United States v. Davis*, 65 M.J. 766 (Army Ct. Crim. App. 2007).

¹⁰ UCMJ art. 32 (2008).

¹¹ See *Davis II*, 64 M.J. 445 (2007).

¹² See *United States v. Clay*, 64 M.J. 274 (2007); *United States v. Briggs*, 64 M.J. 285 (2007); *United States v. Terry*, 64 M.J. 295 (2007).

The 2007 term of court addressed a number of issues in the area of pretrial procedures. However, in the three areas that this article covers, the courts identified significant problems in the resolution of certain issues at the trial level. As such, the courts seemed to make a deliberate effort to outline the correct methodology for handling the use of the providence inquiry during the contested portion of the trial, the motion alleging error in the Article 32 procedure, and the challenge for cause.

Using the Providence Inquiry During Trial

If an accused elects to plead guilty to any offense, the military judge will conduct an inquiry to ensure that the accused has entered his plea providently.¹³ The accused is placed under oath and must recite sufficient facts to convince the military judge that he is indeed guilty of the offense to which he has pled guilty.¹⁴ Prior to conducting the inquiry, the military judge must advise the accused that he gives up certain rights by pleading guilty.¹⁵ One of the rights that the accused sacrifices is the right against self-incrimination, but only with respect to the offense to which he has pled guilty.¹⁶

In cases where the accused has entered into a pretrial agreement with the Convening Authority, there is usually a stipulation of fact that is admitted as a prosecution exhibit during the providence inquiry.¹⁷ The stipulation of fact, at a minimum, should outline the factual circumstances of the offense in sufficient detail to demonstrate that there is a factual basis for the plea. The extent to which a stipulation of fact may be used during the guilty plea inquiry, the contested portion of the trial, and the sentencing proceeding is subject to negotiation between the accused and the convening authority.¹⁸ The actual use of the stipulation of fact may vary from jurisdiction to jurisdiction, and even from case to case.

Generally, admissions the accused makes during the guilty plea inquiry and as a part of the stipulation of fact are used in two ways. First, the military judge uses the admissions to ensure that there is a factual basis for the plea.¹⁹ Second, these admissions are admissible during the sentencing portion of the case.²⁰ In addition to these two uses, the military judge also instructs the accused that if he says anything that is untrue during the inquiry, those statements may be used against him for charges of perjury or making false statements.²¹

In some circumstances, the accused's guilty pleas may be used during the contested portion of the trial.²² If the accused pleads guilty to a lesser included offense, and the government elects to try to prove the greater offense, the elements of the greater offense that are common to the lesser-included offense are established by the guilty plea to the lesser included offense.²³ In this situation, the common elements are established by the guilty pleas, but the accused's admissions during the providence inquiry are not admissible to establish the contested elements of the greater offense.²⁴ To the extent that there was any question regarding the proper use of pleas, the stipulation of fact, or the guilty plea inquiry to establish contested elements during the merits portion of the trial, the CAAF answered them in *United States v. Resch*.²⁵

¹³ UCMJ art. 45; MCM, *supra* note 6; *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

¹⁴ MCM, *supra* note 6, R.C.M. 910(e); *Care*, 40 C.M.R. at 253; U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-1 (1 July 2003) [hereinafter BENCHBOOK].

¹⁵ MCM, *supra* note 6, R.C.M. 910(c); *Care*, 40 C.M.R. at 253.

¹⁶ MCM, *supra* note 6, R.C.M. 910(c); BENCHBOOK, *supra* note 14, para. 2-2-1.

¹⁷ MCM, *supra* note 6, R.C.M. 705(c)(2)(A); BENCHBOOK, *supra* note 14, para. 2-2-2.

¹⁸ See MCM, *supra* note 6, R.C.M. 705(c)(2)(A) & R.C.M. 811; see, e.g., *United States v. Ramelb*, 44 M.J. 625, 626 & n.6 (Army Ct. Crim. App. 1996).

¹⁹ MCM, *supra* note 6, R.C.M. 910(e); BENCHBOOK, *supra* note 14, para. 2-2-1; *Care*, 40 C.M.R. at 253.

²⁰ *United States v. Irwin*, 42 M.J. 479, 481-82 (1995); *United States v. Holt*, 27 M.J. 57, 59 (1988); BENCHBOOK, *supra* note 14, para. 2-2-1.

²¹ MCM, *supra* note 6, R.C.M. 910(c)(5); BENCHBOOK, *supra* note 14, para. 2-2-1.

²² This would occur in a so-called "mixed plea" case where the accused has pled guilty to some offenses and not guilty, guilty by exceptions, guilty by exceptions and substitutions, or guilty of a lesser included offense to other offenses, requiring a contested portion of the trial.

²³ See MCM, *supra* note 6, R.C.M. 913(a) discussion, 920(e)(1); BENCHBOOK, *supra* note 14, para. 2-2-1.

²⁴ *United States v. Grijalva*, 55 M.J. 223, 228 (2001); *United States v. Caszatt*, 29 C.M.R. 521, 523 (C.M.A. 1960); *United States v. Ramelb*, 44, M.J. 625, 629 (Army Ct. Crim. App. 1996).

²⁵ 65 M.J. 233 (2007).

Using the Providence Inquiry to Establish or Refute Contested Elements

United States v. Resch

In order to understand the court's resolution of *United States v. Resch*,²⁶ a rendition of the facts is essential. The accused in this case was an Army private, who was charged with, *inter alia*, desertion in violation of Article 85, UCMJ,²⁷ beginning in April 2002 and ending in March 2003.²⁸ He pled guilty to the lesser included offense of unauthorized absence in violation of Article 86, UCMJ,²⁹ for a shorter period of time—April 2002 until January 2003.³⁰

As a part of his offer to plead guilty, the accused entered into a stipulation of fact that had two apparently conflicting paragraphs. The first paragraph of the stipulation stated that the facts in the stipulation “may be considered by the Military Judge in determining the providence of the accused's plea of guilty, and they may be considered by the sentencing authority . . . even if the evidence of such facts is deemed otherwise inadmissible.”³¹ The fourth paragraph, however, contained additional language regarding the use of the stipulation. That paragraph stated, “[T]he following evidence is admissible at trial, may be considered by the military judge in determining the providence of the accused's plea of guilty, and may be considered by the sentencing authority”³² The paragraph then listed several prosecution exhibits, including the stipulation of fact itself.³³ The stipulation of fact was a central piece of evidence in the case because it described the date that the accused returned to his unit, the circumstances of two incidents where the accused had been arrested in Michigan during his absence, and the statements the accused made to a civilian detective, including that “he had fled the Army and that he had been working construction during the time of his absence.”³⁴

During the guilty plea inquiry, the military judge read the accused several instructions. First, as required by Rule for Courts-Martial (RCM) 910(c)(3), the military judge instructed the accused that by pleading guilty, he was giving up the right against self-incrimination, but only for the offense to which he pled guilty.³⁵ The military judge expressly stated that he retained the privilege against self-incrimination for the greater offense of desertion.³⁶ Additionally, in conducting the required inquiry into the stipulation of fact, the military judge apparently gave the accused the instruction contained in Paragraph 2-2-2 of the *Military Judge's Benchbook (Benchbook)*, which basically informed the accused that the stipulation of fact would be used to determine whether he was guilty of the offenses to which he had pled guilty and would be used to determine an appropriate sentence.³⁷ However, in what the court's opinion describes as “possibly . . . an oversight,” the military judge did not explain that the language in the first paragraph differed from that in the fourth paragraph regarding the use of the stipulation of fact and did not resolve the ambiguity on the record.³⁸

During the providence inquiry, the accused provided sufficient facts to sustain his guilty plea to the unauthorized absence from April 2002 until January 2003.³⁹ In doing so, the accused provided several key facts that the trial counsel believed showed an intent to remain away permanently. The accused obtained a civilian job, lived with his girlfriend, and believed that, after his release from civilian confinement for an unrelated offense, “he had no more obligations to the Army.”⁴⁰ After the military judge accepted the accused's plea, the trial counsel indicated that she intended to prove up the desertion offense

²⁶ 65 M.J. at 233.

²⁷ UCMJ art. 85 (2008).

²⁸ *Resch*, 65 M.J. at 235.

²⁹ UCMJ art. 86 (Absence without leave).

³⁰ *Resch*, 65 M.J. at 235.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 235–36.

³⁴ *Id.* at 235.

³⁵ *Id.* at 237; MCM, *supra* note 6, R.C.M. 910(c)(3); BENCHBOOK, *supra* note 14, para. 2-2-1.

³⁶ *Resch*, 65 M.J. at 237; MCM, *supra* note 6, R.C.M. 910(c)(3); BENCHBOOK, *supra* note 14, para. 2-2-1.

³⁷ *Resch*, 65 M.J. at 236; BENCHBOOK, *supra* note 14, para. 2-2-2; *see also* MCM, *supra* note 6, R.C.M. 811.

³⁸ *Resch*, 65 M.J. at 236.

³⁹ *Id.* at 235–36.

⁴⁰ *Id.* at 236.

terminating in March, as the offense was initially charged.⁴¹ In an effort to prove the contested elements (the full time period and that, during his absence, the accused formed the intent to remain away permanently), the trial counsel called only one witness.⁴² The accused's company commander testified that he saw the accused in formation for the first time on 17 March 2003, the alleged termination date of the desertion.⁴³ The defense rested without calling any witnesses or producing any documentary evidence.⁴⁴

Prior to the closing arguments, the trial counsel sought to clarify a point with the military judge. The trial counsel wanted to ensure that nothing that the accused said in the providence inquiry could be considered by the military judge on the merits as a defense to the desertion offense.⁴⁵ In response, the defense counsel stated that his understanding was that the accused's statements in the providence inquiry *could* be used to prove the elements of the greater offense and therefore, the defense could argue anything exculpatory that was contained in the providence inquiry.⁴⁶ The military judge then ruled that he could consider the stipulation of fact as well as "everything [he had] heard up to now in determining the guilt or innocence of [the accused] on the greater offense."⁴⁷ Based on the military judge's ruling, both counsel argued facts contained in the stipulation of fact and the guilty plea inquiry during their closing arguments on the desertion offense.⁴⁸ After the arguments, the military judge convicted the accused of desertion terminating on 17 March 2003, and later sentenced him to confinement for 150 days and a bad-conduct discharge.⁴⁹ The ACCA affirmed.⁵⁰

On appeal, the CAAF held that the military judge improperly considered the providence inquiry and the stipulation of fact for the guilty plea to the lesser unauthorized absence offense terminating in January 2003 in deciding guilt of the desertion offense terminating in March 2003.⁵¹ In reaching this conclusion, the CAAF focused on the instructions that the military judge gave the accused. Under Article 45, UCMJ, and *Care*, in a guilty plea, the military judge must "address the accused personally and explain the rights he is giving up, and . . . obtain the accused's express waiver of these rights."⁵² In describing the accused's rights, in accordance with RCM 910(c), the military judge explained to the accused that "his guilty plea waived his right against self-incrimination . . . [But only] as to the offenses [he] pled guilty to."⁵³ The military judge's conclusion that he could use the accused's statements during the guilty plea inquiry in deciding the contested offense was in error because it was inconsistent with the advice he gave the accused and as a result, this use was beyond the accused's express waiver of his privilege against self-incrimination.⁵⁴

Similarly, the military judge's advice to the accused regarding the stipulation of fact was that the stipulation would be "used for the limited purposes of determining the providence of [the accused's] guilty pleas and for determining the sentence."⁵⁵ The fourth paragraph of the stipulation, however, suggested that the stipulation and certain other prosecution exhibits could also be used on the merits of the contested case⁵⁶ This language was inconsistent with the advice that the military judge gave the accused, as well as the first paragraph of the stipulation.⁵⁷ Based on the military judge's failure to

⁴¹ *Id.* Although the opinion refers to the trial counsel as "he," it is the understanding of the author that the trial counsel at this court-martial was female. Interview with Major Scott Dunn, Student, 56th Judge Advocate Officer Graduate Course, in Charlottesville, Va. (Nov. 28, 2007).

⁴² *Resch*, 65 M.J. at 236; see also MCM, *supra* note 6, pt. IV, ¶ 9b(1)(c) ("That the accused, at the time the absence began or at some point during the absence, intended to remain away from his or her unit, organization, or place of duty, permanently . . .").

⁴³ *Resch*, 65 M.J. at 236.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 234.

⁵¹ *Id.* at 237.

⁵² *Id.*; see also UCMJ art. 45 (2008); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

⁵³ *Resch*, 65 M.J. at 237; see also UCMJ art. 45; *Care*, 40 C.M.R. at 253 (C.M.A. 1969); MCM, *supra* note 6, R.C.M. 910(c).

⁵⁴ *Resch*, 65 M.J. at 237.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

“clarify the apparent inconsistency” between the first and fourth paragraphs, and his failure to advise the accused that the stipulation could be used on the merits of the desertion offense, the military judge erred in considering the stipulation of fact when deciding the contested offense.⁵⁸

The court then concluded that the military judge’s erroneous use of the providence inquiry and stipulation of fact prejudiced the material rights of the accused.⁵⁹ The government’s sole evidence with respect to the desertion offense was the testimony of the company commander who stated that the first time he saw the accused was in formation on 17 March 2003, implying that this was the first time that the accused returned to military control. The court found that this evidence was insufficient to sustain a finding of guilt on the greater offense of desertion with the later termination date.⁶⁰ The court affirmed only a finding of guilty of unauthorized absence terminating on 22 January 2003 (based on the accused’s provident guilty plea) and affirmed the sentence.⁶¹

Judge Stucky’s opinion, concurring in part and dissenting in part, raises an interesting issue in this case—the doctrine of “invited error.”⁶² In an apparent effort to prevent the accused from raising a defense to the contested charge without being subject to cross-examination, the trial counsel sought to keep the providence inquiry out of the merits portion of the case.⁶³ Had the military judge agreed with the trial counsel, there would not have been any error with respect to the use of the providence inquiry. Instead, the defense counsel insisted that not only could the providence inquiry be used to establish a defense to the desertion charge, but that he intended to use the providence inquiry in this fashion.⁶⁴ In the end, the military judge agreed with the conclusion of the defense counsel, and erred as a result. As Judge Stucky observed, the court has frequently invoked the doctrine of invited error to deny relief in circumstances where the defense has “invited or provoked” error on the part of the trial court.⁶⁵ Judge Baker did not address this doctrine at all in his majority opinion, perhaps leading to the conclusion that the court is loathe to invoke the doctrine in cases like this one where the error is of a constitutional dimension.⁶⁶

In sum, the root of the court’s conclusion with respect to the use of the providence inquiry and the stipulation of fact is the accused’s privilege against self-incrimination. As the court stated, “Military law imposes an independent obligation on the military judge to ensure that the accused understands what he gives up because of his plea and the accused’s consent to do so must be ascertained.”⁶⁷ Here, the military judge advised the accused that the statements he made during the guilty plea inquiry and the stipulation of fact would be only used to determine guilt of the offense he pled to and to determine an appropriate sentence. To use the providence inquiry and stipulation for any purpose outside of this advice without additional advice and the express waiver of the accused was error, even if it was the defense’s idea.

The Use of the Providence Inquiry in Deciding Motions under MRE 104

United States v. Davis

Later in the 2007 term, the ACCA further defined the limits of the use of the accused’s admissions during a guilty plea inquiry. In *United States v. Davis*,⁶⁸ the ACCA explored whether Military Rule of Evidence (MRE) 104 is broad enough to

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 238.

⁶¹ *Id.*

⁶² *Id.* at 239 (Stucky, J., concurring in part, dissenting in part). “Invited error” is a legal doctrine providing that “when the court acquiesces in [a] course of conduct urged by [an accused], [the accused] us estopped on appeal from raising as error that conduct or its result.” BLACK’S LAW DICTIONARY 827 (6th ed. 1990).

⁶³ *Resch*, 65 M.J. at 239 (Stucky, J., concurring in part, dissenting in part).

⁶⁴ *Id.*

⁶⁵ *Id.* at 239–40.

⁶⁶ *See generally id.* at 234–38.

⁶⁷ *Id.* at 237.

⁶⁸ 65 M.J. 766 (Army Ct. Crim. App. 2007).

allow a military judge to consider the guilty plea inquiry in making rulings of admissibility during trial.⁶⁹ Once again, the facts of the case are critical to understanding the court's reasoning in the case.

Staff Sergeant Davis pled guilty to indecent acts with his stepdaughter, M.R., on numerous occasions over a two year period between 1998 and 2000.⁷⁰ At the time of the trial, M.R. was thirteen-years-old, but she was between seven and nine when the incidents occurred.⁷¹ The accused, however, pled not guilty to an indecent acts charge with another stepdaughter, eleven-year-old L.M., in 2004.⁷² During the trial for the charge relating to the acts with L.M., the trial counsel called the other stepdaughter, M.R., to testify to the abuse she suffered at the hands of the accused between 1998 and 2000—the crimes to which the accused had pled guilty.⁷³ Upon defense objection, the trial counsel stated that the testimony was admissible under MRE 414 to show that that accused had a propensity to commit crimes of sexual molestation against children.⁷⁴ In response, the defense counsel objected under MRE 403, arguing that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.⁷⁵ The trial counsel responded that there were numerous similarities between the crimes the accused admitted to committing against M.R. and the crimes the accused was charged with committing against L.M.⁷⁶ These similarities included their age at the time of the abuse, the absence of the mother from the home, the location of the abuse, and the time of day that the incidents occurred.⁷⁷ Considering these similarities, the trial counsel argued that the probative value of M.R.'s testimony outweighed any prejudicial effect.⁷⁸ In ruling on the motion, the military judge expressly relied on the guilty plea inquiry for the offenses regarding M.R., stating:

Well[,] taking into account the evidence the court has previously heard with regard to the charged offense to which Staff Sergeant Davis has previously pled guilty, I do find that there are significant similarities in the charged offense and the offense proffered by the government in this case which they seek to admit under [Mil. R. Evid.] 414⁷⁹

Based on this finding, the military judge admitted M.R.'s testimony.⁸⁰ During the case in chief, the trial counsel called L.M. herself, the victims' mother, and an emergency room physician who found evidence of a "straddle-type" injury on L.M.'s vaginal area.⁸¹ The accused did not testify and the defense did not present any evidence.⁸² The military judge accepted the accused's guilty pleas to the indecent acts with M.R., convicted the accused of the indecent acts with L.M., and sentenced him to be reduced to E-1, to be confined for five years, and to be discharged with a dishonorable discharge.⁸³

On appeal, the ACCA held that it was error of a constitutional dimension to use the guilty plea inquiry to decide the admissibility of evidence under MRE 104.⁸⁴ As in *Resch*, the court looked at the instructions that the military judge gave the accused prior to the inquiry.⁸⁵ Those instructions appeared to be strictly in accordance with RCM 910(c) and Paragraph 2-2-1 of the *Benchbook*.⁸⁶ The military judge did not instruct the accused that the guilty plea, the stipulation of fact, or the

⁶⁹ *Id.* at 767; see MCM, *supra* note 6, MIL. R. EVID. 104.

⁷⁰ *Davis*, 65 M.J. at 767.

⁷¹ *Id.* at 767 n.9.

⁷² *Id.* at 767.

⁷³ *Id.* at 767–69.

⁷⁴ *Id.* at 769; MCM, *supra* note 6, MIL. R. EVID. 414.

⁷⁵ *Davis*, 65 M.J. at 769; MCM, *supra* note 6, MIL. R. EVID. 403.

⁷⁶ *Davis*, 65 M.J. at 770.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (emphasis added by the court). From the ACCA opinion, it appears that the defense counsel did not specifically object to this use of the accused's statements during the providence inquiry. See *id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 768–69.

⁸² *Id.* at 768.

⁸³ *Id.* at 766–67.

⁸⁴ *Id.* at 770–71; MCM, *supra* note 6, MIL. R. EVID. 104.

⁸⁵ *Davis*, 65 M.J. at 767; see also *United States v. Resch*, 65 M.J. 233 (2007).

⁸⁶ *Davis*, 65 M.J. at 767; see also MCM, *supra* note 6, R.C.M. 910(c); BENCHBOOK, *supra* note 14, para. 2-2-1.

statements he made in support of his guilty plea would be used as they were in this case—that is, to determine the admissibility of other evidence under MREs 403 and 414.⁸⁷

In general, MRE 104 is broad and permissive, providing that the military judge is not bound by the rules of evidence when making rulings on the admissibility of evidence.⁸⁸ However, the ACCA concluded that there are still limits to MRE 104(a). The court began by stating, “The judicial policy limiting the use of judicial admissions made during a guilty plea inquiry is a long-standing tenet of military justice.”⁸⁹ Citing prior cases, the ACCA reiterated that the providence inquiry is a “limited waiver of the right against self-incrimination.”⁹⁰ Any use of the accused’s admissions beyond this limited waiver is error of a constitutional dimension requiring relief unless the error was harmless beyond a reasonable doubt.⁹¹ In this case, the ACCA concluded that the military judge erred in considering facts from the accused’s guilty plea in his ruling on the admissibility of evidence under MREs 403 and 414.⁹² The military judge erred because he did not advise the accused that his admissions would be used in this fashion and the accused did not consent to this use in his limited waiver of his privilege against self-incrimination.⁹³ Additionally, the court specifically held that “absent any affirmative waiver,” MRE 104 does not allow the military judge to consider statements made during the providence inquiry when making evidentiary rulings.⁹⁴

Despite the military judge’s error, the ACCA found sufficient basis in the record to conclude that the evidence of the accused’s crimes against the older stepdaughter was admissible under both MREs 403 and 414.⁹⁵ Next, the court found that the military judge’s error was harmless beyond a reasonable doubt because, whether or not the propensity evidence was admissible, there was “ample additional evidence to convict [the accused] beyond a reasonable doubt of the indecent acts with LM.”⁹⁶ As such, the court affirmed the findings and sentence.

Takeaways for the Practitioner—Use of the Providence Inquiry

To the extent that the law was unclear before both *Resch* and *Davis*, the potential uses of the accused’s admissions during the guilty plea inquiry, including the stipulation of fact, are very narrow. The accused’s waiver of his privilege against self-incrimination for purposes of the providence inquiry is limited. Under current case law and the RCMs, the accused’s guilty plea and the attendant providence inquiry may be used in three ways. First, the accused’s admissions will be used to establish guilt of the offense to which a plea of guilty has been entered.⁹⁷ Second, the admissions may be used in determining an appropriate sentence.⁹⁸ Third, if the accused pleads guilty to a lesser included offense and the government elects to try to prove the greater offense, the accused’s admissions “may be used to establish facts and elements common to both the greater and lesser offense within the same specification.”⁹⁹ Any use of the accused’s admissions beyond these three uses requires a knowing and voluntary waiver of the accused’s privilege against self-incrimination, which generally involves an instruction to the accused on his Fifth Amendment rights, an instruction on the proposed use, and an affirmative waiver of rights from the accused himself.¹⁰⁰

⁸⁷ *Davis*, 65 M.J. at 767–68; MCM, *supra* note 6, MIL. R. EVID. 403, 414.

⁸⁸ *Davis*, 65 M.J. at 770; MCM, *supra* note 6, MIL. R. EVID. 104(a).

⁸⁹ *Davis*, 65 M.J. at 770 (quoting *United States v. Ramelb*, 44, M.J. 625, 628 (Army Ct. Crim. App. 1996)).

⁹⁰ See *Davis*, 65 M.J. at 770–71 (quoting *United States v. Grijalva*, 55 M.J. 223, 227 (2001); see also *United States v. Gilchrist*, 61 M.J. 785, 794–95, 795 n.17 (Army Ct. Crim. App. 2005)).

⁹¹ *Davis*, 65 M.J. at 771.

⁹² *Id.* at 770.

⁹³ *Id.* at 770–71.

⁹⁴ *Id.* at 770.

⁹⁵ *Id.* at 771–72.

⁹⁶ *Id.* at 773.

⁹⁷ MCM, *supra* note 6, R.C.M. 910(e).

⁹⁸ *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988).

⁹⁹ *United States v. Grijalva*, 55 M.J. 223, 227 (2001) (citations and internal quotations omitted); MCM, *supra* note 6, R.C.M. 920(e)(1).

¹⁰⁰ *United States v. Resch*, 65 M.J. 233, 237 (2007); *Davis*, 65 M.J. at 771. Of course, statements made during the course of the guilty plea inquiry may also be used later as a basis for charges of perjury or making false statements. See BENCHMARK, *supra* note 14, para. 2-2-1.

The use of the stipulation of fact, however, is a matter of agreement between the accused and the convening authority, and the parties may expand, or limit, the use of the stipulation of fact as desired for each case.¹⁰¹ The intended uses should be clear from the plain language of the document and the military judge must ensure that any ambiguity in the language of the stipulation is resolved on the record.¹⁰² As the *Resch* case demonstrates, any ambiguity that results in a use of the stipulation that contravenes the instructions provided to the accused will likely result in error.¹⁰³

The *Resch* and *Davis* cases teach that it is critical for counsel to understand the permissible uses of the accused's guilty pleas and admissions made during the military judge's inquiry. Additionally, trial judges must be watchful to ensure that counsel use the providence inquiry within the accused's limited waiver of the privilege against self-incrimination. Should the parties seek to use the guilty plea inquiry beyond the uses contemplated by the instructions, the military judge should instruct the accused on his rights and the proposed use of his admissions, and then secure an affirmative waiver from the accused on the record. Otherwise, the use of the providence inquiry beyond the three permissible uses outlined above is prohibited.

Closure of Article 32 Investigations to the Public

The closure of investigations under Article 32, UCMJ, has been an ongoing issue across the services, and the courts have had several opportunities to define the boundaries of the accused's right to a public Article 32 hearing.¹⁰⁴ *United States v. Davis*, a case decided in early 2008, provided CAAF an opportunity to clarify the rules related to the closure of the proceeding to the public, the standard of review when an Article 32 issue reaches an appellate court, and the proper method for handling Article 32 issues that arise at the trial level.¹⁰⁵

In general, Article 32 affords an accused the right to a "thorough and impartial investigation" into any charges or specifications preferred against him before those charges or specifications can be referred to a general court-martial.¹⁰⁶ During the investigation, the accused is entitled to be advised of the charges against him, to be represented by counsel, to cross-examine witnesses, and to present "anything he may desire in his own behalf, either in defense or mitigation."¹⁰⁷ While the requirements of Article 32 are "binding . . . failure to follow them does not constitute jurisdictional error."¹⁰⁸

Article 32 does not mandate that the proceedings be open.¹⁰⁹ However, RCM 405(h)(3) provides that "[a]ccess by spectators . . . may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer."¹¹⁰ In 1997, in *ABC, Inc. v. Powell*,¹¹¹ the CAAF established the bedrock principles for the current rule regarding the closure of Article 32 investigations to the public. This was a high-profile case involving allegations that then-Sergeant Major of the Army (SMA) Gene McKinney had sexually harassed several subordinates and obstructed justice.¹¹² In directing the Article 32 investigation, the Special Court-Martial Convening Authority ordered that the investigation be closed to the public for three reasons:

- (1) to maintain the integrity of the military justice system and ensure due process to SMA McKinney;
- (2) to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the "potential pool of panel members";
- and (3) to protect the alleged victims who would be testifying as witnesses against SMA

¹⁰¹ See MCM, *supra* note 6, R.C.M. 705.

¹⁰² See *id.* R.C.M. 811(b) discussion.

¹⁰³ *Resch*, 65 M.J. at 237.

¹⁰⁴ UCMJ art. 32 (2008). See *ABC, Inc. v. Powell*, 47 M.J. 363 (1997); *United States v. Davis (Davis I)*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006); *Denver Post Corp. v. United States*, No. 20041215 (Army Ct. Crim. App. Feb. 23, 2005).

¹⁰⁵ *Davis II*, 64 M.J. 445 (2007).

¹⁰⁶ UCMJ art. 32.

¹⁰⁷ See *id.* art. 32(b).

¹⁰⁸ *Id.* art. 32(e).

¹⁰⁹ See generally *id.*

¹¹⁰ MCM, *supra* note 6, R.C.M. 405(h)(3).

¹¹¹ 47 M.J. 363 (1997).

¹¹² *Id.* at 364.

McKinney, specifically to shield the alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history.¹¹³

As a result of the closure, SMA McKinney and several news agencies filed a petition for extraordinary relief with the CAAF seeking a writ of mandamus ordering that the Article 32 proceedings be opened to the press and the public.¹¹⁴ In granting the writ, the CAAF articulated several fundamental principles regarding the closure of Article 32 investigations. First, "absent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing."¹¹⁵ Second, should an Article 32 investigation be closed, the closure "determination must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis."¹¹⁶ Finally, "the scope of closure must be tailored to achieve the stated purpose and should also be 'reasoned' and not 'reflexive.'"¹¹⁷

In *United States v. Davis*,¹¹⁸ the CAAF reviewed the rules regarding procedural errors in the Article 32 investigation. In this case, Airman First Class Davis was facing charges of rape, indecent assault, and assault consummated by battery for his conduct toward three separate women.¹¹⁹ The Article 32 investigating officer in the case made the decision to close the hearings during the testimony of two of the three alleged victims.¹²⁰ He made the decision, apparently on his own motion, "due to the sensitive and embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses."¹²¹ The investigating officer closed the proceedings so that that the "convening authority [would have] all the facts necessary to make a proper decision."¹²² In his report, the investigating officer outlined in detail his reasons for the closure of the proceedings during the testimony of these two witnesses and his balancing of the "interests of justice" versus the "public's interest in access."¹²³

Upon hearing that the proceedings would be closed, the defense counsel objected.¹²⁴ There was no evidence that the witnesses would not appear voluntarily or would not testify.¹²⁵ In fact, the investigating officer had not spoken with either witness prior to making his decision to close the proceeding during their testimony.¹²⁶ The investigating officer refused to open the hearings and, when the defense counsel objected to the Article 32 investigation at its conclusion, the investigating officer again refused to re-open the hearings so that the witnesses could testify in an open proceeding.¹²⁷

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 365 (quoting *Press Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 509 (1984)). The court also stated that if the accused's right to an public Article 32 investigation is denied, the press has standing to complain of the denial. *See id.*

¹¹⁶ *Id.* (internal quotations and citations omitted).

¹¹⁷ *Id.*

¹¹⁸ *Davis II*, 64 M.J. 445 (2007).

¹¹⁹ *Davis I*, 62 M.J. 645, 646 (A.F. Ct. Crim. App. 2006).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* The investigating officer's report stated:

Ordinarily, Article 32 proceedings are open to spectators. However, due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses, two limited portions of the hearing were closed. RCM 405(h)(3) and [Air Force Instruction] 51-201, paragraph 4.1.2, permits the investigating officer to restrict access by spectators to all or part of the proceeding when the interests of justice outweigh the public's interest in access. I believed that it was in the best interest of justice, and particularly in the best interest of [the appellant], that the convening authority had all the facts necessary to make a proper decision. I made every effort to close only those limited portions of the investigation necessary to encourage testimony by timid or embarrassed witnesses.

Id.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 647.

At trial, the defense moved for a new Article 32 investigation.¹²⁸ The trial judge found that there was no evidence to support the closure of the proceedings for these two witnesses, but did not grant relief.¹²⁹ The trial judge found that, although it was error to close the proceedings, there was no “articulable harm” in the case.¹³⁰ The accused was ultimately convicted of three specifications of assault consummated by battery, but was acquitted of two specifications of rape and one specification of indecent assault.¹³¹

On appeal to the Air Force Court of Criminal Appeals (AFCCA), the court held that the military judge erred in testing for prejudice at the trial level.¹³² Citing a 1958 Court of Military Appeals (COMA) case where the accused’s right to counsel was denied at an Article 32 hearing, the court stated that “[i]f an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial.”¹³³ Next, the court held that “[a]n accused’s right to a public Article 32 investigative hearing is a ‘substantial pretrial right’ protected by the Sixth Amendment to the Constitution.”¹³⁴ After the military judge found that the accused’s substantial pretrial right was violated, he should have enforced the accused right to an open hearing “without a showing of prejudice or articulable harm.”¹³⁵ The AFCCA held that the military judge abused his discretion by failing to dismiss the charges to allow for a new investigation under Article 32.¹³⁶

Despite this error, the AFCCA affirmed the case. Even though the accused has a right to have a substantial pretrial right enforced at the trial level without a showing for prejudice, the rules differ at the appellate level. Under *United States v. Mickel*:

Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings *or no indication that these proceedings adversely affected the accused’s rights at the trial*, there is no good reason in law or logic to set aside the conviction.¹³⁷

The court then found that the error was constitutional in nature and tested for “material prejudice using the harmless beyond a reasonable doubt standard.”¹³⁸ The court observed that the witness accounts remained consistent, the defense counsel conducted an effective cross-examination of both witnesses at trial, the accused was acquitted of the most serious charges, and there was no reason to believe that the witness testimony would have been different had the proceedings been open.¹³⁹ As such, the court concluded that this error was indeed harmless beyond a reasonable doubt.¹⁴⁰

On appeal, the CAAF also affirmed, but took the opportunity to clarify the rules governing the review of Article 32 issues.¹⁴¹ First, the court noted that the AFCCA correctly held that the trial judge erred by requiring a showing of prejudice before providing a remedy for the violation of the appellant’s right to an open Article 32 investigation.¹⁴² The court went on to state that the “UCMJ and the *Manual for Courts-Martial* provide an accused with a substantial set of rights at an Article 32

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* In ruling on the motion, the military judge stated, “Had there been any articulable harm, I would have sent these charges back and reopened the [Article] 32 again.” *Id.* (alteration in original).

¹³¹ *Id.* at 646.

¹³² *Id.* at 648.

¹³³ *Id.* (citing *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958)).

¹³⁴ *Id.* (quoting *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (1997); *United States v. Chuculate*, 5 M.J. 143, 144–45 (C.M.A. 1978)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting *Mickel*, 26 C.M.R. at 107).

¹³⁸ *Id.* (citing *United States v. Kreutzer*, 61 M.J. 293, 298 (2005)).

¹³⁹ *Id.* at 648–49.

¹⁴⁰ *Id.*

¹⁴¹ *Davis II*, 64 M.J. 445 (2007).

¹⁴² *Id.* at 448.

proceeding.”¹⁴³ Should any of these rights be denied, the “accused is required to identify and object to any errors in the Article 32 proceeding at the outset of the court-martial.”¹⁴⁴ While the “impact” of an Article 32 error “is likely to be speculative at best The time for correction of such an error is when the military judge can fashion an appropriate remedy under R.C.M. 906(b)(3) before it infects the trial.”¹⁴⁵ Additionally, the court confirmed that, should an accused disagree “with the military judge’s ruling, the accused may file a petition for extraordinary relief to address immediately the Article 32 error.”¹⁴⁶

Next, the court recognized that the case law has not been consistent regarding the appellate approach to Article 32 issues.¹⁴⁷ In an effort to resolve the inconsistency, the CAAF held that Article 59(a), UCMJ,¹⁴⁸ is the appellate standard of review for all Article 32 errors.¹⁴⁹ However, as the AFFCCA conducted a detailed analysis and held that the error was harmless beyond a reasonable doubt, the court declined the opportunity to definitively categorize errors involving the closure of Article 32 investigations as errors of constitutional dimension requiring the Government to prove that the error is harmless beyond a reasonable doubt.¹⁵⁰

For practitioners, several key points emerge from this case. First, *Davis* confirmed once again that Article 32 investigations are closed at some peril.¹⁵¹ If there is not “cause that outweighs the value of openness,” the proceedings should remain open to the public.¹⁵² If there is such cause justifying closure, the closure should be only for the particular portion of the witness testimony that justifies such closure.¹⁵³ In addition, the Article 32 IO should place the reasons for closure on the record to ensure that the reviewing courts have the facts necessary to determine whether the IO appropriately balanced the value of openness against the need for closure. Upon a finding that the closure was improper, the military judge should order that the Article 32 investigation be re-opened to accommodate the accused’s and the public’s right to an open Article 32 investigation.¹⁵⁴ A ruling adverse to the accused is grounds for an extraordinary writ and a reviewing court may order that the proceedings be opened to the public.¹⁵⁵ If, however, the case reaches the appellate courts for post-trial review, the error is reviewed under Article 59(a) and the courts will test for prejudice.¹⁵⁶ This could be difficult for the accused to demonstrate on appeal, and as such, the CAAF observed that Article 32 errors are best resolved at the trial level.¹⁵⁷

But *Davis* did not answer all of the questions pertaining to Article 32s. One remains particularly pressing. The court specifically declined to clarify whether denial of the right to a public Article 32 investigation is error of a constitutional dimension requiring that the government show that the error was harmless beyond a reasonable doubt.¹⁵⁸ Although the AFCCA held that the Article 32 closure was indeed error of constitutional dimension, the fact that the CAAF specifically declined to address this issue shows that there may be room to argue that improper closure is not error of a constitutional dimension. This would be a lower standard, requiring the Government to show that the error was harmless, rather than harmless beyond a reasonable doubt.¹⁵⁹ In her concurring opinion, Judge Ryan adds fuel to the fire by questioning whether it

¹⁴³ *Id.* at 449.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* For examples of cases where a party filed an extraordinary writ, see *ABC, Inc. v. Powell*, 47 M.J. 363 (1997) (petition for extraordinary relief in the form of a writ of mandamus) and *Denver Post Corp. v. United States*, No. 20041215 (Army Ct. Crim. App. Feb. 23, 2005) (petition for extraordinary relief to the ACCA in the form of a writ of mandamus and a writ of prohibition).

¹⁴⁷ *Id.*

¹⁴⁸ UCMJ art. 59(a) (2008).

¹⁴⁹ *Davis II*, 64 M.J. at 449.

¹⁵⁰ *Id.*

¹⁵¹ *Accord ABC, Inc.*, 47 M.J. 363; *Denver Post Corp.*, No. 20041215.

¹⁵² *See ABC, Inc.*, 47 M.J. at 365 (quoting *Press Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 509 (1984)).

¹⁵³ *See id.*; *Denver Post Corp.*, No. 20041215.

¹⁵⁴ *See Davis II*, 64 M.J. at 449.

¹⁵⁵ *Id.*; *see also ABC, Inc.*, 47 M.J. at 366; *Denver Post Corp.*, No. 20041215.

¹⁵⁶ *See Davis II*, 64 M.J. at 449.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

is actually the Sixth Amendment that confers the right to a public Article 32 hearing.¹⁶⁰ As she indicates, this issue may be ripe for future appellate litigation.

Finally, practitioners should note that the discussion to RCM 405(h)(3) was amended in the 2008 edition of the *Manual for Courts-Martial (MCM)*, reflecting the recent appellate court holdings regarding closure of Article 32 hearings.¹⁶¹ The discussion to RCM 405(h)(3) in previous versions of the *MCM* was somewhat short, suggesting only that “[c]losure may encourage complete testimony by an embarrassed or timid witness” and stating that “[o]rdinarily [Article 32s] . . . should be open to spectators.”¹⁶² The discussion to RCM 405(h)(3) had not been changed since the since the 1984 edition.¹⁶³

The discussion to RCM 405(h)(3) now provides significant guidance to commanders, investigating officers, and Judge Advocates. First, the discussion articulates the policy that “Article 32 investigations are public hearings and should remain open to the public whenever possible.”¹⁶⁴ Next, the discussion reiterates the current standard for the closure of Article 32 investigations from *ABC, Inc v. Powell*.¹⁶⁵ After stating the current standard for closure, the discussion then mandates that an Article 32 officer closing an investigation “make specific findings of fact in writing that support the closure” and include those findings in the investigating officer’s report to the appointing authority.¹⁶⁶ The discussion concludes with several examples of cases where closure might be warranted.¹⁶⁷ This important change incorporates the holdings from recent cases governing closure of Article 32 investigations and provides a very useful tool for investigating officers and practitioners when faced with the decision whether to close an Article 32 hearing.

In sum, while *Davis* did not answer all of the questions related to the closure of Article 32 hearings, *Davis* and the updated discussion to RCM 405(h)(3) provide key guidance to practitioners. As *Davis* has confirmed, the accused’s right to a public Article 32 is an enforceable right, but a right best enforced at the trial level. Similarly, during the 2007 term, the courts identified another issue best resolved at the trial level: challenges for cause.

Voir Dire and Challenges

Over a period of four days in late January 2007, the CAAF published three opinions that set aside the findings and sentences based on erroneous denials of defense challenges for cause—*United States v. Clay*,¹⁶⁸ *United States v. Briggs*¹⁶⁹ and *United States v. Terry*.¹⁷⁰ All three opinions were unanimous, all three opinions were written by Judge Baker, and all three opinions were absent any participation from Judges Stucky and Ryan. In these three opinions, the CAAF has sent a strong message to the trial courts regarding challenges for cause.

In order to put *Clay*, *Briggs*, and *Terry* in context, an overview of the law regarding challenges for cause is in order. Under Article 41, UCMJ, and RCM 912(f), trial counsel and defense counsel have an unlimited number of challenges for

¹⁶⁰ *Id.* at 450 (Ryan, J., concurring). Commentators appear to differ on this issue. See Major Gregory B. Coe, “*Something Old, Something New, Something Borrowed, Something Blue*”: *Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44, 49 (“[W]hile not specifically making the Article 32 investigation a trial proceeding under the Sixth Amendment, the CAAF [in *ABC, Inc. v. Powell*] did reason by analogy that an accused has a qualified right to a public Article 32 investigation similar to the right to a public trial.”); cf. Major Mark A. Kulish, *The Public’s Right of Access to Pretrial Proceedings Versus the Accused’s Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1, 11 n.126 (“Although the court did not cite *Waller v. Georgia*, [467 U.S. 39 (1984), in *ABC, Inc.*] it . . . most directly supports the proposition that when a criminal accused opposes closure of a pretrial proceeding, the accused is invoking his Sixth Amendment right to a public trial . . .”).

¹⁶¹ MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

¹⁶² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(h)(3) discussion (2005) [hereinafter 2005 MCM].

¹⁶³ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(h)(3) discussion (1984).

¹⁶⁴ MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

¹⁶⁵ *Id.*; see also *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (1997).

¹⁶⁶ MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

¹⁶⁷ *Id.*

¹⁶⁸ 64 M.J. 274 (2007).

¹⁶⁹ 64 M.J. 285 (2007).

¹⁷⁰ 64 M.J. 295 (2007).

cause.¹⁷¹ There are two broad categories of challenges for cause. Rule for Court-Martial 912(f)(1)(A)–(M) contains thirteen nondiscretionary bases for challenges for cause, mostly covering circumstances where the member is somehow involved in the case.¹⁷² However, RCM 912(f)(1)(N) provides a basis for challenge where the military judge has some discretion.¹⁷³ Under RCM 912(f)(1)(N), challenges for cause should be granted whenever an individual “[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”¹⁷⁴ Challenges for cause under this provision fall into two further categories: (1) challenges involving actual bias, and (2) challenges involving implied bias.¹⁷⁵ Actual bias is bias that will not yield to the evidence presented or the military judge’s instructions.¹⁷⁶ As challenges for cause for actual bias are “based on the military judge’s subjective determination of the member’s credibility,” the appellate courts grant the military judge great deference when deciding whether actual bias exists.¹⁷⁷

Implied bias, however, is more difficult. Military judges should grant challenges for cause under the doctrine of implied bias “when most people in the same position would be prejudiced.”¹⁷⁸ The standard is an objective one, “viewed through the eyes of the public, focusing on the appearance of fairness” of the military justice system.¹⁷⁹ Accordingly, the courts grant military judges less deference when reviewing issues of implied bias. The standard of review is “less deferential than abuse of discretion but more deferential than *de novo*.”¹⁸⁰

The last fundamental concept regarding challenges for cause is the “liberal grant mandate.”¹⁸¹ The courts have directed military judges to liberally grant challenges for cause in order to ensure that “members of the military have their guilt or innocence determined ‘by a jury composed of individuals with a fair and open mind.’”¹⁸² This policy, however, applies only to defense challenges for cause.¹⁸³ As the government has a number of opportunities in the panel selection process to shape the composition of the panel, the government does not need the benefit of the liberal grant mandate.¹⁸⁴ Aside from the limitation of the liberal grant mandate to defense challenges, these fundamental principles are not new. However, in *Clay*, *Briggs*, and *Terry*, the CAAF applied these basic principles with renewed vigor.

Responses from the Senior Panel Member

United States v. Clay

*United States v. Clay*¹⁸⁵ is the first case this term addressing a military judge’s denial of a defense challenge for cause. The accused in this case, Marine Private First Class Clay, was tried by a general court-martial for one specification of rape and two specifications of indecent assault.¹⁸⁶ The president of the panel was a Marine colonel named “Col J.”¹⁸⁷ During voir

¹⁷¹ UCMJ art. 41 (2008); MCM, *supra* note 6, R.C.M. 912(f).

¹⁷² MCM, *supra* note 6, R.C.M. 912(f)(1)(A)–(M).

¹⁷³ *Id.* R.C.M. 912(f)(1)(N).

¹⁷⁴ *Id.*

¹⁷⁵ *United States v. Armstrong*, 54 M.J. 51 (2000); Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 45 [hereinafter Fleming, *Out, Damned Error Out, I Say!*].

¹⁷⁶ *See United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

¹⁷⁷ *See Fleming, Out, Damned Error Out, I Say!*, *supra* note 170, at 52.

¹⁷⁸ *United States v. Daulton*, 45 M.J. 212, 217 (1996) (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)).

¹⁷⁹ *See Fleming, Out, Damned Error Out, I Say!*, *supra* note 175, at 52 (quoting *United States v. Rome*, 47 M.J. 467, 469 (1998)).

¹⁸⁰ *Id.* (quoting *United States v. Downing*, 56 M.J. 419, 422 (2002)).

¹⁸¹ Major Deidra J. Fleming, *Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., Apr. 2006, at 36 [hereinafter Fleming, *Another Broken Record*].

¹⁸² *United States v. James*, 61 M.J. 132, 138 (2005) (quoting *Smart*, 21 M.J. at 18).

¹⁸³ *Id.*

¹⁸⁴ *Id.*; Fleming, *Another Broken Record*, *supra* note 181, at 42.

¹⁸⁵ 64 M.J. 274 (2007).

¹⁸⁶ *Id.* at 275.

¹⁸⁷ *Id.*

dire, in response to a question about whether his ability to judge the case would be influenced by the fact that he had two daughters, Col J stated:

I will objectively view the case; but let me be very candid. I have a 15-year[-]old daughter and a 7-year[-]old daughter who I would protect with my life; and *if I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be merciless within the limit of the law.*¹⁸⁸

In an effort to rehabilitate the member, the trial counsel asked a series of questions in order to get the officer to disclaim any belief that he had prejudged the case or had an inelastic view as to sentence.¹⁸⁹ As the court described it, Col J “returned to his earlier theme” of favoring harsh punishment for those convicted of sexually assaulting young females.¹⁹⁰

The defense counsel challenged Col J for cause and, without making any findings of fact or conclusions of law regarding actual bias, implied bias, or the liberal grant mandate, the military judge denied the challenge.¹⁹¹ Applying the now-superseded “But For Rule,” the defense counsel then exercised his sole peremptory challenge against Col J.¹⁹² Colonel J did not sit on the panel that ultimately convicted Private First Class Clay.¹⁹³ The Navy-Marine Court of Criminal Appeals affirmed the case.¹⁹⁴

In reviewing the military judge’s denial of the challenge for cause against Col J, the CAAF admits that this is a “close case.”¹⁹⁵ However, in making the decision to deny the challenge, the military judge did not address either the implied bias doctrine or the liberal grant mandate on the record.¹⁹⁶ As such, the court relied on the statements of the member in making its own assessment of whether Col J’s responses raised a question of implied bias.¹⁹⁷ In weighing Col J’s responses, the court concluded that “[h]is answers, taken together, create the perception that if Col J, the senior member of the panel, were convinced of Appellant’s guilt he would favor the harshest sentence available.”¹⁹⁸ The court then concluded that the military judge erred in denying the challenge for cause against the member and also in failing to apply the liberal grant mandate.¹⁹⁹ The court set aside the findings of guilt regarding rape and indecent assault, as well as a sentence that included ten years of confinement and a dishonorable discharge.²⁰⁰

There are three important points that emerge from this case and inform Judge Baker’s later opinions in *Briggs* and *Terry*. The first is the court’s interpretation of a principle contained in several cases that provides, “[I]n the absence of actual bias,

¹⁸⁸ *Id.* (emphasis in opinion).

¹⁸⁹ *Id.* at 275–76.

¹⁹⁰ *Id.* at 278.

¹⁹¹ *Id.* at 276.

¹⁹² *Id.* Prior to Executive Order 13,387, dated 13 October 2005, R.C.M. 912(f)(4) required the use of the “but for” rule to preserve a denied challenge for cause for appellate review. 2005 MCM, *supra* note 162, R.C.M. 912(f)(4). If a challenge for cause was denied and the challenging party used their peremptory challenge against the individual, that party must have stated that “but for” the denied challenge for cause, the challenging party would have used their peremptory challenge against another member. *Id.* Executive Order 13,387 changed R.C.M. 912(f)(4) and now, if the challenging party uses their peremptory challenge to remove a member who was challenged for cause, any appellate issue surrounding the denial of the challenge for cause against that member is waived. *See* Exec. Order No. 13, 387, 70 Fed. Reg. 60,697 (Oct. 18, 2005); *see also* Fleming, *Out, Damned Error Out, I Say!*, *supra* note 175, at 45–46.

¹⁹³ *Clay*, 64 M.J. at 275–76.

¹⁹⁴ *Id.* at 275.

¹⁹⁵ *Id.* at 278. “Close case” is a term of art that describes those cases where the facts make it very difficult to decide whether bias should be implied and, perhaps, where reasonable minds may differ as to whether a challenge should be, or should not have been, granted. *See id.* at 277 (“As a result, in close cases military judges are enjoined to liberally grant challenges for cause.”); *United States v. Townsend*, 65 M.J. 460, 467 (2008) (Baker, J., *dubitante*) (“[T]his was a close case as a matter of law (as opposed to practice), and I was not present to evaluate the tone, content, and sincerity of the member’s responses, all of which inform an implied as well as actual bias challenge.”); Colonel Louis J. Puleo, *Implied Bias: A Suggested Disciplined Methodology*, *ARMY LAW.*, Mar. 2008, at 34, 35 (“[W]hat factors are necessary to constitute a close case is a matter of debate.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 275–78.

¹⁹⁸ *Id.* at 278.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

‘implied bias should be invoked rarely.’”²⁰¹ A plain reading of this principle suggests that courts should rarely find implied bias where actual bias is lacking. Judge Baker, however, provides more insight into this principle, explaining that, “[W]here actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established.”²⁰²

Next, Judge Baker offers a key policy explanation for the liberal grant mandate and the importance of resolving actual and implied bias issues at trial through the application of the liberal grant mandate. He observed:

The [liberal grant] mandate recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving potential court members. To start, military judges are in the best position to address issues of actual bias, as well as the appearance of bias of court members. Guided by their knowledge of the law, military judges observe the demeanor of the members and are better situated to make credibility judgments. However, implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation. The prompt resolution of member challenges spares the victim the potential of testifying anew, the government the expense of retrial, as well as society the risk that evidence (in particular witness recollection) may be lost or degraded over time. As a result, in close cases military judges are enjoined to liberally grant challenges for cause. It is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.²⁰³

In short, issues of implied bias are best resolved at the trial level and the liberal grant mandate gives military judges a tool to apply in close cases.

The third important principle is the amount of deference that a trial court receives when it fails to address either implied bias or the liberal grant mandate on the record when denying a challenge for cause. Judge Baker states that “[w]here a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge’s exercise of discretion will be reversed will indeed be rare.”²⁰⁴ This echoes statements made by the Judge Baker in the past. In *United States v. Downing*,²⁰⁵ Judge Baker instructed that, with respect to findings regarding implied bias, “We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law.”²⁰⁶ He stated further, “While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted.”²⁰⁷ In denying challenges for cause, military judges who fail to address implied bias or the liberal grant mandate in denying challenges for cause by the defense risk little, if any, deference from the appellate courts in reviewing their rulings.²⁰⁸ The next case provided another opportunity for Judge Baker to expand upon this principle.

When a Member Is Married to the Accused’s Commander

United States v. Briggs

The next case where the court addressed challenges for cause and implied bias is *United States v. Briggs*.²⁰⁹ In this case, Air Force Technical Sergeant Briggs was convicted of stealing and then re-selling survival vests from the C-5 aircraft he was

²⁰¹ *Id.* at 277 (citing *United States v. Leonard*, 63 M.J. 398, 402 (2006); *United States v. Strand*, 59 M.J. 455, 458 (2004); *United States v. Rome*, 47 M.J. 467, 469 (1998); *United States v. Lavender*, 46 M.J. 485, 488 (1997)).

²⁰² *Id.*

²⁰³ *Id.* at 277.

²⁰⁴ *Id.*

²⁰⁵ *United States v. Downing*, 56 M.J. 419 (2002).

²⁰⁶ *Id.* at 422.

²⁰⁷ *Id.*

²⁰⁸ *See Clay*, 64 M.J. at 277.

²⁰⁹ 64 M.J. 285 (2007).

responsible for maintaining.²¹⁰ One of the members on his officer panel was Captain (Capt) H, the wife of the accused's flight commander.²¹¹ During voir dire, Capt H revealed that she knew about the case because her husband had told her that several "vests went missing and that the person . . . was put on desk duty."²¹² When questioned further during voir dire, she stated that she did not know anything more about the case and also explained that her husband was currently deployed to Kuwait.²¹³ The defense challenged Capt H for cause because "there would be an appearance of unfairness if the wife of [the accused's] commanding officer were allowed to sit on [the] court-martial."²¹⁴ In denying the defense challenge for cause, the military judge made several findings on the record. First, he noted that Capt H did not know exactly what unit the accused was in and, as Capt H's husband was deployed to Kuwait, they would be unable to discuss the case.²¹⁵ The military judge also observed that "Capt H 'appeared to be quite sincere and listened quite attentively as [he] instructed her on what she could consider.'"²¹⁶ Finally, the military judge stated that the evidence at trial would reveal that "vests were missing from one of the flights on the base."²¹⁷ The military judge did not make any specific findings regarding the application of the implied bias theory or the liberal grant mandate.

The defense preserved the issue under the amended RCM 705(f)(4) by using his peremptory challenge against another member.²¹⁸ Captain H, the wife of the accused's commander, sat on the case and the accused was convicted of four specifications of selling military property and one specification of larceny on divers occasions.²¹⁹ He was sentenced to total forfeitures, reduction to E-1, confinement for five years, and a dishonorable discharge.²²⁰ The AFCCA affirmed.²²¹

On appeal, the CAAF concluded that the military judge erred in denying the challenge for cause against Capt H.²²² The court agreed that Capt H did not demonstrate any actual bias, but found that several factors warranted her excusal under an implied bias theory.²²³ First, her spouse's safety and that of his unit were put at risk by this theft of security vests.²²⁴ Second, her husband's "performance evaluation could be affected by criminal conduct regarding critical squadron equipment that was supposed to be safeguarded in a secure area."²²⁵ Third, her husband was the accused's immediate commander, and immediate commanders are usually responsible for the initial investigation into potential misconduct and the "initial decision as to disposition."²²⁶ As such "the decision to retain Capt H, the spouse of [the Accused's] immediate commander, unnecessarily raised the perception of improper command bias."²²⁷

In evaluating implied bias cases, the courts have consistently stated that "a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias."²²⁸ In *Downing*, Judge Baker noted that "where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."²²⁹

²¹⁰ *Id.* at 286.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 287.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 286–87 (citing *United States v. Strand*, 59 M.J. 455, 458 (2004)).

²²⁹ *United States v. Downing*, 56 M.J. 419, 422 (2002).

He quoted this standard again in *Clay*.²³⁰ In *Briggs*, however, Judge Baker expands this principle, concluding, “[D]eference is warranted *only* when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts.”²³¹ In *Briggs*, just as in *Clay*, the military judge did not address either implied bias or the liberal grant mandate when making his ruling on the defense challenge for cause. He only addressed “factors relating to Capt H’s demeanor, her professed lack of knowledge, and her husband’s absence.”²³² As such, the CAAF had nothing in the record to evaluate whether or how the military judge considered issues relating to implied bias and the liberal grant mandate. In conducting its own analysis, the court concluded that the military judge erred and set aside the findings and sentence in this larceny case. Judge Baker further refined his implied bias analysis in a third case during the 2007 term.

When a Member Has Experience with the Charged Offense

United States v. Terry

The third case that the CAAF reviewed this term with issues involving implied bias is *United States v. Terry*.²³³ Air Force Staff Sergeant Terry was charged with the rape of a female airman and disobeying a lawful no-contact order.²³⁴ Staff Sergeant Terry selected a panel of officer members to hear his case.²³⁵ Two of the members had distinct experiences with rape. First, Major (Maj) H’s wife was sexually assaulted by a family member between ten and twenty years before the court-martial.²³⁶ Second, Captain (Capt) A’s longtime girlfriend was raped by a family friend about seven years before the court-martial.²³⁷ The defense challenged both of these members for cause and the military judge denied both challenges.²³⁸

In denying both challenges, the military judge placed her findings on the record based on the members’ responses during voir dire. With respect to Maj H, the military judge noted that while he “was [initially] uncomfortable when answering the questions [about his wife’s experiences with sexual abuse] . . . as the questioning went on he was [more] forthright in answering.”²³⁹ Also, Maj H stated that he “had no predisposition . . . [and] could be fair and impartial.”²⁴⁰ In Capt A’s case, the military judge found from his voir dire responses that he had no “feelings about rape ‘[that could not be] put aside’ so that he could be impartial.”²⁴¹ In addressing both members, the military judge based her rulings on her observations of their demeanor and the tenor of their responses during voir dire. After the challenges were denied, the defense preserved the issue for appeal by exercising their peremptory challenge against another member.²⁴²

On appeal, the CAAF cited several guiding principles in reviewing cases involving a “member’s exposure to a crime similar to the one to be litigated before them.”²⁴³ First, the fact that a member was close to someone who was a victim of a similar crime is not a per se basis for disqualification.²⁴⁴ Second, even if a member has been exposed to a similar crime, they may rehabilitate themselves by “honestly claiming that [they] would not be biased.”²⁴⁵ Third, the courts have found that

²³⁰ *United States v. Clay*, 64 M.J. 274, 277 (2007) (quoting *Downing*, 56 M.J. at 422).

²³¹ *Briggs*, 64 M.J. at 287 (citing *Downing*, 56 M.J. at 422) (emphasis added).

²³² *Id.*

²³³ 64 M.J. 295 (2007).

²³⁴ *Id.* at 296.

²³⁵ *Id.*

²³⁶ *Id.* at 297.

²³⁷ *Id.* Captain A actually had two prior girlfriends who had been the victims of sexual assault. *Id.* at 300. However, the first girlfriend that the court addresses was a relatively clear case and the court did not find any actual or implied bias. *Id.* at 304. As such, the member’s relationship with that victim is not addressed here.

²³⁸ *Id.*

²³⁹ *Id.* at 301 (alteration in original).

²⁴⁰ *Id.*

²⁴¹ *Id.* (alteration in original).

²⁴² *Id.*

²⁴³ *Id.* at 303.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

there is actual bias in cases “when members have been victims of similar, *particularly* violent or traumatic crimes, or if other unique circumstances pertained.”²⁴⁶

As in the previous two cases, the military judge did not consider implied bias or the liberal grant mandate on the record. While the military judge put her findings on the record regarding the statements of the members’ and their demeanor during voir dire, the CAAF observed that “the record does not reflect the application of an objective implied bias test.”²⁴⁷ As such, the court granted deference to her findings and conclusions regarding actual bias, but conducted an independent analysis of implied bias.

The court first looked at the issue of actual bias and determined that the members effectively “disclaimed any bias or partiality.”²⁴⁸ The court also found that Maj H’s circumstances did not yield any basis for finding implied bias and held that the military judge did not err in denying the challenge for cause against Maj H.²⁴⁹ In addressing Maj H’s responses during voir dire, the court observed that the sexual assault involving Maj H’s wife had happened at least ten, if not twenty, years before the court-martial, even before Maj H met her.²⁵⁰ Additionally, the incident was not reported to the police, Maj H’s wife never sought counseling, and the two only spoke of the event a “couple of times.”²⁵¹ The court noted that Maj H’s mother-in-law stayed married to the man and his wife had apparently reconciled with her assailant.²⁵² Finally, the record revealed that Maj H’s reluctance to discuss the incident during voir dire was related more to “his concern for his wife’s reputation in the community, rather than any distress he personally suffered due to his wife’s experiences.”²⁵³ As such, there was nothing that would create “the appearance of implied bias” in this case.²⁵⁴

On the other hand, the court held that the military judge erred in denying the challenge for cause against Capt A.²⁵⁵ The court noted several factors that should have caused the military judge to “squarely address the essential question of an implied bias analysis[, that is,] was she satisfied that an objective public observer would find Capt A’s service on the panel notwithstanding his acute involvement with the crime of rape as consonant with a fair and impartial system of military justice?”²⁵⁶

First, the court noted several factors that favored a finding that implied bias did not exist in the case, including the fact that the incident happened several years before, that the member had not been in contact with the victim for several years out of respect for his current wife, and that the relationship with the victim was “on and off” and at the time of the incident the relationship was “off.”²⁵⁷ However, the court quickly turned to a list of factors favoring a challenge for cause against Capt A based on implied bias. Captain A was familiar with the details of his friend’s rape as well as the “specific aggravating circumstances of the attack,” which included “the fact that the rape was the victim’s first sexual experience, that the victim had wished to save herself for marriage, . . . that the rape resulted in a pregnancy and a child,” and that the child was named after Capt A.²⁵⁸ Additionally, when asked during voir dire, Capt A stated that he was “incensed” by the incident and “he was angry that his ‘very close friend’ had been hurt.”²⁵⁹ Finally, the court noted that he intended to marry the victim, that he was in the victim’s sister’s wedding party, and that “the rape was the reason that the victim broke up with him.”²⁶⁰

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 305.

²⁴⁸ *Id.* at 304.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 305.

²⁵⁶ *Id.* (internal brackets omitted).

²⁵⁷ *Id.* at 304.

²⁵⁸ *Id.*

²⁵⁹ *Id.* The court notes that it is unclear whether Capt A was referring to his current feelings or his feelings at the time of the incident. *Id.*

²⁶⁰ *Id.* at 305.

Considering these facts, the court concluded that “most people in Capt A’s circumstance would be hard pressed . . . to sit impartially in a rape case.”²⁶¹ Considering the “totality of the circumstances,” the court found that “it was asking too much of him and the system for Capt A to sit.”²⁶² As such, applying the liberal grant mandate and the “case law finding implied bias when most people in the same position would be prejudiced,” the court held that the military judge erred in denying the challenge for cause against Capt A.²⁶³ The findings and sentence in this rape case were set aside.²⁶⁴

2007’s Lessons in Implied Bias

Clay, Briggs, and Terry were not the only implied bias cases in 2007. The AFCCA overturned a case where the military judge denied a defense challenge for cause against a senior member who could have been viewed as “the alter ego” of the Special Court-Martial Convening Authority.²⁶⁵ The senior member had directed the Article 32 investigation, appointed the Article 32 officer, forwarded the case to the General Court-Martial Convening Authority, and nominated members in the case.²⁶⁶ Additionally, the CAAF affirmed a case where the facts on the record simply did not support a finding of actual or implied bias.²⁶⁷ Finally, in July, the CAAF overturned a case using an implied bias theory where a member failed to indicate that he knew, and had a hostile view toward, a defense witness.²⁶⁸ Although these three cases were decided in 2007, they do not add anything more to the implied bias analysis that Judge Baker articulated in *Clay, Briggs, and Terry*.

These three cases offer several critical points for practitioners at the trial level. First, in deciding whether to grant a challenge for cause, military judges must consider actual bias, implied bias, and the liberal grant mandate. The military judge should first assess whether the member has actual bias. Actual bias is a subjective test that looks at whether the member’s bias will yield to the military judge’s instructions and the evidence presented.²⁶⁹ The courts give “great deference” to the military judge’s rulings on actual bias, especially findings with respect to the answers given and the demeanor of the member.²⁷⁰ The military judge should then conduct an analysis to determine whether implied bias exists. Implied bias is an objective standard, viewed from the perspective of a member of the public, focusing on the appearance of fairness.²⁷¹ The military judge must ask whether “most people in the same position would be prejudiced[, that is, biased].”²⁷² Additionally, the military judge should weigh whether an “objective public observer would find [that the member’s service on the panel is] consonant with a fair and impartial system of military justice.”²⁷³ “[W]hile not reviewed de novo, [the military judge’s findings on implied bias are] afforded less deference than a ruling on actual bias.”²⁷⁴ Lastly, the military judge must apply the liberal grant mandate for defense challenges, meaning that, in close cases, the military judge should favor granting the defense challenge for cause. Using this methodology, the military judge can ensure that he receives the maximum amount of deference from the appellate courts.

²⁶¹ *Id.*

²⁶² *Id.* (internal quotations omitted).

²⁶³ *Id.* (quoting *United States v. Weisen*, 57 M.J. 172, 174 (2001)).

²⁶⁴ *Id.*

²⁶⁵ See *United States v. Bryant*, 65 M.J. 746, 746–48 (A.F. Ct. Crim. App. 2007). The senior member was a Reserve Component Individual Mobilized Augmentee (IMA) to the 45th Space Wing and was “‘used in capacity almost like a second vice commander,’ and would ‘substitute in meetings for either the commander or the vice commander.’” *Id.* at 747.

²⁶⁶ *Id.*

²⁶⁷ See *United States v. Hollings*, 65 M.J. 116, 118 (2007) (concluding that although a member had been “‘career legal officer,’ . . . was familiar with [the accused’s] case as a result of his duties, and at least some of those duties were legal in nature,” the record of trial did not support a finding of actual or implied bias, even applying the liberal grant mandate); see also *United States v. Townsend*, No. 200501197, 2007 CCA LEXIS 23 (N-M. Ct. Crim. App. Jan. 12, 2007), *aff’d*, 65 M.J. 460 (2008) (finding no actual or implied bias where a member, among other things, was in law school studying criminal law and hoped to be a prosecutor).

²⁶⁸ See *United States v. Albaaj*, 65 M.J. 167 (2007). As this member failed to disclose the basis for challenge, the CAAF reviewed the case based on the members’ duty of candor. *Id.*

²⁶⁹ *United States v. Terry*, 64 M.J. 295, 302 (2007) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (1997)).

²⁷⁰ *United States v. Clay*, 64 M.J. 274, 276 (2007).

²⁷¹ *United States v. Briggs*, 64 M.J. 285, 286 (2007).

²⁷² *Id.* (alteration in original).

²⁷³ *Terry*, 64 M.J. at 305 (quoting *United States v. Downing*, 56 M.J. 419, 422 (2002)).

²⁷⁴ *Id.* (citing *United States v. Strand*, 59 M.J. 455, 458 (2004)).

In addition, the military judge must place on the record his observations of the members' demeanor, his understanding of the members' responses, and his assessment of the credibility of the members' responses. As the court stated in *Briggs*, "[D]eference [in implied bias rulings] is warranted only where the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts."²⁷⁵ As *Briggs*, *Terry*, and *Clay* demonstrate, when a military judge fails to consider implied bias and the liberal grant mandate on the record, the CAAF will grant what is tantamount to no deference to the military judge's opinion on appellate review.

As a final note, these cases offer an important caution to the trial counsel. The CAAF has shown an appropriate willingness to overturn serious cases based on implied bias and the failure of the military judge to consider implied bias and the liberal grant mandate in denying defense challenges for cause. This is not a new trend.²⁷⁶ Trial counsel must ensure that the military judge addresses actual bias, implied bias, and the liberal grant mandate when denying challenges for cause. More importantly, though, trial counsel must realize that a denial of a challenge for cause in a close case creates an appellate issue that is not only subject to review, but could result in the court setting aside findings and sentence. Joining defense challenges for cause in close circumstances, like those of Col J in *Clay*, Capt H in *Briggs*, Capt A in *Terry*, may end up being the strategy that protects the conviction in a serious case from appellate reversal.

The 2007 term had five published cases addressing challenges for cause and a sixth involving implied bias coupled with a member's failure to reveal grounds for potential challenge. This trend seems to be continuing into the 2008 term with CAAF reviewing three cases with issues involving challenges for cause.²⁷⁷ While the facts vary with each case and the personal circumstances of each member, the CAAF has made a deliberate effort to ensure military judges understand and apply the black letter law regarding challenges for cause

Conclusion

If there is a singular message from the cases this term involving the use of the guilty plea inquiry, the denial of the challenge for cause, and the closure of the Article 32 investigation, it is that these particular areas are fraught with peril. Military judges and counsel must know the standards that apply to these areas of criminal procedure and apply them correctly. During this term, the courts made a deliberate effort to clarify the rules applicable to these three different areas of the law to ensure that trial practitioners know the standards and the military judges apply the correct rules. The 2007 term of court proved extraordinarily fruitful in terms of law regarding pretrial procedures. If the cases that have come out thus far in the 2008 term are any indication, court-martial procedure at the pretrial stage will continue to provide plenty of work for the appellate level for the CAAF as well as the service courts.

²⁷⁵ *Id.* at 287 (citing *Downing*, 56 M.J. at 422).

²⁷⁶ *See, e.g.*, *United States v. Leonard*, 63 M.J. 398, 402 (2006) (setting aside findings and sentence on a rape case); *United States v. Wiesen*, 56 M.J. 172 (2001) (setting aside findings and sentence on a child sexual abuse case); *United States v. Rome*, 47 M.J. 467, 469 (1998) (setting aside findings and sentence on an attempted robbery case); *United States v. Daulton*, 45 M.J. 212 (1996) (setting aside findings and sentence on a child sexual abuse case).

²⁷⁷ *See United States v. Townsend*, 65 M.J. 460 (2008); *United States v. Elfayoumi*, 66 M.J. 354 (2008); *United States v. Bragg*, 66 M.J. 325 (2008).

Military Sentencing 101—Back to the Basics

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Introduction

“Have you first checked the big red book?”¹ This is the answer most new counsel receives when they ask questions regarding court-martial procedures. The supervisor is not being lazy, but ensuring that the counsel has at least opened the *Manual for Courts-Martial* and read the appropriate rule before asking their question. A working knowledge of the Rules for Courts-Martial (RCM) is essential not only for the merits portion of a case, but also for the sentencing portion. Sentencing in the military is unique. Unlike the civilian system, the military does not use sentencing guidelines but instead uses an adversarial hearing to “receive full information concerning the accused’s life and characteristics in order to arrive at a sentence.”² This enables the Armed Forces to follow a traditional approach; to devise “an individualized sentence . . . that fits the offender and the offense.”³ Counsel may only present evidence that fits specifically within the RCM presentencing procedure.⁴ Rule for Courts-Martial 1001(b) allows the government only five categories (or “pigeon holes”) to introduce evidence.⁵ These five categories include service data from the charge sheet, personal data and character of prior service of the accused, evidence of prior convictions of the accused, evidence in aggravation, and evidence of rehabilitative potential.⁶ Under RCM 1001(c), defense counsel has two broad rules in which to introduce evidence: extenuation and mitigation.⁷ Although these rules might appear straight-forward at first blush, presenting a strong sentencing takes preparation.

Two rules that often cause counsel confusion are RCM 1001(b)(4), evidence in aggravation, and RCM 1001(c), matters to be presented by the defense.⁸ This article addresses evidence in aggravation and the implications of *United States v. Hardison*⁹ where the Court of Appeals for the Armed Forces (CAAF) reiterated its holding as to when the government may use uncharged misconduct as aggravating evidence. This article also addresses the defense sentencing case of *United States v. Perez*¹⁰ in which the CAAF emphasized the importance of defense presenting a presentencing case. Through these two cases, the CAAF sent a clear message this past term that counsel need to remember the basics when presenting their presentencing case.

Evidence in Aggravation—the General Rule

Before any discussion of appropriate aggravation evidence can begin, a refresher on the text of the rule is in order. Rule for Courts-Martial 1001(b)(4) states:

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 and evidence of significant

¹ A common reference to the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

² FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 23–29 (3d ed. 2006) (quoting *United States v. Mack*, 9 M.J. 300, 316 (C.M.A. 1980)).

³ *Id.*

⁴ See generally MCM, *supra* note 1, R.C.M. 1001.

⁵ *Id.* R.C.M. 1001(b)(4).

⁶ *Id.*

⁷ *Id.* R.C.M. 1001(c).

⁸ *Id.* R.C.M. 1001(b)(4), (c).

⁹ 64 M.J. 279 (2007).

¹⁰ 64 M.J. 239 (2006).

adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.¹¹

Not only must the evidence meet the above stated rule, the evidence must also comply with Military Rule of Evidence (MRE) 403.¹² The rule states that the probative value of the evidence must substantially outweigh the danger of unfair prejudice, the evidence must not confuse the issues or mislead the members, and the evidence may not cause undue delay, waste of time, or needless presentation of cumulative evidence.¹³ Additionally, the military judge has broad discretion in determining whether to admit evidence under RCM 1001(b)(4).¹⁴ Often, aggravation evidence takes the form of evidence of circumstances surrounding the offense and evidence of impact of the offense on the victim and community.¹⁵ During the 2007 term, the service appellate courts, in unpublished opinions, provided several useful examples of proper aggravating evidence.

The first of these cases is *United States v Palomares*.¹⁶ A general court-martial convicted the accused of wrongful use of diazepam¹⁷ on divers occasions while deployed to Afghanistan and engaged in combat operations.¹⁸ The company commander testified about the character of the unit's combat operations, the difficult nature of their mission, and the complications that the illegal use of the diazepam by the accused and other members of the unit caused during the relief in place.¹⁹ In addition, the commander testified how the company was singled out and subjected to a unit-wide urinalysis and search of their personal gear immediately upon their return home.²⁰ The urinalysis and search delayed the entire company's reunification with their family members by at least six hours.²¹ The Navy-Marine Court of Criminal Appeals (NMCCA) held that although Palomares was not the only Marine who wrongfully used the drug, "his offense still had an unnecessary and deleterious impact on the mission, discipline, and efficiency of the command."²² This evidence was directly related and resulted from the offense of which he was convicted.²³ In addition, the court found that the probative value of the evidence outweighed any potential prejudicial impact.²⁴

Another example of proper aggravating evidence is seen in *United States v. Chapman*.²⁵ In a military judge alone trial, Lance Corporal Aaron Chapman plead guilty to unauthorized absence and missing movement by design.²⁶ As evidence in aggravation, the government presented a witness who testified that another Marine was ordered to deploy much earlier than planned to take the accused's place.²⁷ The accused also acknowledged this fact during his unsworn statement.²⁸ The defense

¹¹ MCM, *supra* note 1, R.C.M. 1001(b)(4).

¹² *Id.* MIL. R. EVID. 403.

¹³ *Id.*; *see also* *United States v. Glover*, 53 M.J. 366 (2000); *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

¹⁴ *See* *United States v. Gogas*, 58 M.J. 96 (2003); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Rust*, 41 M.J. 472, 478 (1995).

¹⁵ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 941-42 (6th ed. 2004).

¹⁶ No. 200602496, 2007 CCA LEXIS 319 (N-M. Ct. Crim. App. Aug. 23, 2007).

¹⁷ Diazepam is more commonly known by its brand name Valium. Diazepam is in the group of drugs called benzodiazepines and it is used for short term relief of anxiety, seizures, insomnia, and other conditions. Drugs.com, *Diazepam*, <http://www.drugs.com/diazepam.html> (last visited Apr. 22, 2008). Diazepam is a Schedule IV controlled substance. U.S. Drug Enforcement Administration, *Drug Scheduling*, <http://www.justice.gov/dea/pubs/scheduling.html> (last visited Apr. 22, 2008).

¹⁸ *Palomares*, 2007 CCA LEXIS 319, at *1-2.

¹⁹ *Id.* at *3.

²⁰ *Id.*.

²¹ *Id.* at *4.

²² *Id.* at *5.

²³ *Id.*

²⁴ *Id.*

²⁵ No. 200700035, 2007 CCA LEXIS 243 (N-M. Ct. Crim. App. July 17, 2007).

²⁶ *Id.* at *1.

²⁷ *Id.* at *3.

²⁸ *Id.* at *7.

counsel did not object to the witness's testimony regarding this issue.²⁹ On appeal, because defense did not object, the NMCCA applied a plain error analysis and found no plain error.³⁰

Over defense objection, the same witness also testified to the injuries he personally received while deployed.³¹ The military judge noted for the record that he believed that the witness's testimony was directly related to or resulted from the conduct of the accused.³² He further stated that the testimony provided him information as to the type of duty that the accused took action to avoid.³³ Specifically the military judge stated

[T]hat on the scale of aggravation in the area of missing movement by design, the type of danger the unit is moving into is relevant in considering what the nature of the specific intent of the accused [sic], what he was seeking to avoid and the actual danger that he was in fact seeking to avoid are relevant factors³⁴

The military judge also performed an MRE 403 balancing test and determined that the information was highly probative and the prejudicial effect was low.³⁵ The NMCCA held that the military judge properly limited his consideration of the evidence of the injuries the witness received to the nature of the environment to which the accused was to have deployed and the type of danger he specifically intended to avoid.³⁶ The court stated that this type of evidence, to include the potential for injury, is directly related to the missing movement by design offense under Article 87, UCMJ.³⁷

These are just two examples of proper aggravation evidence. The essential element in both examples is that the evidence was *directly related to* or *resulted from* the offenses of which the accused had been found guilty. In *Palomares*, the accused's drug use was directly linked with the problems the unit had conducting the relief in place, and with the delay the unit encounter in reuniting with their family members after a combat deployment.³⁸ In *Chapman*, the evidence indicated that another individual had to take the accused's place in the deployment. More importantly, the evidence demonstrated the nature of the environment that the accused sought to avoid by intentionally missing movement.³⁹ The practice point taken from these cases is that case preparation is essential. For the government, this type of information and potential witness testimony may not be obvious from just reading the case file. Instead, trial counsel can uncover this information by conducting in-depth witness interviews. The defense counsel must ensure the evidence fits within the rules, if not, defense must object. These examples provide a clear application of RCM 1001(b)(4). More troublesome however, is determining if and when the government can present evidence of uncharged misconduct as aggravating evidence.

Using Uncharged Misconduct as Aggravation Evidence and *United States v. Hardison*

The CAAF has allowed uncharged misconduct as aggravating evidence in a narrow set of circumstances. Trial counsel cannot use uncharged misconduct to get around the RCM 1001(b)(4)'s requirement that the evidence must directly relate to or result from "the offenses of which the accused has been found guilty."⁴⁰ The court has allowed uncharged misconduct as aggravating evidence if it was directly preparatory to the current crime;⁴¹ if it was part of the same course of conduct which

²⁹ *Id.* at *6.

³⁰ *Id.* at *7. The court held that under *United States v. Baer*, 53 M.J. 235, 237 (2000), a trial counsel may argue the evidence of record as well as all reasonable inferences fairly derived for the evidence. In addition, the court also took into consideration that during his unsworn statement the accused reinforced the inference that a specific Marine was deployed in his place. *Chapman*, 2007 CCA LEXIS 243, at *7.

³¹ *Chapman*, 2007 CCA LEXIS 243, at *3-4.

³² *Id.* at *4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at *5.

³⁶ *Id.* at *9.

³⁷ *Id.*

³⁸ *United States v. Palomares*, No. 200602496, 2007 CCA LEXIS 319 (N-M. Ct. Crim. App. Aug. 23, 2007).

³⁹ *Chapman*, 2007 CCA LEXIS 243.

⁴⁰ MCM, *supra* note 1, R.C.M. 1001(b)(4); *see also* *United States v. Hardison*, 64 M.J. 279 (2007).

⁴¹ *United States v. Wingart*, 27 M.J. 128, 135 (C.M.A. 1988).

the accused had committed against the same victim, in the same place, several times prior to the charged offense;⁴² if it showed a wider course of conduct;⁴³ or if it showed a continuous course of conduct involving the same or similar crimes, the same victims, and a similar status.⁴⁴ In each of these cases, the uncharged misconduct was direct and closely related in time, type and outcome.⁴⁵ Such was not the case in *United States v. Hardison*.⁴⁶

A special court-martial composed of officer members convicted Seaman Vangle Hardison of a single specification of wrongfully using marijuana.⁴⁷ The panel sentenced her to a bad conduct discharge, the convening authority approved the findings and sentence, and the NMCCA affirmed.⁴⁸ Hardison joined the Navy pursuant to a drug waiver which permitted her to enlist despite an admission of pre-service drug use.⁴⁹ Approximately three years into her service commitment, Hardison tested positive for recent marijuana use.⁵⁰ During the presentencing argument, trial counsel focused on three enlistment documents. Two of the documents showed Hardison's admission to the pre-service marijuana use and the third document was her signed pledged not use drugs in the future.⁵¹ During arguments, the trial counsel contended that the panel members, when assessing her sentence, should consider that Hardison "knew better. The trial counsel argued that she entered the Navy on a drug waiver. Furthermore he argued that she knew the Navy's drug policy and she violated it anyway."⁵² Defense counsel failed to object to this argument and the military judge failed to provide a curative or limiting instruction to the panel in response to the Government's statements.⁵³ Rather, the military judge instructed the panel members to consider all matters offered in aggravation.⁵⁴

On appeal, the CAAF applied the three-part plain error analysis because defense counsel did not object to the admission of the evidence.⁵⁵ The court determined that the military judge committed plain error when he admitted evidence in aggravation of the accused's pre-service drug use and the service waiver for that drug use contained in her enlistment records.⁵⁶

On appeal, the government argued that the uncharged misconduct of the pre-service drug use was evidence in aggravation under RCM 1001(b)(4).⁵⁷ The court reasoned that this evidence must fit the requirements of RCM 1001(b)(4) because the rule does not make any distinction between evidence of uncharged misconduct or other aggravating evidence. RCM 1001(b)(4) requires all evidence to be "directly related" to the offenses of which the accused was found guilty and the probative value of the evidence must outweigh the likely prejudicial impact.⁵⁸ In the CAAF's holding, they stated that "[t]he

⁴² *United States v. Nourse*, 55 M.J. 229, 232 (2001).

⁴³ *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992).

⁴⁴ *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990).

⁴⁵ *See also* *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006) (no error in allowing the accused's uncharged misconduct in sentencing because the acts were close in time and directly related to the convicted offense); *United States v. Turner*, 62 M.J. 504 (A.F. Ct. Crim. App. 2005) (allowing evidence that the accused committed a robbery at the same location several weeks earlier).

⁴⁶ *United States v. Hardison*, 64 M.J. 279, 279 (2007).

⁴⁷ *Id.* at 280.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The three enlistment documents were: U.S. Dep't of Defense, DD Form 1966/2 (Nov. 2003) (in response to Question 26 which inquired if Hardison had "ever tried or used or possessed . . . cannabis ([including marijuana])," Hardison answered in the affirmative); U.S. Dep't of Defense, DD Form 1966 Annex (Nov. 2003) (in answering Question 8 in Section Three of the form in the affirmative, Hardison admitted to having "experimentally/casually used marijuana within the past six months."); and, U.S. DEP'T OF NAVY, NAVCRUIT 1133/53, ENLISTMENT STATEMENT OF UNDERSTANDING (Aug. 1991) (Hardison confirmed that she understood that "DRUG USAGE IN THE NAVY IS PROHIBITED AND WILL NOT BE TOLERATED!") (emphasis in the original). *Id.* at 280.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 281; *see also* *United States v. Powell*, 49 M.J. 460, 463-65 (1998); *United States v. Hays*, 62 M.J. 158, 166 (2005). "Plain error is established when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Hardison*, 64 M.J. at 281 (citing *Powell*, 49 M.J. at 463-65).

⁵⁶ *Hardison*, 64 M.J. at 283.

⁵⁷ *Id.*

⁵⁸ *Id.* at 281; *see also* MCM, *supra* note 1, R.C.M. 1001(b)(4), MIL. R. EVID. 403.

meaning of ‘directly related’ under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted.”⁵⁹ The link between the uncharged misconduct and the crime for which the accused was convicted must be direct, and “closely related in time, type, and/or outcome.”⁶⁰

At the time of her enlistment, Seaman Hardison admitted to pre-service drug use.⁶¹ Then three years into her enlistment she tested positive for marijuana.⁶² The court concluded that based on these facts her offense was an isolated occurrence.⁶³ The government did not and could not provide any evidence showing how those two uses were even remotely connected, much less directly related to or resulting from conviction.⁶⁴

Compare the facts of *Hardison*⁶⁵ to *United States v. Shupe*⁶⁶ where the CAAF upheld the admission of uncharged misconduct as aggravating evidence.⁶⁷ During the sentencing case in *Shupe*, the government presented evidence of five uncharged instances of drug distribution that arose during the same time period, were of the same drug type, and were distributed by the accused in the same location as the five specifications of drug distribution to which Shupe had plead guilty.⁶⁸ The court held that the five uncharged instances were part of a single “extensive and continuing scheme to introduce and sell [drugs].”⁶⁹ In *Hardison*, there was no single, continuous nature between the uncharged and charged conduct.

Next the appellate government counsel argued that aggravation was not from the pre-service drug use alone, but that fact that the Navy provided Hardison with a second chance by granting her a waiver to enter the Navy and that she squandered this second chance.⁷⁰ The court rejected this argument, bluntly stating that this argument negated the meaning of the words “directly related.”⁷¹

Based on the above reasoning, the CAAF held that the military judge erred when he admitted the prior service drug admission.⁷² The court then considered whether the error materially prejudiced a substantial right of the accused.⁷³ They weighed the evidence of Hardison’s attempts to avoid taking the drug test and her lack of contrition in her unsworn statement with her military history that included no past disciplinary problems and positive evaluations.⁷⁴ In addition, the court also took into account that her trial was before a panel.⁷⁵ Lastly, the court also noted that the military judge did not offer any curative instructions and had, in fact, stressed to the members that they consider *all* matters offered in aggravation.⁷⁶ As such, the CAAF held that Hardison’s trial may have been different if the military judge had excluded the evidence of pre-service drug use and waiver.⁷⁷ The court affirmed the findings and set aside the sentence.⁷⁸

⁵⁹ *Hardison*, 64 M.J. at 281.

⁶⁰ *Id.* at 281–82.

⁶¹ *Id.* at 281.

⁶² *Id.*

⁶³ *Id.* at 282.

⁶⁴ *Id.* at 283.

⁶⁵ *Id.* at 280.

⁶⁶ 36 M.J. 431, 436 (C.M.A. 1993).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Hardison*, 64 M.J. at 283.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 283–84.

⁷⁵ *Id.*

⁷⁶ *Id.* at 284.

⁷⁷ *Id.*

⁷⁸ *Id.*

The bottom line for practitioners is that “the link between RCM 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type and/or often outcome, to the convicted crime.”⁷⁹ Defense counsel must object making the argument that the evidence is not proper aggravation evidence or that the prejudicial effect outweighs any probative value.

Defense Sentencing Case—Matters in Extenuation and Mitigation

“Traditionally, the heart of the sentencing portion of trial by court-martial was the defense effort to achieve the most lenient sentence possible by the presentation of favorable information to the sentencing authority.”⁸⁰ This evidence takes the form of extenuation and mitigation.⁸¹ Extenuation allows the accused to explain the circumstances surrounding his offense, while mitigation deals with the circumstances of the accused offered to lessen the punishment.⁸² Included in mitigation are acts of good conduct or bravery, family circumstances, and the reputation or record of the accused.⁸³ Evidence of extenuation and mitigation is the framework defense counsel use to develop their sentencing case. A defense counsel has great latitude in developing his case strategy. “As a general matter, the [CAAF] will not second-guess the strategic or tactical decisions made at trial by defense counsel.”⁸⁴ Recently in *United States v. Perez*,⁸⁵ the CAAF reviewed the nature of the defense sentencing case when determining an ineffective counsel claim.⁸⁶

At a general court-martial a military judge alone convicted Sergeant First Class Rafael Perez of several charges and specifications of rape, forcible sodomy, and indecent acts with a child.⁸⁷ The adjudged and approved sentence included a dishonorable discharge, confinement for twenty-seven years, and reduction to the lowest enlisted grade.⁸⁸

A brief summary of the facts are necessary to understand the CAAF’s holding in this case. The accused’s teenage stepdaughter alleged that he sexually abused her over an eight-year period.⁸⁹ During the investigation, she provided CID with a written statement describing the sexual abuse.⁹⁰ During the findings phase of the trial, the government counsel called the victim as a witness in their case-in-chief.⁹¹ During her testimony, she stated that she could neither remember providing a statement to the investigators nor recall the events described in her statement.⁹² The defense also called the victim as a witness during their case-in-chief.⁹³ During her testimony as a defense witness, she provided specific details that portrayed a significantly lesser scope of sexual activity than she previously provided to investigators.⁹⁴ In addition, she disavowed considerable portions of her pretrial statement.⁹⁵ During closing, defense counsel concentrated on the distinctly different statements provided by the stepdaughter.⁹⁶ Notably, the military judge found Perez not guilty of a number of the charged offenses.⁹⁷ On appeal, the accused alleged that the trial defense counsel was ineffective because he called his stepdaughter as

⁷⁹ *Id.* at 281–82.

⁸⁰ GILLIGAN & LEDERER, *supra* note 2, at 23–63.

⁸¹ See MCM, *supra* note 1, R.C.M. 1001(c).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *United States v. Perez*, 64 M.J. 239, 243 (2006) (citing *United States v. Anderson*, 55 M.J. 198, 202 (2001)).

⁸⁵ 64 M.J. 239 (2006).

⁸⁶ *Id.*

⁸⁷ *Id.* at 240.

⁸⁸ *Id.*

⁸⁹ *Id.* at 241.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 241–42.

⁹⁶ *Id.* at 242.

⁹⁷ *Id.*

a witness.⁹⁸ The CAAF disagreed.⁹⁹ The court stated that the military judge's decision to find the accused not guilty on several of the charges came directly from the testimony provided by the stepdaughter.¹⁰⁰ As such, the CAAF held that the accused did not demonstrate ineffective counsel.¹⁰¹ During the presentencing phase, defense counsel again obtained testimony from the victim in support of the accused.¹⁰²

The defense presentencing case included the accused's unsworn statement, testimony of the victim, and testimony from the accused's wife.¹⁰³ At the close of defense's presentencing case, the military judge questioned Perez to whether there were any other matters that he, as the military judge, should consider.¹⁰⁴ Perez informed the military judge that there were no other witnesses or documentary evidence that he wanted to bring forth.¹⁰⁵ In addition to arguing the extenuation and mitigation evidence presented during the defense's presentencing case, the defense counsel asked the judge to consider the earlier "good Soldier" testimony that the accused's first sergeant presented during the findings portion of the trial.¹⁰⁶ Specifically "[d]efense counsel noted that First Sergeant . . . had testified about [Perez] 'being a good soldier, one of the best he ever saw.'"¹⁰⁷ Although the accused faced a maximum sentence that included life in prison, the military judge sentenced him to a lesser sentence that included twenty-seven years of confinement.¹⁰⁸

On appeal, the accused alleged that the defense counsel was ineffective because he did not recall the first sergeant to testify during the sentencing hearing, and failed to call other witnesses including military officers and noncommissioned officers that he served with, and members of his church. He alleged that these individuals would have testified on his behalf on sentencing and that he provided his defense counsel with their names.¹⁰⁹

Looking at each issue separately, the CAAF noted that defense counsel specifically referred the military judge back to the first sergeant's testimony on the merits.¹¹⁰ By doing this instead of recalling the witness, the court noted that defense avoided the risk of having the first sergeant cross examined by the government counsel.¹¹¹ The court held that this method was not ineffective.¹¹²

Next the court assumed, without deciding, that the accused provided his counsel with the above described witnesses.¹¹³ Here the court held that the accused failed to meet his burden because he failed to provide specifically what those witnesses would have said if they testified. As such, the appellant failed to demonstrate how he was prejudiced by defense counsel's failure to call those individuals and the court held that his argument was without merit.¹¹⁴

This case demonstrates the importance of defense counsel developing a sentencing case even when the evidence is presented to a military judge alone. Here, the appellate courts were able to identify a defense strategy. As the *Perez* court noted earlier, they will not second guess the tactical or strategic decisions of the counsel.¹¹⁵ *Perez* demonstrates the

⁹⁸ *Id.* at 243.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 242.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 244.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

importance of having a presentencing case.¹¹⁶ Not only must defense counsel prepare a solid presentencing case but they must also take care to preserve evidentiary issues pertaining to their case, just as they would during findings.

When proper extenuation or mitigation evidence is not allowed and that evidence may have substantially influenced the adjudged sentence, the appellate courts will set aside the sentence.¹¹⁷ The case of *United States v. Ottley*, decided this past year, provides a good illustration of this principle.¹¹⁸

Marine Sergeant (Sgt) Cody Ottley pleaded guilty in a military judge alone general court-martial to negligent homicide.¹¹⁹ The facts in the case show that the accused negligently commingled magazines containing blank ammunition and magazines containing live ammunition.¹²⁰ During a close quarters battle (CQB) exercise, Ottley failed to inspect his weapon to ensure it only contained blank rounds and fired several rounds of live ammunition into another Marine, killing him.¹²¹ During the presentencing case, the defense counsel attempted to introduce testimony through Gunnery Sergeant Morrison, the chief instructor for CQB training at the time of the incident, about changes made to the CQB curriculum prior to the exercise.¹²² In addition, defense counsel also attempted to present testimony from Gunnery Sergeant Schmidt, the Range Safety Officer on the date of the shooting, about the remedial measures taken after the incident.¹²³ Defense argued that the testimony of these two witnesses would have “tended to show additional facts and ‘circumstances surrounding’ the death of [the victim] which [would have] provided a full or complete picture. . . .”¹²⁴ The defense counsel also argued that the testimony would have tended to show that the changes in the curriculum increased the risk that the blank and the live rounds would get commingled, creating a situation where a Marine could fire live ammunition by mistake.¹²⁵

The military judge excluded the testimony as irrelevant and in violation of MRE 407 which prohibits evidence of measures taken after a harm is caused, that if measure, if taken previously, would have made the harm less likely.¹²⁶ Although the defense counsel argued that the testimony was admissible as evidence of matters in extenuation and mitigation under RCM 1001(c), the military judge responded, “I will tell you right now, that the M.R.E. trumps the R.C.M.”¹²⁷ Additionally, the military judge sustained the trial counsel’s objection and did not allow Sgt Ottley’s supervisor for the year prior to his court-martial to answer whether he had any reservations about going to combat with the accused.¹²⁸

Looking first at the testimony from Sgt Ottley’s supervisor, the CAAF held in *United States v. Griggs*¹²⁹ that defense may present evidence during sentencing that the witness would willingly serve with the accused.¹³⁰ The court in *Griggs*

¹¹⁶ *Id.*

¹¹⁷ *United States v. Griggs*, 61 M.J. 402, 410 (2005).

¹¹⁸ *United States v. Ottley*, No. 200500985, 2007 CCA LEXIS 154 (N-M. Ct. Crim. App. Apr. 24, 2007).

¹¹⁹ *Id.* at *1.

¹²⁰ *Id.* at *3.

¹²¹ *Id.*

¹²² *Id.* at *4.

¹²³ *Id.*.

¹²⁴ *Id.* (quoting Appellant’s Brief, 27 Feb. 2006, at 15).

¹²⁵ *Id.*

¹²⁶ *Id.* at *5; *see also* MCM, *supra* note 1, MIL. R. EVID. 407.

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

¹²⁷ *Ottley*, 2007 CCA LEXIS 154, at *6.

¹²⁸ *Id.* at *5–6.

¹²⁹ 61 M.J. 402 (2005).

¹³⁰ *Id.* at 409.

stated that RCM 1001(b)(5)(D)¹³¹ does not apply to defense mitigation evidence and “specifically does not preclude evidence that a witness would willingly serve with the accused again.”¹³² The court observed that

‘[R]etention evidence’ is classic matter in mitigation, which is expressly permitted to be presented by the defense. As noted in *Aurich*, ‘the fact that a member of an armed force has sufficient trust and confidence in another member is often a powerful endorsement of the character of his fellow soldier.’¹³³

Applying *Griggs*, the NMCCA held that the military judge erred when he excluded the testimony from Sgt Ottley’s supervisor.¹³⁴

The court then discussed the issue concerning whether the military judge erred in sustaining the trial counsel’s objection to the testimony regarding the changes to the exercise and actions taken after the shooting.¹³⁵ Defense witness Gunnery Sergeant Morrison testified that each CQB training package contained minor changes that included adding blank fire.¹³⁶ The first training package to use the blank fire was the training package in which the accused failed to inspect his weapon and fired the live rounds instead of the blank rounds.¹³⁷ When the defense counsel attempted to question Gunnery Sergeant Morrison about other types of ammunition the Marines used at that exercise, the judge struck the testimony as irrelevant on the grounds that the answer did not change Ottley’s duty or his neglect at the time of the offense.¹³⁸ After reviewing the record, the NMCCA determined that defense counsel was offering the testimony to “‘explain the circumstances surrounding the commission’ of the offense, and to demonstrate how those circumstances may have contributed to the appellant negligently loading his weapon with live ammunition.”¹³⁹ The court held that the military judge again erred in excluding the testimony because it was proper extenuation evidence.¹⁴⁰

Lastly, the court held that the military judge erred when he excluded Gunnery Sergeant Schmidt’s testimony about changes made to the CQB training package after the shooting.¹⁴¹ The military judge ruled that the testimony would have been irrelevant and inadmissible under MRE 407, as evidence of subsequent remedial measures.¹⁴² The defense counsel argued that the evidence of “safety-related changes . . . made after the offense, impliedly demonstrated that the course was conducted in a less safe manner at the time of the offense.”¹⁴³ The court held that this testimony “could have served to ‘explain the circumstances surrounding the commission’ of the offense, and, therefore, would have been proper evidence in extenuation.”¹⁴⁴

Next, the NMCCA considered whether these errors had a “substantial influence on the sentence.”¹⁴⁵ They determined that the prohibited testimony likely contained evidence that would have been favorable to Ottley.¹⁴⁶ They found that Ottley’s supervisor, a field grade officer with fourteen years experience in the Marine Corps, would have provided powerful evidence in mitigation.¹⁴⁷ Also the other two witnesses could have explained the circumstances surrounding the offense, which may

¹³¹ MCM, *supra* note 1, R.C.M. 1001(c).

¹³² *Griggs*, 61 M.J. at 409.

¹³³ *Id.* (quoting *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990)).

¹³⁴ *United States v. Ottley*, No. 200500985, 2007 CCA LEXIS 154 (N-M. Ct. Crim. App. Apr. 24, 2007).

¹³⁵ *Id.* at *7.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at *8.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at *9.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *10.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *10–11.

have made Ottley's misconduct appear less horrific.¹⁴⁸ As a result, the court held that the "erroneous exclusion of three separate lines of extenuation and mitigation testimony, in light of the cumulative effect this testimony might otherwise have had, tipped the balance in favor"¹⁴⁹ of Sgt Ottley. Concluding that the excluded testimony may have substantially influenced the adjudged sentence, the NMCCA affirmed the findings and set aside the sentence.¹⁵⁰

Echoing the earlier practice tips, the importance of defense counsel preparing a sentencing case in extenuation and mitigation if the evidence is available cannot be emphasized enough. A good sentencing case will almost always have an impact on the sentence.

Conclusion

Although the 2007 court term was relatively quiet in terms of cases addressing sentencing, the sentencing cases this term emphasized earlier holdings regarding matters in aggravation and the importance of offering matters in extenuation and mitigation. Both trial counsel and defense counsel should remember that the case does not end upon a finding of guilty.

¹⁴⁸ *Id.* at *11.

¹⁴⁹ *Id.* at *12.

¹⁵⁰ *Id.*

The Lion Who Squeaked: How the *Moreno* Decision Hasn't Changed the World and Other Post-Trial News

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Introduction

The 2007 term for the Court of Appeals for the Armed Forces (CAAF) and the service courts was of great interest to post-trial practitioners. The first part of this article addresses the continuing development of post-trial delay jurisprudence in light of CAAF's 2006 *United States v. Moreno*¹ decision. When CAAF expressed its frustration with the military's long history of dilatory post-trial processing by announcing that it would apply "a presumption of unreasonable delay . . . where the action of the convening authority is not taken within 120 days of the completion of trial,"² many post-trial practitioners feared the worst. Knowing that most cases, particularly contested cases, required significantly longer than 120 days to process,³ there was great concern that appellate courts would apply the 120-day rule strictly and bludgeon the government into timeline compliance by granting widespread and significant relief to otherwise undeserving appellants.⁴

Fortunately (or unfortunately—depending on your perspective), neither the service courts nor the CAAF are granting wholesale relief to appellants whose cases have violated the *Moreno* timelines. This article reviews four cases which shed light on how CAAF is applying the *Moreno* decision to determine questions of unreasonable post-trial and appellate delay. Each of these cases adds new insight into how CAAF intends to proceed with this new and powerful tool to remedy meritorious claims of excessive post-trial delay. These cases, taken collectively, demonstrate that the CAAF is not applying as strict a standard to the government as would appear to be permitted under the *Moreno* opinion.

The second part of this article reviews those 2007 term of court cases involving the technical aspects of the post-trial process. It begins with a discussion of several cases involving the advice the staff judge advocate (SJA) gives the convening authority under Rule for Court-Martial (RCM) 1106.⁵ It also examines actions taken by the convening authority pursuant to RCM 1107.⁶ In the case of *United States v. Bonner*,⁷ the Army Court of Criminal Appeals (ACCA) distinguished between the requirement for sentence reassessment in light of a legal error versus the absence of such a requirement where the convening authority grants "pure" clemency under his RCM 1107(d)(2)⁸ authority.

In *United States v. Wilson*,⁹ the CAAF analyzed a convening authority's action under RCM 1107(d)(1)¹⁰ and ruled that when an action is unambiguous on its face, the meaning will be given effect regardless of what surrounding documents might indicate the convening authority's true intent may have been. The last case discussed in part two of this article addresses the SJA's duty to advise his convening authority on defense deferment and waiver of forfeiture requests as illustrated by the ACCA opinion in *United States v. Morales*.¹¹

¹ 63 M.J. 129 (2006).

² *Id.* at 142.

³ Major John Rothwell, *Annual Developments in Sentencing and Post-Trial—2006*, ARMY LAW., June 2007, at 42, 54.

⁴ *Moreno* provided that relief for denial of speedy post-trial or appeal could include, but was not limited to:

- (a) day-to-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside portions of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice.

Moreno, 63 M.J. at 143.

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106 (2008) [hereinafter MCM].

⁶ *Id.* R.C.M. 1107.

⁷ 64 M.J. 638 (Army Ct. Crim. App. 2007).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1) (2005) [hereinafter 2005 MCM].

⁹ 65 M.J. 140 (2007).

¹⁰ 2005 MCM, *supra* note 8, R.C.M. 1107(d)(1).

¹¹ 65 M.J. 665 (Army Ct. Crim. App. 2007).

Post-Trial Processing in a Post-*Moreno* World

United States v. Moreno¹²

*“Time keeps on slippin, slippin, slippin . . . Into the future”*¹³

On 11 May 2006, the CAAF released its opinion in the post-trial delay case of *United States v. Moreno*.¹⁴ The *Moreno* case represents the most recent manifestation of CAAF’s frustration with post-trial delay in the military justice system. When confronted with a 746-page court-martial record that required almost five years (1688 days) to process from announcement of sentence to service court review,¹⁵ the CAAF expressed its disappointment in the “institutional vigilance”¹⁶ of the Government by providing appellants a means to obtain meaningful relief for what appellate courts determine is unreasonable post-trial delay.¹⁷

In *Moreno*, the court declined to resurrect a bright-line *Dunlap*-like rule requiring initial action by the convening authority within ninety days,¹⁸ but did announce that it would apply a presumption of unreasonable delay in any case, completed after 11 June 2007, which did not have initial action taken within 120 days of the completion of the trial.¹⁹ The court warned that in such cases, the court “will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial.”²⁰ In *Barker v. Wingo*,²¹ the Supreme Court set out four factors to review speedy trial issues in a pretrial, Sixth Amendment context: (1) the length of delay; (2) the reason for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.²²

Under the *Moreno* precedent, once the post-trial delay in a case is determined to be unreasonable, the court must balance the length of delay against the three other factors, with no single factor being required to find that the post-trial delay constitutes a due process violation.²³ With respect to the fourth factor involving prejudice, the appellate court must evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern over those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal or retrial, might be impaired.²⁴ In *United States v. Toohey*, a case decided three months after the *Moreno* decision was released, the CAAF elaborated on the prejudice factor by announcing that when an appellant had not shown prejudice under the fourth factor, the appellate courts “will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.”²⁵

¹² 63 M.J. 129 (2006).

¹³ LyricsFreak.com, Steve Miller, Lyrics to Fly Like an Eagle, http://www.lyricsfreak.com/s/steve+miller/fly+like+an+eagle_20130994.html (last visited June 18, 2008).

¹⁴ *Moreno*, 63 M.J. 129.

¹⁵ *Id.* at 132.

¹⁶ *Id.* at 137.

¹⁷ *Id.* at 142–43.

¹⁸ *Dunlap v. Convening Authority*, 23 C.M.A. 135 (1974). In *Dunlap*, the Court of Military Review (the predecessor to the present Court of Appeals for the Armed Forces) announced that there would be a presumption of a denial of speedy disposition where the convening authority failed to take action within ninety days of trial. *Id.* at 138. This presumption placed a “heavy burden on the Government to show diligence, and in the absence of such a showing the charges would be dismissed.” *Id.* at 138 (quoting *United States v. Burton*, 44 C.M.R. 166, 172 (C.M.A. 1971)).

¹⁹ *Moreno*, 63 M.J. at 142. The court further announced a similar “presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority’s action.” *Id.*

²⁰ *Id.*

²¹ 407 U.S. 514 (1972).

²² *Id.* at 530.

²³ *Moreno*, 63 M.J. 136.

²⁴ *Id.* at 138–39.

²⁵ 63 M.J. 353, 362 (2006).

If, after completing a *Barker* four factor analysis, a reviewing authority finds a post-trial denial of due process rights, that authority may grant relief as it finds appropriate.²⁶ In *Moreno*, the CAAF suggested a non-exclusive list of relief that could include, but was not, limited to: (1) day-for-day reduction in confinement or confinement credit; (2) reduction of forfeitures; (3) set aside of portions of the approved sentence including punitive discharge; (4) set aside of the entire sentence, leaving a sentence of no punishment; (5) limitation upon the sentence that may be approved by the convening authority following a rehearing; and (6) dismissal of the charges and specifications with or without prejudice.²⁷

As a result of prior case law and *Moreno*, service courts have two distinct responsibilities when reviewing allegations of post-trial and appellate delay. First, service courts may grant relief to appellants for excessive post-trial delay under their broad authority to determine sentence appropriateness under Article 66(c), UCMJ.²⁸ Second, as a matter of law, both the service courts and the CAAF may review claims of untimely review and appeal under the Due Process Clause of the Constitution using the principles announced in *Moreno*.²⁹

The 2006–2007 Court Term

During the past court term, the CAAF published eight opinions analyzing post-trial delay in cases tried after the implementation of the *Moreno* timelines.³⁰ Of those eight decisions, three resulted in the CAAF granting relief directly to the appellant³¹ and two resulted in the CAAF returning the case to the service court for favorable action.³² Part one of this article will examine four of those cases for clues as to how the *Moreno* decision is being interpreted by CAAF and what that interpretation means to military justice practitioners. As will be seen, the worst fears imagined by government post-trial practitioners in the summer of 2006 do not appear to be coming to fruition. *Moreno* is not being interpreted in a way that grants wholesale relief to appellants whose cases have taken longer to process than the timelines set out in the *Moreno* decision. Instead, the CAAF decisions in the last court term appear to begin to provide a nuanced and descriptive methodology for understanding how the CAAF will decide post-trial delay cases in the future.

United States v. Dearing³³

An Example of Unreasonable Post-Trial Delay Analysis

A military panel convicted Operations Specialist Seaman (OSS) Brian Dearing, contrary to his pleas, of one specification of unpremeditated murder, two specifications of aggravated assault, and one specification of obstruction of justice.³⁴ The panel adjudged, and the convening authority approved, a sentence of twenty-five years confinement, reduction to E-1, total forfeiture of all pay and allowances, and a dishonorable discharge.³⁵ The CAAF reviewed OSS Dearing's case after a 1794

²⁶ *Moreno*, 63 M.J. at 143.

²⁷ *Id.*

²⁸ UCMJ Article 66 deals with review by the Service Courts of Criminal Appeals. Specifically, Article 66(c) states:

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

UCMJ art. 66 (2008); see *United States v. Tardif*, 57 M.J. 219, 225 (2002).

²⁹ U.S. CONST. amend. V; see *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (2003).

³⁰ *United States v. Dearing*, 63 M.J. 478 (2006); *United States v. Harvey*, 64 M.J. 13 (2006); *United States v. Simon*, 64 M.J. 205 (2006); *United States v. Canchola (Canchola II)*, 64 M.J. 245 (2007); *United States v. Young*, 64 M.J. 404 (2007); *United State v. Roberson*, 65 M.J. 43 (2007); *United States v. Pflueger*, 65 M.J. 127 (2007); *United States v. Harrow*, 65 M.J. 190 (2007).

³¹ *Dearing*, 64 M.J. at 489; *Harvey*, 64 M.J. at 25; *Pflueger*, 65 M.J. at 131.

³² *Canchola II*, 64 M.J. at 247; *Simon*, 64 M.J. at 208.

³³ *Dearing*, 63 M.J. 478.

³⁴ *Id.* at 480.

³⁵ *Id.* at 482–83.

day delay between OSS Dearing's murder trial and his first-level appellate review.³⁶ Three hundred and forty days elapsed between the announcement of the sentence in his case and the action by the convening authority.³⁷ Four more years passed before the Navy-Marine Corps Court of Appeals (NMCCA) affirmed OSS Dearing's case.³⁸ The CAAF granted review on an instructional issue at trial and on whether OSS Dearing was provided timely post-trial and appellate review.³⁹

Length of Delay

In the first part of the opinion, the CAAF reviewed the military judge's instruction to the military panel with regard to an aggressor's right to exercise self-defense in an escalation of force situation and determined that he erred and that the error was not harmless beyond a reasonable doubt.⁴⁰ After setting aside OSS Dearing's convictions for murder and aggravated assault, the court took up the post-trial delay issue.⁴¹ Finding the first *Barker* factor "heavily" in favor of OSS Dearing, the court quickly determined that a delay of "almost five years for a first-level appellate review by a service court of criminal appeals is facially unreasonable and clearly excessive and inordinate."⁴²

Reason for Delay

Examining the reasons for delay in the record of trial, the court noted that the record was "neither unusually long or complex, and there is no reasonable explanation for why it took the convening authority over ten months to take action."⁴³ While the CAAF acknowledged that the twenty-one defense motions for enlargement (constituting two years of delay) that the service court granted were a "significant" reason for delay, the CAAF still held that "the Government has the ultimate responsibility for the staffing and administrative management of the appellate review process for cases pending before lower court."⁴⁴ Finally, the court concluded that the government had not presented legitimate reasons or exceptional circumstances for the excessive post-trial delay and that the second *Barker* factor weighed heavily in favor of OSS Dearing.⁴⁵

Assertion of the Right to Timely Review and Appeal

While initially saying that they would normally weigh OSS Dearing's failure to raise any complaint about his post-trial delay to the service court against him, the CAAF went on to say that the facts of OSS Dearing's case required further analysis.⁴⁶ Noting that in a communication with his defense counsel, OSS Dearing complained that his case had sat "idle for almost (1) one year" and that he had filed a congressional complaint alleging that his appellate defense counsel had "neglected to show any interest at all in helping me" the court concluded that the third *Barker* factor also weighed heavily in his favor.⁴⁷

Prejudice

Examining prejudice in OSS Dearing's case, the CAAF first turned its attention to the lack of "institutional vigilance" that led the defense to request twenty-one defense enlargements. After granting the twenty-first enlargement, the CAAF

³⁶ *Id.* at 485.

³⁷ *Id.* at 486.

³⁸ *Id.*

³⁹ *Id.* at 479.

⁴⁰ *Id.* at 484–85.

⁴¹ *Id.* at 485.

⁴² *Id.* at 486.

⁴³ *Id.*

⁴⁴ *Id.* The court concluded by saying, "we decline to hold Appellant responsible for the lack of 'institutional vigilance' that should have been exercised in this case. *Id.* (quoting *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 39–40).

⁴⁵ *Id.*

⁴⁶ *Id.* at 487.

⁴⁷ *Id.*

noted that the service court notified OSS Dearing that it would decide the case without a brief if one was not filed by a deadline set by the court.⁴⁸ In response, “the detailed military appellate counsel merely submitted a *Grosetefon* submission.”⁴⁹ Finally, apparently out of desperation, OSS Dearing hired a civilian appellate counsel who managed to file a substantive brief in OSS Dearing’s case.⁵⁰ Reviewing these facts, the CAAF concluded that the lack of institutional vigilance “effectively denied Appellant his statutory right to the free and timely professional assistance of detailed military appellate defense counsel.”⁵¹

Conclusion

In the end, the CAAF held that all of the *Barker* factors weighed heavily in favor of the accused and that prejudice, in particular, required a finding that the error arising from the post-trial delay was not harmless beyond a reasonable doubt.⁵² In deciding in favor of OSS Dearing, the court pointed to two forms of actual prejudice. First, OSS Dearing “endured oppressive incarceration because he has been denied a timely review of his meritorious claim of legal error for over six years while he was incarcerated.”⁵³ Second, lack of institutional vigilance by the government resulted in OSS Dearing being denied his statutory right to free and timely professional assistance of his appeals by a military appellate defense counsel.⁵⁴

Relief

Reviewing the broad relief contemplated in the *Moreno* decision, the CAAF declined to order dismissal of the murder and aggravated assault charges with prejudice because OSS Dearing had not made any showing of prejudice to his ability to defend against those at a rehearing.⁵⁵ The CAAF then reflected upon the fact that since a rehearing had been authorized, there was no sentence relief the court could immediately provide OSS Dearing.⁵⁶ Crafting a flexible form of relief to apply to the authorized rehearing, the court ordered that: (1) should a rehearing result in confinement, the convening authority must direct that OSS Dearing be credited with 365 days of confinement served; or (2) if the adjudged sentence at the rehearing does not include confinement, the convening authority will not approve a punitive discharge.⁵⁷

United States v. Harvey⁵⁸

Relief Without Prejudice

The CAAF case of *United States v. Harvey*, like *Dearing*, is another case where the appellant received relief for both a substantive error in the trial as well as additional relief for unreasonable post-trial delay.⁵⁹ A military panel convicted Lance Corporal (LCpl) Jemima Harvey on charges of conspiracy, false official statement, communication of a threat, and a variety of wrongful possession and use of controlled substances.⁶⁰ Lance Corporal Harvey was subsequently sentenced to

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 488.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Earlier in the opinion, however, the court that “[c]onsistent with *Moreno*, Appellant may in any later proceeding demonstrate prejudice arising from post-trial delay.” *Id.*

⁵⁶ *Id.* at 489.

⁵⁷ *Id.*

⁵⁸ 64 M.J. 13 (2006).

⁵⁹ *Id.*

⁶⁰ *Id.* at 17.

confinement for sixty-days, reduction to E-1, partial forfeitures, and a bad-conduct discharge.⁶¹ On appeal, CAAF focused on two issues: (1) unlawful command influence, and (2) denial of speedy review.⁶²

Deciding the unlawful command influence issue first, the CAAF found in favor of LCpl Harvey and set aside the findings and sentence.⁶³ The court then examined the 2031-day delay between announcement of sentence and the completion LCpl Harvey's first-level appellate review.⁶⁴ The court wasted little time finding that the first three *Barker* factors weighed in favor of the appellant.⁶⁵ Turning to the fourth factor of prejudice, the court looked immediately to the success of LCpl Harvey's underlying appeal on the substantive issue of unlawful command influence.⁶⁶ The court acknowledged that when an appellant's appeal is meritorious, "she may have served oppressive incarceration during the appeal period."⁶⁷ When looking at the facts of the case, however, the CAAF concluded that since LCpl Harvey was only sentenced to sixty days of confinement and had been released even before the convening authority's action, the post-trial delay did not result in any prolonged incarceration.⁶⁸

The CAAF then examined the other sub-factors of prejudice and determined that none of these factors weighed in favor of any prejudice to LCpl Harvey as a result of post-trial delay.⁶⁹ Despite not finding any prejudice in the case, the CAAF recalled that the *Barker* decision permits relief even in the absence of prejudice when "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."⁷⁰ Ultimately, the CAAF found that the unexplained and unreasonably lengthy delay weighed in favor of finding that LCpl Harvey's due process right to a speedy review and appeal was denied notwithstanding her inability to establish specific prejudice under the fourth factor.⁷¹ Turning to the issue of relief, the CAAF decreed that in the case of a rehearing resulting in a conviction and sentence, the convening authority could not approve any sentence other than a punitive discharge.⁷²

United States v. Simon⁷³

Never Forget to Mail the Record of Trial

In the case of *United States v. Simon*, CAAF reviewed a case in which there was an 847-day delay between the announcement of the appellant's sentence and the docketing at the service court.⁷⁴ Of the 847 days, 275 days elapsed between the court-martial and the initial action by the convening authority and another 572 days passed before the service court received the record of trial and docketed the case for review.⁷⁵ Not surprisingly, the CAAF opinion took direct aim at the 572-day delay in mailing the record of trial to service court as "the most glaring deficiency in the post-trial processing of this case."⁷⁶ The court had little sympathy for the delay, noting that "[t]ransmission of the record of trial from the field to the court is a ministerial act, routinely accomplished in a brief period of time in the absence of special circumstances."⁷⁷

⁶¹ *Id.* at 16 n.4.

⁶² *Id.* at 14.

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 24. In this case, 370 days passed from announcement of sentence to convening authority action. *Id.* at 23 n.46. Docketing at the service court required an additional 195 days and the service court required 555 days to decide the case once the government filed its response to the appellant's brief. *Id.*

⁶⁵ *Id.* at 23–24.

⁶⁶ *Id.* at 24.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 24–25.

⁷⁰ *Id.* (quoting *United States v. Toohey*, 63 M.J. 353, 362 (2006)).

⁷¹ *Id.*

⁷² *Id.* at 25.

⁷³ 64 M.J. 205 (2006).

⁷⁴ *Id.* at 206.

⁷⁵ *Id.*

⁷⁶ *Id.* at 207.

⁷⁷ *Id.*

Finding no special circumstances in the appellant's case, the CAAF returned the record of trial to the NMCCA to conduct a new review under Article 66(c), UCMJ.⁷⁸ The court directed that the NMCCA review consider and expressly address whether the appellant should be entitled to relief for post-trial delays as a matter of sentence appropriateness under the Due Process Clause of the Constitution or as a matter of sentence appropriateness under Article 66(c), UCMJ.⁷⁹

United States v. Canchola⁸⁰

Excludable Delay for Good Cause Shown? Absolutely Not!

Unlike the last three cases, the case of *United States v. Canchola* is not notable for the relief granted the appellant. In fact, the CAAF agreed with the NMCCA's determination that the appellant was not entitled to relief for the 783 days that elapsed before the convening authority acted upon his fifty-nine-page record of trial or the total 1263 days that passed between announcement of sentence and the decision of the NMCCA.⁸¹ What is notable about the *Canchola* is CAAF's assessment, and rejection, of the analysis that led to the NMCCA's decision.

In the NMCCA's decision, the court attempted to carve out a doctrine of excusable delay similar to the provisions of RCM 707(c).⁸² Reviewing the appellant's allegation of unreasonable post-trial delay using the *Barker* factors, the NMCCA attempted to graft the concept of excusable delay onto the second *Barker* factor of reasons for delay.⁸³ In response to the SJA's assertion in his post-trial recommendation that the delays were caused by manpower shortages caused by his office's support of ongoing operations in Iraq and Afghanistan, the NMCCA noted that:

We believe that such consideration is demanded by the very nature of deployable fighting forces, especially when those forces are expected to answer the call to arms under austere budget and manpower constraints that are a reality in our nation today. *There must be recognition in the post-trial arena of the concept of "excludable delay" for good cause shown, just as it is recognizable in the pretrial arena.*⁸⁴

While agreeing that the "high demands placed upon military personnel in supporting the national interests of the United States, particularly in combat or hostile environments" should be considered in assessing post-trial delays under the *Barker* analysis, the CAAF refused to permit an "exclusion" of delay and only recommended that such delays be thoroughly documented in the record of trial.⁸⁵ The court cautioned that "general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government."⁸⁶ Looking at the case at hand, the CAAF concluded that the SJA's proffered explanation was "too general to demonstrate that the 'unforeseeable events' had a reasonably direct impact on the timeliness of post-trial processing."⁸⁷ Despite their rejection of the NMCCA's "excludable delay" construct, the court agreed that after balancing the *Barker* factors in a case where the accused had demonstrated no prejudice, the appellant was not denied his due process right to timely post-trial review and speedy appeal.⁸⁸

⁷⁸ *Id.*; UCMJ art. 66(c) (2008).

⁷⁹ *Simon*, 64 M.J. at 208.

⁸⁰ *Canchola II*, 64 M.J. 245 (2007).

⁸¹ *Id.* at 246–47.

⁸² 2005 MCM, *supra* note 8, R.C.M. 707(c).

⁸³ *Canchola II*, 64 M.J. at 247.

⁸⁴ *United States v. Canchola (Canchola I)*, 63 M.J. 649, 651 (N-M. Ct. Crim. App. 2006) (emphasis added).

⁸⁵ *Canchola II*, 64 M.J. at 247.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Trends in Post-Trial and Appellate Delay Litigation

While the meaning of the *Moreno* decision continues to reveal itself through the CAAF decisions of the last term, a few trends are apparent. First, the biggest key for an appellant to obtain meaningful relief for post-trial delay is by prevailing on another substantive issue during his appeal. Not surprisingly, if the CAAF finds that the appellant's rights were substantially impaired at trial and also find that he was forced to wait an unreasonable period to obtain appellate review, the appellant is very likely to receive some form of sentence relief. This is particularly true if the appellant has been continuously confined during the review period.

Second, while the third *Barker* factor looks to the appellant's assertion of the right to timely review and appeal, the CAAF really doesn't hold it against an appellant if he fails to make such an assertion. In a footnote to the *Harvey* opinion, the CAAF referred back to an earlier opinion in which they had found that the "weight against [the appellant] [for failing to assert his right to timely appeal] is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay."⁸⁹ Despite the slight weight given to this factor by the CAAF, trial and appellate defense counsel would still be prudent to object early and often if the government violates the *Moreno* timelines.

The third trend that can be detected is that delays, particularly prior to action by the convening authority, must be thoroughly documented and explained in the record of trial if the government appellate division is going to defend against claims of unreasonable post-trial delay. In *Canchola*, the CAAF not only rejected the NMCCA's attempt to create an RCM 707-like "excludable delay" construct to excuse post-trial delays, but also dismissed the SJAs generalized explanation for the delay.⁹⁰ While the court indicated that it will give due consideration to the demanding job of executing military justice in a wartime environment, it appears clear that the only explanation that will withstand CAAF's scrutiny will explicitly explain the delay in a detailed fashion.⁹¹ Generalized explanations or talismanic incantations of such keywords as "manpower shortages," the "Global War on Terror," or "Operation Iraq/Enduring Freedom" in the SJAs post-trial recommendation or addendum will not satisfactorily explain the delay.

The SJA Recommendation and Action by the Convening Authority

United States v. Bonner⁹²

To Reassess or Not to Reassess, that Is the Question

Sergeant (SGT) Bonner was convicted, contrary to his pleas, of rape, sodomy, and adultery.⁹³ The panel sentenced SGT Bonner to a bad-conduct discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to E-1.⁹⁴ In his recommendation to the convening authority under RCM 1106, the SJA recommended the convening authority set aside and dismiss with prejudice the findings of guilty for sodomy.⁹⁵ The convening authority, in accord with the SJA's recommendation, disapproved the findings of guilty to the sodomy charge and dismissed the charge and its specification with

⁸⁹ United States v. Harvey, 64 M.J. 13, 23 n.53 (2006) (quoting, United States v. Moreno, 63 M.J. 129, 138 (2006)).

⁹⁰ *Canchola II*, 64 M.J. at 247. In the addendum to his post-trial recommendation, the staff judge advocate explained the 783-day delay to action by saying that:

Due to a number of unforeseen events the post-trial review process in this case has been unusually lengthy. Multiple deployments by the SJA and support judge advocates, as well as many of the Convening Authorities, in support of Operation Enduring Freedom and Operation Iraqi Freedom, and its many follow-on missions, have caused severe manpower issues that have affected the review process.

Id. at 246.

⁹¹ *Id.*

⁹² United States v. Bonner, 64 M.J. 638 (Army Ct. Crim. App. 2007).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 639.

prejudice.⁹⁶ The convening authority then approved the remaining findings of guilty, reduced the adjudged confinement by two months, and approved the remainder of the adjudged sentence.⁹⁷

On appeal, SGT Bonner argued that the SJA failed to advise the convening authority properly on sentence reassessment after dismissal of a portion of the findings of guilty.⁹⁸ Denying SGT Bonner the relief he sought, ACCA described how sentence reassessment “in light of a legal error and a grant of clemency are distinctly different acts; therefore, the advice required for sentence reassessment in light of legal error is not required in conjunction with an act of clemency.”⁹⁹

Reviewing the requirements of RCM 1107(d)(2) in light of the applicable case law, ACCA reminded SJAs that “[w]hen a convening authority disapproves a finding[of guilty] based on *legal* error, the SJA must provide advice on the responsibilities to reassess the sentence in light of the error and make a determination of sentence appropriateness.”¹⁰⁰ This advice should include instruction to the convening authority that he has two separate and distinct responsibilities: “first, to ‘cur[e] any effect that the error may have had on the sentencing authority,’ and second, to ‘determin[e] anew the appropriateness of the adjudged sentence.’”¹⁰¹ Having said that, the court went on to say that “[w]here there is no error, however, there is no obligation on the SJA to advise the convening authority on corrective action as to sentence.”¹⁰²

Applying the law to the facts in SGT Bonner’s case, the court refused to read any legal error into the case based upon the SJA’s recommendation to the convening authority to set aside the findings of guilty to sodomy.¹⁰³ The court noted that the “SJA gave no reason for his recommendation, and we will not speculate as to the basis.”¹⁰⁴ The court also observed that the defense did not complain of any legal error in their post-trial submissions.¹⁰⁵ Finally, the court concluded that since the convening authority’s disapproval of SGT Bonner’s sodomy conviction was an act of clemency in itself, no further advice was required of the SJA and no further sentence reassessment was required by the convening authority.¹⁰⁶

United States v. Wilson¹⁰⁷

Action Language: Say What You Mean, and Mean What You Say

A panel of members at a general court-martial convicted Hospitalman Wilson, contrary to his pleas, of rape, assault, adultery, and unlawful entry into a dwelling.¹⁰⁸ The panel sentenced Hospitalman Wilson to confinement for eight years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.¹⁰⁹ When the convening authority took action, his action stated, in relevant part, as follows:

In the case of Hospitalman Sean A. Wilson, U.S. Navy, . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.¹¹⁰

⁹⁶ *Id.* at 638.

⁹⁷ *Id.* In his action, the convening authority also waived automatic forfeitures for six months.

⁹⁸ *Id.*

⁹⁹ *Id.* at 639.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 640 (citations omitted). *See generally* United States v. Sales, 22 M.J. 305, 307–08 (C.M.A. 1988) (“[W]hen prejudicial error has occurred at trial, not only must the [sentence assessment authority] assure that the sentence is appropriate in relation to the affirmed findings of guilty, but it must also assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed.”).

¹⁰² *Id.*

¹⁰³ *Id.* at 639.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 641.

¹⁰⁷ United States v. Wilson, 65 M.J. 140 (2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 140–41.

In an unpublished opinion, the NMCCA recognized that the sentence to confinement had been reduced to three years and three months and affirmed the findings and sentence “as approved by the convening authority.”¹¹¹ The service court did not address the language concerning the dishonorable discharge.¹¹² On appeal to CAAF, Hospitalman Wilson challenged the NMCCA’s finding that the convening authority had approved the adjudged dishonorable discharge.¹¹³

The court’s started its analysis of Wilson’s challenge by pointing out the fact that “the convening authority must exercise care in drafting the action.”¹¹⁴ Evaluating the convening authority’s action in light of RCM 1107(f)(4),¹¹⁵ the CAAF determined that the first sentence of the convening authority’s action explicitly approved three years and three months of confinement.¹¹⁶ The court then stated that the second sentence approved the “remainder of the sentence, *with the exception of the Dishonorable Discharge.*”¹¹⁷ The CAAF then stated that, “[u]nder the plain meaning of this language, the dishonorable discharge was not approved.”¹¹⁸

In the 2006 case of *United States v. Politte*,¹¹⁹ the CAAF reviewed another action whose language was questioned by the appellant. In *Politte*, the convening authority took the following action:

In the case of Hospital Corpsman Second Class Michael J. Politte, U.S. Navy, . . . *the sentence is approved except for that part of the sentence extending to a bad conduct discharge.*¹²⁰

In *Politte*’s action, the convening authority approved the sentence, but failed to order any portion of the sentence executed. Based upon this ambiguity, the CAAF determined that the convening authority’s action was ambiguous, looked at the surrounding documentation (i.e., the pretrial agreement, the SJA’s recommendation, the defense submission, and the fact that the case was forwarded to the service court for review pursuant to Article 66), and concluded that the convening authority had meant to approve a punitive discharge.¹²¹ The case was then returned to the Judge Advocate General of the Navy for submission to the convening authority for clarification.¹²²

In contrast to *Politte*, the CAAF found no ambiguity in the action the convening authority took in *Wilson*.¹²³ When the convening authority in *Wilson* stated that, “[t]he remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed,”¹²⁴ the language was plain and complete on its face. A sentence was approved and ordered executed. Because there was no ambiguity, the court apparently found no need to look for an ambiguity by looking at the surrounding documentation in the *Wilson* record of trial.

The *Wilson* case represents a cautionary tale for military justice managers. While the CAAF can caution convening authorities about “drafting” their actions, the court doubtlessly knew it was really directing its caution toward post-trial paralegal noncommissioned officers and Judge Advocates. The error in this case arose because the drafter of the appellant’s action did not follow the form language provided in Appendix 16 of the *Manual for Courts-Martial (MCM)*.¹²⁵ Specifically, the individual who prepared the action put the word “approved” after, rather than before, the phrase “with the exception of

¹¹¹ *United States v. Wilson*, No. NCMMA 20010205, slip op. at 7 (N-M. Ct. Crim. App. Feb. 7, 2006).

¹¹² *Id.*

¹¹³ *Wilson*, 65 M.J. at 141.

¹¹⁴ *Id.*

¹¹⁵ 2005 MCM, *supra* note 8, R.C.M. 1107(f)(4). Rule for Courts-Martial 1107(f)(4) states: “(A) *In general.* The action shall state whether the sentence adjudged by the lower court is approved. If only part of the sentence is approved, the action shall state which parts are approved.” *Id.*

¹¹⁶ *Wilson*, 65 M.J. at 142 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 63 M.J. 24 (2006).

¹²⁰ *Id.* at 25 (emphasis in original).

¹²¹ *Id.* at 26.

¹²² *Id.* at 27.

¹²³ *Wilson*, 65 M.J. at 142.

¹²⁴ *Id.*

¹²⁵ MCM, *supra* note 5, App. 16.

the dishonorable discharge.”¹²⁶ Unfortunately, this small error resulted in the convening authority disapproving a dishonorable discharge he probably intended to approve.¹²⁷ Had the individual who prepared Hospitalman Wilson’s action accurately followed the sample language contained in Appendix 16 of the *MCM*, a convicted rapist would have received the dishonorable discharge he was adjudged and by all accounts, save the action itself, deserved.¹²⁸

United States v. Moralez¹²⁹

Process, Process, Process, You’ve Got to Have a Process

In *United States v. Moralez*, the ACCA reconsidered its earlier affirming of the findings and sentence to “highlight a common and recurring problem in the Army: misinterpretation of the rules governing deferment and waiver of forfeitures.”¹³⁰ While the court again affirmed the findings and sentence, it also declared that “all parties in the court-martial process must understand the deferment and waiver concepts and how to apply them in different factual settings.”¹³¹ The ACCA went on to state that it wrote a new opinion “to reinforce the military justice practitioners’ professional responsibility to recognize and *properly* apply congressionally-created deferment and waiver rules on a case-by-case basis.”¹³²

A military judge sitting as a general court-martial convicted First Lieutenant (1LT) Javier O. Moralez, in accordance with his pleas, of failing to obey a lawful general regulation, adultery on divers occasions, fraternization, and fraternization on divers occasions.¹³³ First Lieutenant Moralez was sentenced to a dismissal, confinement for six months, and forfeiture of all pay and allowances.¹³⁴ Pursuant to a pretrial agreement, the convening authority approved confinement for only 120 days, but otherwise approved the adjudged sentence.¹³⁵

On 21 February 2006, appellant’s trial defense counsel requested a deferment and waiver of forfeitures asking the convening authority to: “(1) defer adjudged and automatic forfeitures until initial action; and (2) at action, disapprove adjudged forfeitures and waive automatic forfeitures until appellant’s release from confinement.”¹³⁶ On 24 February 2006, the SJA advised the convening authority to only act on the first part of the defense’s request and defer the appellant’s adjudged and automatic forfeitures.¹³⁷ The SJA addressed the second part of the defense request by advising the convening authority that “[t]he request to disapprove [adjudged] and waive [automatic] forfeitures is more appropriately addressed at the time of [a]ction.”¹³⁸

On 3 March 2006, the convening authority responded to the appellant’s 21 February request. Following his SJA’s advice, the convening authority deferred the appellant’s adjudged and automatic forfeitures until action, effective 23 February 2006, and further stated that “I will address the request to waive the adjudged [sic] and automatic forfeitures, for the period of

¹²⁶ *Wilson*, 65 M.J. at 142.

¹²⁷ *Id.*

¹²⁸ To approve the desired reduction in confinement and dishonorable discharge, the convening authority’s action should have read, in relevant part:

In the case of Hospitalman Sean A. Wilson, . . . only so much of the sentence as provides for reduction to Private E1, forfeiture of all pay and allowances, confinement for 3 years and 3 months, and a Dishonorable Discharge **is approved** and, except for that part of the sentence extending to a Dishonorable Discharge, will be executed.

See generally 2005 MCM, *supra* note 8, Forms for Action, at A16-6 (emphasis added).

¹²⁹ 65 M.J. 665 (2007).

¹³⁰ *Id.* at 666 (citing UCMJ arts. 57(a)(2), 58(a), (b) (2008)).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 665.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 666.

¹³⁷ *Id.*

¹³⁸ *Id.*

[appellant's] confinement, at the time of [a]ction."¹³⁹ Unfortunately, the SJA did not revisit the defense request for disapproval of adjudged forfeitures and waiver of automatic forfeitures in his post-trial SJA recommendation to the convening authority.¹⁴⁰ Complicating matters further, the appellant's defense counsel did not revisit the request in his clemency submission and the convening authority did not explicitly refer to the request when, in his 9 June 2006 initial action, he approved the appellant's adjudged sentence (including the forfeiture of all pay and allowances).¹⁴¹

In its discussion, the ACCA determined that the SJA rendered incomplete advice to the convening authority by advising him that the disapproval and waiver request was "more appropriately addressed at the time of [a]ction."¹⁴² The court concluded that the SJA should have "further advised that although adjudged forfeitures can be disapproved only at action, automatic forfeitures can be waived as soon as they become effective."¹⁴³ The court pointed out that the convening authority, although never informed of this by the SJA, had a number of options available to him with regard to the appellant's 21 February request:

(1) first deferring adjudged forfeitures—thus creating an entitlement to pay and allowances subject to automatic forfeiture; and then (2) waiving automatic forfeitures for the period of appellant's confinement, not to exceed six months, "when they bec[a]me effective by operation of *Article 57(a)*," i.e., fourteen days after the military judge imposed the sentence in this case.¹⁴⁴

As stated earlier, after reviewing the rules governing deferral and waiver of forfeitures the ACCA again affirmed the findings and sentence in appellant's case.¹⁴⁵ In large part, the court's failure to grant any relief was a result of the convening authority's 3 March 2006 approval of a deferral of adjudged and automatic forfeitures until action and the likelihood that the accused was already out of confinement (and thus not in a pay status and unable to benefit from any further disapproval or waiver of adjudged or automatic forfeitures) by the time the convening authority took initial action on 9 June 2006. Despite the affirmation of findings and sentence, *Moralez* holds several lessons for both government and defense representatives.

The first lesson that can be drawn from *Moralez* is that the military justice office must have a process that ensures that the SJA provides complete and accurate advice to the convening authority covering all of the defense's deferment and waiver requests, whenever made. All the loose ends must be tied up prior to the convening authority taking initial action. If, as in the case at hand, the defense submits a request before action that the convening authority take certain steps before action (e.g., defer both adjudged and automatic forfeitures) and other steps at action (e.g., disapproval of adjudged and waiver of automatic for six months), there is nothing wrong with the SJA recommending that the convening authority wait until action to take the steps requested by the defense. The only catch to this advice is that the SJA must be able to prove that he has informed the convening authority of the defense's outstanding request, and his options in response to that request, in either his post-trial recommendation or his addendum.

The second lesson is that military justice practitioners themselves must understand the rules governing deferral and waiver of forfeitures and how those rules fit the particular case for which they are preparing the SJA's advice to the convening authority. Perhaps the most illuminating case ever published in the area of deferral and waiver of forfeitures is the 2002 case of *United States v. Emminizer*.¹⁴⁶ Every military justice practitioner should be familiar with *Emminizer* and have a copy available for reference when preparing the SJA advice to the convening authority on deferral and waiver of forfeiture requests.

¹³⁹ *Id.* The convening authority's response incorrectly stated that the defense had requested waiver of the adjudged forfeiture at action. Pursuant to RCM 1107(d), adjudged forfeitures can only be disapproved at the time of action.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (citations omitted).

¹⁴⁴ *Id.* at 666–67.

¹⁴⁵ *Id.* at 667.

¹⁴⁶ 56 M.J. 441 (2002).

Conclusion

As has been seen in prior court terms, post-trial processing continues to be an area of concern and activity for the appellate courts. Attention to detail and the tying up of all the loose ends in the post-trial process is the order of the day, as it always is in the post-trial world. With regard to post-trial delay, the full meaning of the 2006 *Moreno* decision continues to be defined as more post-*Moreno* trial cases make their way through appellate review. While the 2008 term of court may hold some surprises, it does not appear that the prevailing interpretation of the *Moreno* decision will result in arbitrary or unreasoned grants of relief to otherwise undeserving appellants.

Professional Responsibility on the Edge

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*If you're not living on the edge then you're taking up too much room.*¹

Professional responsibility on the edge? It may strike you that approaching professional responsibility by studying the edge or boundaries of the rules is a problem in itself. It just seems right that in trial work in general and professional responsibility practice in particular a practitioner should be concerned with model conduct far from the edge or limits of what he can get away with. Not so fast—Professional Responsibility does have some straightforward no-no's. Lying,² vouching,³ and violating the rules of court⁴ are always proscribed, and it is generally forbidden to serve two masters.⁵

In a greater sense, however, our profession⁶ requires trade-offs and compromises between competing values.⁷ While counsel may never lie, a defense counsel may be required to use truthful means to paint a false picture.⁸ And while we've come a long way since the days where trial by ambush was the norm,⁹ there is still an expectation that advocates can and will seize on ambiguities in language or interpretation to put their client in his best light. This article will plunge into the gray waters at the edge of what's permissible in professional responsibility.

¹ Anonymous, although it is frequently attributed to motorcycle daredevil Evel Knievel or Lieutenant Colonel Nick Lancaster, U.S. Army.

² U.S. DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rules 3.3, 3.4, 4.1 (1 May 1992) [hereinafter AR 27-26] (proscribing outright lies and the destruction of evidence).

³ *Id.* R. 3.4; ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-5.8 (3d ed. 1993) (proscribing an attorney who is an advocate in a trial from expressing a personal belief in the truth or falsity of any evidence, witness or in the guilt or innocence of the accused).

⁴ AR 27-26, *supra* note 2, R. 3.4 (requiring obedience to the rules of evidence, discovery, and orders of the court).

⁵ *Id.* R. 1.7; *see also* Matthew 6:24.

⁶ A profession is "[a] vocation or occupation requiring special, usually advanced, education, knowledge, and skill." BLACK'S LAW DICTIONARY (6th ed. 1990). Originally, this term applied only to the fields of theology, law, and medicine but is now also accepted in the fields of science and learning that take more mental and intellectual skill. *Id.*

⁷ For instance, an attorney must balance the various duties of loyalty to a single client ("zealous representation") with justice and fair play as public officers and officers of the court.

⁸ The Supreme Court opined:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. . . . To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. . . . He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 257–58 (1967).

⁹ Consider Professor Wigmore's view of discovery sixty eight years ago:

To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Thus the common law permitted a litigant to reserve his evidential resources (tactics, documents, witnesses) until the final moment, marshaling them at the trial before his surprised and dismayed antagonist. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.

Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002) (quoting 6 WIGMORE, DISCOVERY § 1845, at 490 (3d ed. 1940)).

Expert Testimony: A Lie Detector by a Different Name?

*Too often we . . . enjoy the comfort of opinion without the discomfort of thought.*¹⁰

Assume you are prosecuting a difficult case involving a child victim. You know from opening statements that the defense intends to allege that the child victim's story is fabricated as a result of ideas implanted by forensic interviews. In discussions and preparation for trial your expert witness has told you a number of empirical reasons why he believes the victim is truthful. Is there any way to get that in?

In *United States v. Brooks*,¹¹ Staff Sergeant (SSG) Stacey S. Brooks was convicted at a general court-martial of two specifications of indecent liberties with a female under the age of sixteen, in violation of Article 134, Uniform Code of Military Justice (UCMJ).¹² The victim was a five-year-old girl who SSG Brooks's wife babysat from time to time.¹³ Staff Sergeant Brooks was sentenced to a dishonorable discharge, eighteen months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.¹⁴ The convening authority reduced his confinement to fourteen months.¹⁵ Staff Sergeant Brooks appealed his case to the United States Air Force Court of Criminal Appeals (AFCCA), which affirmed the findings and sentence as approved by the convening authority.¹⁶

At issue in the *Brooks* case was the testimony of Dr. Marvin W. Acklin, Jr.¹⁷ Dr. Acklin was qualified as an expert in the field of clinical child psychology by the prosecution.¹⁸ On direct examination Dr. Acklin testified generally about the cognitive abilities of children, specifically their ability to differentiate fact from fiction.¹⁹ Dr. Acklin further testified about suggestibility, the prospect that interaction with a person, not the accused, could have influenced the child's testimony or memory about events.²⁰ He testified that he found the alleged victim in this case to be a normal little girl who could distinguish truth versus lies.²¹

On cross examination the defense solicited testimony that Dr. Acklin did not re-interview the alleged victim because of his concern about suggestibility.²² The defense counsel explored with Dr. Acklin how and why children generally might fabricate stories of sexual abuse.²³ Dr. Acklin agreed that multiple interviews of a child, as what occurred in this case, might have the effect of influencing the child's belief and testimony about what happened.²⁴

When the trial counsel conducted redirect examination he immediately drew an objection for a question regarding what motives, if any, the child would have to lie in the case.²⁵ The objection was overruled and Dr. Acklin testified that false allegations sometimes arise because of misinterpretation of the alleged victim's comments by the interviewer.²⁶ He then suggested that if you take out misinterpretations and allegations made from homes embroiled in divorce litigation the

¹⁰ Brainyquote.com, President John F. Kennedy, http://www.brainyquote.com/quotes/authors/j/john_f_kennedy.html (last visited Apr. 17, 2008).

¹¹ 64 M.J. 325, 326 (2007).

¹² UCMJ art. 134 (2008).

¹³ *Brooks*, 64 M.J. at 326.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; see also *United States v. Brooks*, No. ACM 35420, 2005 CCA LEXIS 277 (A.F. Ct. Crim. App. 2005).

¹⁷ *Brooks*, 64 M.J. at 326.

¹⁸ *Id.* at 327.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

incidence of false allegations were very low.²⁷ He went on to share with the panel that empirical studies in the “business” showed a roughly 2% chance that allegations were fabricated under these circumstances.²⁸ That exchange did not draw an objection from the defense, nor did the military judge issue a curative instruction *sua sponte*.²⁹

At closing argument the military judge read standard instructions on witness credibility and gave a basic instruction that the panel should not interpret Dr. Acklin’s testimony as evidence of any other witness’s credibility.³⁰ The trial counsel argued that he was, among other things, “convinced beyond a reasonable doubt” that the child witness was being truthful.³¹ Staff Sergeant Brooks argued on appeal that counsel’s argument was improper and that the admission of Dr. Acklin’s percentage evidence was impermissible “profile” evidence, whose admission prejudiced his right to a fair trial.³²

Profile Evidence?

Profile evidence is evidence that characteristics of an accused match those of a standard profile of the perpetrator of a crime in evidence.³³ For instance, a trial counsel might elicit expert testimony from a Drug Enforcement Agency official to the effect that: “Drug dealers are generally tall with a full head of hair. The accused is tall and bushy topped, and therefore you may conclude he deals drugs.”³⁴

The court established that the prosecution did not elicit profile evidence. Profile evidence compares characteristics of an accused with a “standard perpetrator.” In this case the prosecution sought to use statistical evidence to bolster the victim’s credibility. In effect the expert testified that “statistically speaking, the victim is telling the truth.” Although this was not profile evidence, which is improper in criminal trials,³⁵ was it otherwise permissible?

²⁷ *Id.*

²⁸ *Id.* The critical exchange in re-direct is as follows:

[TC]: In your experience, in your professional medical experience, how frequency, how frequently, excuse me, do you see cases of false allegations?

[Dr. Acklin]: I believe I testified at the Article 32 Hearing that it’s about a five percent level. That’s considered to be about, interestingly enough, the level of false allegations one encounters in the business and in research. It ranges anywhere from five to twenty percent, depending on the sample that you look at, but it’s generally considered to be, what’s called a low base-rate phenomenon, which is . . . not that infrequent.

Once you take away misinterpretation, then it even drops even further, because then we’re talking about the pure fabricated sex abuse allegation. And, the general sense of that in the divorce business, where they tend to occur at the greatest frequency, is it’s two to five percent.

Id.

²⁹ *Id.*

³⁰ *Id.* at 326. The instruction given by the military judge:

Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim’s account of what occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.

Id. at 327.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 329 (quoting *United States v. Bresnahan*, 62 M.J. 137 (2005)).

Profile evidence is defined as “evidence that presents a ‘characteristic profile’ of an offender, such as a pedophile or child abuser, and then places the accused’s personal characteristics within that profile as proof of guilt.” Generally, the use of any “profile” characteristic as evidence of guilt or innocence is improper at a criminal trial.

Id.

³⁴ Author’s note: The author’s height exceeds the national average height of adult males in the United States and is not currently bald or balding. The author does not wish to imply that tallness or hairy-headedness is in any way indicative of criminal activity.

³⁵ *Brooks*, 64 M.J. at 329.

Military Rule of Evidence 608 governs the limits of what can be done to bolster or attack credibility of a witness.³⁶ A witness's credibility may be bolstered by testimony by someone with an adequate foundation to give an opinion as to the witness's truthfulness or reputation for the same in their community.³⁷ The CAAF has repeatedly rejected the premise that a lay or expert witness could give an opinion as to the credibility of a witness with respect to a specific fact in issue in the case.³⁸

The court articulated three reasons why so called "human lie-detector" testimony is inadmissible.

"First, determination of truthfulness 'exceeds the scope of a witness' expertise, for the expert lacks specialized knowledge . . . to determine if a child-sexual-abuse victim [is] telling the truth'" and therefore cannot "assist the trier of fact" as required under Military Rule of Evidence (M.R.E.) 702 before expert testimony is permissible. Second, such testimony violates the limitations of M.R.E. 608. Third, human lie detector testimony encroaches into the exclusive province of the court members to determine the credibility of witnesses.³⁹

Clearly, human lie detector testimony is impermissible. That is to say, Dr. Acklin could not have taken the stand and said, "In my expert opinion, the little girl's allegations are true." Yet, he did not do that, he simply shared studies known within the scientific community about credibility rates of alleged victims. To answer whether that was permissible they looked at the three reasons for prohibiting lie detector testimony listed above and they looked outside the military.⁴⁰ The Delaware Supreme Court found that an expert's statement that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth,'"⁴¹ was an example of plain error. The court made this finding even though the defense elicited the statement during defense voir dire of the expert.⁴²

In the Delaware court's view this "percentage" testimony exceeded the permissible bounds of expert testimony permitted in child sexual abuse prosecutions.⁴³ A previous Court of Appeals for the Armed Forces (CAAF) case found that an expert may "inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits,"⁴⁴ but that an expert may not give numerical testimony that is the functional equivalent of saying that the victim in a given case is truthful or should be believed.⁴⁵

The CAAF found that Dr. Acklin was quantifying the chance of the alleged child victim's testimony being false as less than 2%.⁴⁶ To admit expert testimony that the odds that a victim's version of events is correct are forty-nine out of fifty impermissibly invaded the province of the fact finder. The CAAF therefore reversed the Air Force court and remanded the case for rehearing.⁴⁷

³⁶ MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 608 (2008) [hereinafter MCM].

³⁷ *Id.*

³⁸ *Brooks*, 64 M.J. at 328; *see also* *United States v. Kasper*, 58 M.J. 314, 315 (2003) ("[A]n expert on the subject of child abuse is not permitted to testify that the alleged victim is or is not telling the truth as to whether the abuse occurred."); *United States v. Birdsall*, 47 M.J. 404, 410 (1998) ("[T]he expert in child abuse may not act as a human lie detector for the court-martial."); *United States v. Cacy*, 43 M.J. 214, 218 (1995) ("We do not allow an expert to opine that a victim is telling the truth . . ."); *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990) ("It is impermissible for an expert to testify about his or her belief that a child is telling the truth regarding an alleged incident of sexual abuse."); *United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988) ("[C]hild-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses."); *United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.").

³⁹ *Brooks*, 64 M.J. at 328 (citations omitted).

⁴⁰ *Id.*

⁴¹ *Powell v. State*, 527 A.2d 276, 278 (Del. 1987).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *United States v. Birdsall*, 47 M.J. 404, 409 (1998) (quoting *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993)).

⁴⁵ *Id.*

⁴⁶ *United States v. Brooks*, 64 M.J. 325, 330 (2007).

⁴⁷ *Id.* at 330.

What can you do? The court allows in a sense “reverse profile evidence.” It is proper to have a witness testify that victims of child sexual abuse exhibit given symptoms.⁴⁸ An expert may describe the patterns of grooming that pedophiles adopt to condition their victims for abuse.⁴⁹ You may be wondering what this has to do with professional responsibility. Improper argument, and failure by the defense to object to improper argument, may constitute prosecutorial misconduct and ineffective assistance of counsel.⁵⁰ Changes in presentation regarding similar information may change useful expert testimony into reversible plain error. It pays to know where the edge of permissible expert pattern testimony is.

Justice Past Due Meets Justice over Done

Let us imagine that you are a defense counsel who is frustrated that Military Rules of Evidence (MRE) 404(b), 413, and 414 permit the introduction of significant uncharged misconduct in your client’s trial.⁵¹ You are concerned, not only about undue prejudice of such misconduct on a panel’s findings, but also its impact on sentencing.⁵²

The prosecutor, on the other hand, used those rules to gleefully admit fifteen year old allegations of uncharged misconduct. The prosecutor rises to address the panel for her closing argument. Her paralegal NCO dims the lights as her co-counsel turns on a PowerPoint slide show. You see the first slide has photos of the alleged victim and the alleged victim from the uncharged misconduct under the heading “Stolen Innocence: Justice Past Due.”⁵³ As your co-counsel rolls his eyes, a voice deep within you stirs. Is this objectionable? Is it ethical?

It is well-settled in American jurisprudence that the criminally accused should be convicted and sentenced based on competent evidence of their guilt of the offenses charged and not on evidence of a general criminal propensity or other

⁴⁸ *Id.* at 328.

⁴⁹ *Id.* (quoting *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990)).

An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. He or she may also “discuss ‘various patterns of consistency in the stories of child sexual abuse victims and compar[e] those patterns with patterns in . . . [the victim’s] story.’”

Id.

⁵⁰ *See, e.g.*, *United States v. Edmond*, 63 M.J. 343 (2006).

⁵¹ The MRE provides, in part, that:

Military Rule of Evidence 404

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Military Rule of Evidence 413, Evidence of Similar Crimes in Sexual Assault Cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused’s commission of one or more offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Military Rule of Evidence 414, *Evidence of Similar crimes in child molestation cases*

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused’s commission of one or more offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

MCM, *supra* note 36, MIL. R. EVID. 404(b), MIL. R. EVID. 413(a), MIL. R. EVID. 414(a).

⁵² Federal Rules of Evidence 413 and 414 are substantially similar to the MRE 413 and 414. The Judicial Conference of the United States noted in response to the proposed federal rules:

The new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person

United States v. Schroder, 65 M.J. 49, 55 (2007) (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995)).

⁵³ *See, e.g., id.* at 52.

evidence of bad character.⁵⁴ Military Rules of Evidence 413 and 414 present a thorny problem for trial practitioners trying to determine the ethical use of uncharged misconduct. Military Rule of Evidence 414(a) clearly provides that evidence of uncharged misconduct may be considered for “any matter to which it is relevant.”⁵⁵ In contrast, as noted above, use of propensity evidence presents a risk that an accused may be convicted and sentenced based on uncharged conduct and not the acts for which he is on trial.⁵⁶

The CAAF confronted this issue last year in *United States v. Schroder*.⁵⁷ In *Schroder*, a prosecutor duly admitted evidence that Chief Master Sergeant Schroder had molested his stepdaughter in 1981 and used uncharged incidents of molestation with Schroder’s other daughter to support the charged offenses of raping his daughter and sexually molesting a twelve-year-old neighbor over a decade later.⁵⁸

The panel was instructed that they could consider similarities in the charged and uncharged misconduct in determining whether the accused was guilty.⁵⁹ The court found the instruction insufficient on the grounds that the military judge did not sufficiently clarify that the introduction of propensity evidence did not relieve the prosecution of its burden to prove every element of every offense beyond a reasonable doubt.⁶⁰

The court then turned to the issue of argument. The prosecution team in their closing argument on the merits, rebuttal argument on the merits, and the pre-sentencing argument featured a slide show depicting the three alleged victims under the heading “Stolen Innocence: Justice Past Due.”⁶¹ The trial counsel made a direct appeal at the end of his rebuttal argument, exhorting the panel to “not forget about the victims”⁶² and went on to list three, while only two were victims of charged

⁵⁴ The government has a constitutional burden to prove every element of every charged offense beyond a reasonable doubt without reliance on propensity evidence. *Id.* at 55.

⁵⁵ MCM, *supra* note 36, MIL. R. EVID. 414(a).

⁵⁶ *Schroder*, 65 M.J. at 56.

⁵⁷ *Id.* at 49.

⁵⁸ *Id.* at 51–52.

⁵⁹ The extent of the military judge’s instructions regarding the use of SJS’s and JPR’s testimony admitted under MRE 414, the proper use of the uncharged misconduct evidence:

Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense. However, you may consider the similarities in the testimony of [SJS] and [JPR] concerning any alleged offensive touching with regard to the charged offense of rape. And you may consider the similarities in the testimony of [SRS], [SJS], and [JPR] concerning any alleged offensive touching with regard to the offense of indecent acts with a child.

Id. at 54.

⁶⁰ The court’s holding regarding the instructions is as follows:

In this case, the military judge’s instructions fell short. The military judge correctly instructed the members that “[t]he burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense.” Nonetheless, the military judge qualified this statement by informing the members that they may “[h]owever . . . consider the similarities in the testimony” of the three alleged victims concerning the alleged rape and indecent acts. On its own, the instruction was susceptible to unconstitutional interpretation: that the members were permitted to conclude that the presence of “similarities” between the charged and uncharged misconduct were, standing alone, sufficient evidence to convict Appellant of the charged offenses.

Id. at 55.

The *Military Judges Benchbook* suggests that where an instruction on propensity evidence is given, the members should also be instructed that:

You may not, however, convict the accused of one offense merely because you believe (he) (she) committed (this) (these) other offense(s) or merely because you believe (he) (she) has a propensity to commit (sexual assault) (child molestation). Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution’s burden of proof to establish the accused’s guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK ch. 7, para. 7-13-1 note 4 (1 July 2003).

⁶¹ *Schroder*, 65 M.J. at 57.

⁶² *Id.*

offenses.⁶³ The assistant trial counsel was less direct in the sentencing argument. He did not name the victims but he exhorted the panel to: “Look at those girls. That is why we are here today. They deserve justice. They have been waiting for years for justice. They scream for justice. Members, make sure your sentence delivers justice to those girls”⁶⁴ In the background as he spoke was the slide presentation of all three girls. The defense counsel did not object. The court found that the argument was clearly error.⁶⁵ While the court declined to reverse the court-martial findings based on the trial counsels’ conduct, the court noted that the argument exceeded an important procedural safeguard of the use of uncharged misconduct when the “[t]rial counsels’ presentation invited members to convict and punish Appellant for his uncharged misconduct, as opposed to using that misconduct to inform their judgments regarding the charged conduct.”⁶⁶ The court reminded the trial counsel that it was improper to demand or even request justice on behalf of the uncharged victim because “as a matter of law, not morality, the court was not convened to render justice to [the uncharged victim].”⁶⁷

Uncharged misconduct can illuminate an accused’s conduct and place it in a context which assists the fact finder. However, counsel must be careful to limit its use in argument to the reasons for which it was admitted. As CAAF noted in *Schroder*, “safeguards could be undermined if trial counsel’s comments were permitted to range outside the realm of legally ‘relevant matters’ and express a sense of outrage and injustice regarding the victims of uncharged misconduct.”⁶⁸ Exceeding those safeguards might feel satisfying in delivering a powerful merits or sentencing argument, but such an argument can imperil your case and if you make a pattern of it, it may imperil your bar license.

Jerry, just remember it’s not a lie if you believe it.⁶⁹

A lawyer who believes his client will lie on the stand is caught between two basic obligations. On the one hand, the duties of confidentiality and loyalty allow the free flow of information vital to effective representation. On the other hand, every lawyer is an officer of the court, who owes the court candor in all their own communications and in those they sponsor as proponent of the evidence.⁷⁰ The comment of Rule 3.3, Army Regulation 27-26, *Professional Responsibility*, addresses counsel who believe that their clients wish to testify falsely.⁷¹ Counsel are first to attempt to dissuade them, but if those attempts fail, they are to seek withdrawal from the case.⁷² In *United States v. Baker*,⁷³ two experienced defense counsel followed that direction and found themselves accused of ineffective assistance of counsel.⁷⁴ One had four years of active duty military service including at least fifteen courts-martial, the other was an activated reservist who had practiced since 1992 including thirty-five federal jury trials and two capital cases.⁷⁵

Staff Sergeant Baker was accused of twelve specifications of various offenses including absence without leave, dereliction of duty, larceny, and willful disobedience.⁷⁶ Staff Sergeant Baker contested all those charges.⁷⁷ Apparently,

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 58.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 57.

⁶⁹ George Costanza from *Seinfeld: The Beard* (NBC television broadcast Feb. 9, 1995).

⁷⁰ *United States v. Baker (Baker II)*, 65 M.J. 691, 697 (Army Ct. Crim. App. 2007).

⁷¹ AR 27-26, *supra* note 2, R. 3.3 cmt. (Candor Toward the Tribunal).

⁷² Rule 3.3, directs counsel as follows:

If the accused has admitted to the lawyer facts which establish guilt and the lawyer’s independent investigation establishes that the admissions are true but the accused insists on exercising the right to testify, the lawyer must advise the client against taking the witness stand to testify falsely. If before trial the accused insists on testifying falsely, the lawyer shall seek to withdraw from representation. See Rule 1.16

Id.

⁷³ *Baker II*, 65 M.J. 691.

⁷⁴ *Id.* at 692.

⁷⁵ *Id.*

⁷⁶ *Id.* at 700.

pretrial discussions between the accused and counsel led counsel to the conclusion that SSG Baker could not truthfully offer testimony rebutting the allegation that he willfully disobeyed an order to go get a haircut, or offer testimony on a type of printer cartridge relevant to a larceny specification.⁷⁸ Counsel and accused apparently further agreed that SSG Baker would not testify at all in part due to his inability to plausibly reconcile certain events.⁷⁹ Mid-trial, SSG Baker changed his mind and informed counsel of his desire to testify.⁸⁰ After presenting two witnesses, four stipulations of expected testimony, and introducing eight exhibits, the defense took a recess to discuss SSG Baker's newfound desire to testify.⁸¹ Following that recess counsel informed the military judge they sought to withdraw from the case.⁸² The judge denied their request and the accused testified in the free narrative form for two hours.⁸³ After which he was subject to a detailed cross examination and questions from the panel and military judge, all without the assistance of counsel.⁸⁴ An officer panel convicted SSG Baker of attempted larceny, absence from his appointed place of duty, and two specifications of willful disobedience.⁸⁵ Staff Sergeant Baker appealed his conviction on the grounds that his counsel's attempted withdrawal and subsequent failure to assist him in testifying constituted a deprivation of his Sixth Amendment right to counsel.⁸⁶ The Army Court of Criminal Appeals (ACCA) affirmed his conviction and sentence, but their decision was set aside by CAAF, who remanded the case for further factfinding.⁸⁷

Ultimately, two *DuBay* hearings were conducted in the case which permitted the Army court to answer the superior court's questions and render a final decision.⁸⁸ The court reviewed the allegation that counsel were ineffective in improperly failing to assist him during his testimony because of their determination that their client would perjure himself.⁸⁹

What Should Counsel Do If They Suspect Perjury?

The CAAF articulated in their holding in *Baker* that a counsel who is concerned that their client may commit perjury should first perform a full investigation of the facts surrounding the questioned testimony.⁹⁰ Second, they should proceed as if it's perjury only if they arrive at a "firm factual basis" to believe that the questioned testimony is perjury.⁹¹ Third, the attorney should discuss his concerns with his client by reviewing the facts and explaining the attorney's basis for concluding that the statements are perjury.⁹² Next, the attorney should explore whether it's possible to structure the testimony in a way that avoids perjury altogether; if not, then the attorney should review with the accused the potential consequences of

⁷⁷ *Id.*

⁷⁸ *Id.* at 695.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 694.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 692.

⁸⁶ *Id.* at 693.

⁸⁷ *Id.*; see also *United States v. Baker (Baker I)*, 58 M.J. 380, 387 (2003). The CAAF sought replies to seven specific questions:

(1) What information, if any, led defense counsel to perceive that testimony by Appellant would present an ethical problem? (2) What inquiry, if any, did defense counsel make? (3) What facts were revealed by the inquiry? (4) What standard, if any, did defense counsel apply in evaluating those facts? (5) What determination, if any, did defense counsel make with respect to prospective testimony by Appellant in light of those facts? (6) After making any such determination, what information and advice, if any, did counsel provide to the Appellant? (7) What response, if any, did Appellant make? (8) What information was disclosed by the two defense counsel during their off-the-record conversation with the military judge?

Id.

⁸⁸ *Baker II*, 65 M.J. at 693.

⁸⁹ *Id.*

⁹⁰ *Id.* at 698.

⁹¹ *Id.*; see also *Baker I*, 58 M.J. at 387.

⁹² *Baker I*, 58 M.J. at 387–88.

testifying falsely.⁹³ This advice should include the requirement to testify truthfully, the criminal sanctions for perjury, the tactical effects on the trial of losing credibility, and the requirement that an accused will have to testify in the free narrative form without benefit of counsel and without the attorney arguing any of the questioned testimony at closing.⁹⁴ If an accused persists the attorney should request an on the record, ex parte proceeding with the military judge where they explain in front of the accused that the accused wishes to testify and will do so in the free narrative form.⁹⁵ Counsel should not elaborate on the reasons behind this unusual format of testimony.⁹⁶ Counsel should not move to withdraw unless circumstances have created an irreconcilable conflict between the attorney and client relationship which preclude continued representation.⁹⁷

The military judge should not inquire into the reasons for the unusual testimony format, but should: (1) remind the attorney of his obligation to conduct a full inquiry into the questioned matters; (2) ensure the accused understands the pitfalls of the free narrative form; (3) ask the attorney and client to further discuss the issue during a recess; and (4) direct the attorney to prepare a memorandum describing the attorney's investigations, factual concerns, and advice to the accused.⁹⁸ If, after recess, the accused wishes to proceed, the military judge should ensure the defense counsel prepares the memorandum and it should be placed under seal and attached to the record.

How Sure Must Counsel Be That the Questioned Testimony Is Perjury?

Staff Sergeant Baker's counselors were initially reluctant to fully express the reasons they disbelieved their client.⁹⁹ By the second *DuBay* hearing counsel expressed that they felt their client's testimony would contain perjury because portions of his testimony could not be reconciled with the version of events he related at the outset of representation and it was completely at odds with all the other evidence in the case.¹⁰⁰ The defense lawyers felt that they had to be certain that their client's version was perjury before they moved to withdraw or declined to assist him.¹⁰¹ They both reached that conclusion and then attempted to withdraw.¹⁰²

The Army court noted that various courts have articulated similarly high standards for determining whether a client has committed perjury.¹⁰³ The Armed Forces courts have not issued a rigid definition for what constitutes a firm factual basis, but they have pointed out that neither inconsistencies with other statements by the accused, testimony at odds with testimony of other witnesses, nor contradictory physical or forensic evidence, constitute clear evidence of perjury.¹⁰⁴

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Baker II*, 65 M.J. 691, 694 (Army Ct. Crim. App. 2007).

¹⁰⁰ *Id.* at 695. Among other things the client intended to deny facts about his federal criminal conviction, though those facts were clearly accessible by independent electronic research conducted by the defense and official documents supplied by counsel. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* The court recounted the various courts holdings they reviewed:

Courts employ a variety of standards to determine whether an attorney justifiably believed a client intended to commit perjury. See *Long*, 857 F.2d at 446 ("firm factual basis" standard); *Johnson*, 555 F.2d at 122 (stating same); *Commonwealth v. Mitchell*, 438 Mass. 535, 781 N.E.2d 1237 (Mass.) (stating same) . . . : *In re Grievance Committee*, 847 F.2d 57, 63 (2d Cir. 1988) ("actual knowledge" standard); *Iowa v. Hirschke*, 639 N.W.2d 6 (Iowa 2002) ("convinced with good cause" standard); *Wisconsin v. McDowell*, . . . 681 N.W.2d 500 (Wis. 2004) (requiring express admission that accused intends to commit perjury); *Shockley v. Delaware*, 565 A.2d 1373 (Del. 1989) (beyond a reasonable doubt standard); *People v. Calhoun*, . . . 815 N.E.2d 492 . . . (Ill. App. 2004) ("good faith determination" standard). In previously reviewing this case, the CAAF announced it "shall not require a higher standard than [the] firm factual basis" standard discussed in *Johnson*.

Id.

¹⁰⁴ *Id.* at 698-99. The court noted the holding in *People v. Calhoun*, 815 N.E.2d. 492, 503 (Ill. App. 2004), to discuss the broad leeway counsel should grant a defendant's version of the facts before concluding that the defendant is committing perjury. *Id.* The CAAF sets a high standard for counsel determining if questioned testimony is perjury:

The court found that the counsel in *Baker* had a firm factual basis to conclude their client committed perjury.¹⁰⁵ The Army court looked to SSG Baker's original admission to his lawyers that he failed to go get a haircut.¹⁰⁶ They found this different from shifting memories, accounts, or explanations of a consistent denial of wrongdoing.¹⁰⁷ The court also found that SSG Baker's explanations about why he ordered a particular cartridge were patently untrue.¹⁰⁸

What was the accused told regarding the consequences of testifying falsely?

The court, in line with CAAF's holding, then investigated whether counsel made a serious attempt to dissuade SSG Baker from testifying falsely.¹⁰⁹ Counsel made very limited attempts to dissuade SSG Baker when he notified them during trial of his intent to testify.¹¹⁰ However, prior to trial, both counsel repeatedly confronted him with their concerns over inconsistencies in his testimony.¹¹¹ Further, on the record, the military judge laid out step by step what would occur if the accused persisted in testifying.¹¹² Finally, the court adopted the *DuBay* judge's findings that given the accused temperament, any attempt to limit his testimony to areas where there was no risk of perjury would have failed.¹¹³

When the question of perjured testimony by a defendant arises, we require that the lawyer act in good faith and have a firm basis in objective fact. Conjecture or speculation that the defendant intends to testify falsely are not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the lawyer's obligation not to elicit false testimony, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Counsel can rely on facts made known to him, and is under no duty to conduct an independent investigation.

Id. (citations omitted) (quoting *Calhoun*, 815 N.E.2d. at 503).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Staff Sergeant Baker claimed he ordered a particular printer cartridge because it was so popular it was "flying off the shelves," in fact there was no record that type of cartridge had ever been ordered or stocked and the unit supply sergeants interviewed by the defense were unanimous that none of the unit's computers used that type of cartridge. *Id.*

¹⁰⁹ *Id.* at 699–700.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* The military judge's exchange with SSG Baker went as follows:

Military Judge: What I am telling you, Sergeant Baker, is if you persist in this wish to testify, I can't tell you that you can't testify. But your attorneys don't have to basically go along with offering your testimony and they're not going to cooperate in offering what they believe might be perjured testimony to the panel.

So if you want to do this, if you want to testify without the assistance of counsel, you can do that. But what that means is when the members come back, I'm going to say—I'm going to say the defense calls Sergeant Baker to the stand. The trial counsel is going to swear you in. And then you're going to testify all by yourself.

Now one of the dangers there is, when you do that, you don't have the assistance of a lawyer who has been trained to keep you away from certain areas of testimony that might not be helpful to yourself. One of those areas is that threat of this prior conviction, which at this point is not admissible on the merits of the case; but, depending on what you say, it may come in on cross examination, because you are going to be cross examined. So that means the government's side, with the two lawyers they have there, are going to be able to go at you and, basically, your defense counsel aren't going to do anything to help you.

Do you understand that?

Accused: Yes, ma'am.

Military Judge: Do you understand the risk you run when you get on the stand and you don't have the help of a lawyer helping you through your testimony?

Accused: Yes.

Appellant asked the military judge if, during his testimony, he could refer to notes that he had prepared prior to trial. The military judge advised him that he could do so, that the notes would be marked as an exhibit, that the government would have the opportunity to review the notes, and that he could be cross-examined on the notes. The military judge returned to the subject of testifying without the benefit of counsel:

Military Judge: And the other thing I want to say—I want to say a couple of other things—like I said, when you do this, you know, we have lawyers represent people for a purpose, and they know what things to avoid and what things to emphasize. And when you take the stand like this, you're not going to have the assistance of counsel, and you're going to be cross-examined, and if the members have questions they're going to be able to ask you, and you're not going to have a lawyer there to talk to about whether or not you should answer, or how you should answer it.

The court of appeals ultimately agreed that counsel had acted with sufficient diligence in investigating and concluding that SSG Baker would perjure himself. Once they did it was apparent that they were not only permitted but required to refrain from assisting in the perjury.¹¹⁴ Counsel in the *Baker* case failed to submit the memorandum suggested by the court explaining their reasons for suspecting perjury. That failure led to two *DuBay* hearings and a decade of litigation¹¹⁵ in lieu of summary affirmance. The lesson is there is value in complying with the court's request to document your reasons, because your client could put you on the edge despite your best efforts. If that happens savvy counsel will document how they got there in line with CAAF's guidance.

Conclusion

Trial advocacy on the edge is about "leaning forward" with experts, making full use of uncharged misconduct to prove an offense, and knowing how to deal with the less than credible accused. Trial advocates should know that an expert witness can provide evidence about how victims behave, but not conclusions about whether those victims are truthful. They should know that they can parallel an uncharged victim's story with that of the victim at issue to show a pattern in the accused conduct. They cannot however demand justice for an uncharged victim. If an accused wants to offer false testimony you must first be sure that it's not just a faulty memory at work. If you have a firm factual basis to know your client's proposed testimony will be perjury, never violate a client's confidence, but never assist a client in perjuring himself. The three cases we reviewed from last year's term will help you negotiate the edge without going over.

The other thing is—

Accused: Does—does—is the same procedure going to be followed? I mean, will they go through you?

Military Judge: The panel questions? Yes. And I will decide whether or not they're asked.

But your counsel aren't going to get a chance to say objection because they're not going to participate in any way with your testifying.

....

But when they go to do their closing argument, they're not going to refer to things you said. They're going to attack in other ways, they're going to attack the government's case I'm sure, but they're going to do it with the evidence that's been presented so far.

Do you understand that?

Accused: Yes, ma'am.

Baker I, 58 M.J. 380, 382–84 (2003).

¹¹³ *Baker II*, 65 M.J. at 700.

¹¹⁴ *Id.* at 698. A client has a constitutional right to testify and to assistance of counsel, but does not have a right to testify falsely with the assistance of counsel. *Id.*

¹¹⁵ *Id.* at 692.

Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the “Mortal Enemy” of Military Justice

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Introduction

The past term brought no cases from the Court of Appeals for the Armed Forces (CAAF) to the area of unlawful command influence. However, there were several service court cases that illustrate the continuing struggle with unlawful command influence (UCI) and the need for vigilance from everyone associated with the military criminal justice system. This article will focus on two of those cases,¹ and discuss some recurring problems in the field. These cases and other examples serve as reminders that unlawful command influence is still the mortal enemy of military justice,² and that all military justice practitioners must prevent even the appearance of impropriety in this area.³ They also demonstrate the effects of deliberate planning to guard against inappropriate influence on those participating in the military justice process, effective remedial action when confronted with actual or perceived interference, and the need for training at all levels of command and the legal community.

Commanders and Issues Surrounding “Type Two” and “Type Three” Accusers

United States v. Ashby⁴

Ashby involves the tragic mishap flight of an EA-6B “Prowler” aircraft engaged in a low-level training flight outside of Aviano, Italy in February 1998.⁵ On the final leg of the flight, the aircraft flew well below established minimum altitudes, severing two cables carrying a gondola car with twenty passengers.⁶ The gondola car plummeted approximately 365 feet, killing everyone on board.⁷ Despite serious damage to the aircraft, the crew survived after conducting a successful emergency landing at the NATO air base in Aviano, Italy.⁸ A command investigation board (CIB) was convened to investigate the tragedy and senior leaders were intimately involved with the progress and direction of that investigation.⁹ Specifically, then Lieutenant General (LTG) Pace, the general court-martial convening authority (GCMCA), had extensive contact with the board president as the investigation unfolded.¹⁰

Captain (Capt.) Ashby was the pilot of the aircraft on the day of the mishap and ultimately faced two general courts-martial.¹¹ At his first general court-martial Capt. Ashby was charged with numerous offenses, including: dereliction of duty; negligently suffering military property to be damaged; recklessly damaging non-military property; twenty specifications of involuntary manslaughter; and twenty specifications of negligent homicide in violation of Articles 92, 108, 109, 119, and

¹ United States v. Ashby, No. 200000250, 2007 WL 1893626 (N-M. Ct. Crim. App. June 27, 2007); United States v. Bisson, No. 20060097, WL 2005077 (N-M. Ct. Crim. App. July 9, 2007). Although these cases are unpublished and therefore not precedent, they provide a useful medium to discuss recurring issues in complex and high-profile cases as well as witness intimidation.

² United States v. Lewis, 63 M.J. 405, 407 (2006) (quoting United States v. Gore, 60 M.J. 178, 178 (2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))).

³ “The ‘appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.’” *Id.* (quoting United States v. Simpson, 58 M.J. 368, 374 (2003) (quoting United States v. Stoneman, 57 M.J. 35, 42–43 (2002))).

⁴ *Ashby*, 2007 WL 1893626. For a similar discussion of these issues, see the companion case of *United v. Schweitzer*, No. 200000755, 2007 WL 1704165 (N-M. Ct. Crim. App. May 10, 2007).

⁵ *Ashby*, 2007 WL 1893626, at *1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *20–23.

¹⁰ *Id.*

¹¹ *Id.* at *1.

134, UCMJ.¹² Captain Ashby was ultimately acquitted of these offenses on 4 March 1999.¹³ At his second general court-martial Capt. Ashby faced two specifications of conduct unbecoming an officer under Article 133, UCMJ, for conspiring to obstruct justice and ultimately obstructing justice for secreting a videotape and thereafter participating in its destruction.¹⁴ (Capt. Ashby had earlier refused joinder after arraignment for these offenses).¹⁵ Contrary to his pleas, Capt. Ashby was convicted of both offenses on 10 May 1999, and sentenced to six months confinement, total forfeitures, and a dismissal.¹⁶

The first issue addressed in this article is whether the GCMCA improperly convened Capt. Ashby's court-martial because he had nominally directed that the charges and specifications be signed and sworn by another,¹⁷ making him a "type two" accuser in violation of Article 1(9), Uniform Code of Military Justice (UCMJ).¹⁸ The second and closely related issue is whether the GCMCA was disqualified from serving as the convening authority because he had an "other than official interest" in prosecuting the appellant, making him a "type three" accuser.¹⁹

The court held that the convening authority was not a "type two" accuser.²⁰ There was no credible evidence that his actions, words, or official correspondence "directed" that charges nominally be signed and sworn to by another.²¹ The fact that the GCMCA (then LTG Pace) was intimately involved with, and ultimately endorsed, the findings and recommendations of a CIB did not make him a type two accuser.²² "We find nothing improper in Gen Pace consulting with his various legal advisors and commenting in his endorsement to the CIB (a strictly administrative investigation) upon criminal charges that might logically flow from this catastrophic mishap."²³

Neither did the court find that the convening authority was a "type three" accuser.²⁴ Nothing in the record indicates that he acted with anything other than an official interest in this case.²⁵ General Pace was extensively and understandably involved in this high-profile case, but only to review the clarity and not the substance of the findings.²⁶ The CIB was an administrative investigation, and not a proceeding under the UCMJ.²⁷ General Pace had no input on selecting the CIB members (other than the President) and never discussed the nature, content or referral of charges with the President of the CIB.²⁸ General Pace made it clear on many occasions that the findings and recommendations must be those of the CIB.²⁹ "He was adamant in his sworn testimony that he never directed any member of the CIB to arrive at specific conclusions, nor did he direct that any finding of fact, opinion, or recommendation be included, changed, or deleted."³⁰

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *20. Especially troubling to Capt. Ashby is that the charges preferred against him were those recommended in Gen Pace's first endorsement to the CIB. *Id.*

¹⁸ *Id.* ("As previously mentioned, if Gen Pace had been a 'type two' accuser he would have been obligated under Article 22(b), UCMJ, to forward the case for disposition by a 'superior competent authority.'").

¹⁹ *Id.* at *22.

²⁰ *Id.* at *21.

²¹ *Id.*

²² *Id.* ("According to the military judge, the fact that the charges ultimately preferred against the appellant mirrored those reflected in Gen Pace's draft and final endorsements was simply a by-product of lawyers . . . working carefully and continuously together throughout the CIB to hone proposed charges to what the evidence actually supported.").

²³ *Id.*

²⁴ *Id.* at *22. ("The test for determining whether a convening authority is a 'type three' accuser is whether he is 'so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.'") (citing *United States v. Dinges*, 55 M.J. 308, 312 (2001)).

²⁵ *Id.* at *23.

²⁶ *Id.* ("We can find no fault in Gen Pace's desire to ensure that the CIB report was thorough, clear, concise, and devoid of content unintelligible to the wide and general audience that would no doubt be scrutinizing it.").

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Finally, the court held that Capt. Ashby did not demonstrate any prejudice from the “accuser” issues in this case.³¹ The offenses to which he was convicted were not contemplated at the time that the CIB was conducted, nor were they mentioned in the CIB endorsement.³² “Even if Gen Pace was disqualified as an ‘accuser’ on the original charges, we can fathom no reason why he should be similarly disqualified in regard to the additional offenses (the only offenses before this court).”³³

Actual and Apparent UCI—GCMCA Involvement in the Investigative Process and
“Chilling” Statements Made by Senior Leaders

The next and more difficult issues faced by the court in *Ashby* concerned actual and apparent UCI. First, did the GCMCA commit UCI in this case through his extensive involvement in the Command Investigation Board conducted prior to the courts-martial?³⁴ Second, did the comments and actions of senior leaders constitute “public condemnation,” tending to discourage defense witnesses, and creating a “chilling environment” in regard to fundamental fairness and due process for Capt. Ashby?³⁵ Specifically, the court examined several allegations, including: (1) comments made at “all officers” meetings insinuating that flight crews were breaking the rules;³⁶ (2) a collateral investigation into whether there was a systemic problem with flight crew violations;³⁷ (3) a meeting between the Commandant of the Marine Corps and a Marine aviator in which the Commandant pledged his support for the crew but insinuated they would have to be disciplined;³⁸ (4) comments made by the CIB president that were inaccurate and a statement that the “cause of the mishap was aircrew error”;³⁹ and (5) emails to the mishap crew and their counsel asking them to submit discovery requests through the chain of command rather than submitting them to squadron personnel directly.⁴⁰

Using the factual analysis previously discussed in this case the court noted the lack of any credible evidence to show an intent or motive on the part of the GCMCA to influence the CIB, the Article 32 Investigation, or the ultimate court-martial.⁴¹ In particular, General Pace did not direct that specific charges be brought against Capt. Ashby.⁴² Further, the court was satisfied beyond a reasonable doubt that the GCMCA’s actions did not constitute either actual or apparent UCI.⁴³ The court also held there was no improper conduct or UCI stemming from the actions of senior leaders referenced in this case.⁴⁴ First, none of the statements or investigations sought to attribute criminal wrongdoing to the mishap crewmembers.⁴⁵ Second, there was no attempt to impede access to witnesses or evidence.⁴⁶ Third, none of the actions or statements have been shown to

³¹ *Id.* at *24.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *25.

³⁵ *Id.*

³⁶ *Id.* During these meetings General Ryan allegedly read inflammatory articles concerning the tragedy and suggested they were caused by aircrew error, and insinuated that flight crews routinely flew below minimum flight levels. *Id.*

³⁷ *Id.* at *26. During this investigation every crewmember in the “Prowler” community at Cherry Point was administered Article 31(b), UCMJ, warnings; some perceived retribution against those unwilling to cooperate. *Id.*

³⁸ *Id.*

³⁹ *Id.* These remarks were made at a press conference on 12 March 1998. *Id.*

⁴⁰ *Id.* at *27.

⁴¹ *Id.* at *30.

⁴² *Id.*

⁴³ *Id.* Throughout their analysis the court applied the framework presented in the seminal case of *United States v. Biagase*, 50 M.J. 143 (1999). The primary focus under *Biagase* is the duty of the military judge to allocate burdens between the prosecution and the defense. *Id.* To discharge this duty, the military judge engages in a two-step process. *Id.* at 150–51. First, the defense must raise the issue of unlawful command influence. *Id.* The test is some evidence of facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings. *Id.* The burden then shifts to the government which has three options: The government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence. *Id.* On appeal, an appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. *Id.*

⁴⁴ *Ashby*, 2007 WL 1893626, at *30.

⁴⁵ *Id.*

⁴⁶ *Id.*

have had any direct or negative impact upon Capt. Ashby's court-martial.⁴⁷ Fourth, Capt. Ashby has not demonstrated any prejudice from referral of the additional charges to trial after he was acquitted of all original charges.⁴⁸ Finally, Capt. Ashby has presented no credible evidence that any substantial segment of the general population suffered any loss of confidence in the military justice system.⁴⁹ The court held that Capt. Ashby failed to raise a prima facie case of actual or apparent UCI.⁵⁰ In addition, there was no nexus between these acts and any unfairness in his court-martial.⁵¹ Even if the issue was raised, the court found beyond a reasonable doubt that the actions did not constitute UCI and that the findings and sentence were unaffected.⁵²

There are several practical lessons for practitioners in this case. First, military cases are more likely to receive intense media scrutiny than ever before. Commanders at all levels must be mindful of their role in our system of justice and be careful not to comment inappropriately on pending cases in their command. Judge Advocates have a central role and responsibility to ensure that commanders discharge those responsibilities correctly; this is done through proper advice and recurring training.

Practitioners must also be aware that any role of the GCMCA will be thoroughly scrutinized, and if necessary Staff Judge Advocates must prepare them for the possibility of testifying concerning their role in high-profile cases. The testimony of General Pace in *Ashby* was obviously compelling and credible.⁵³ More importantly, his role in the process was well defined from the beginning of the investigation through the completion of the court-martial. He repeatedly informed members of the CIB that they were to come to their own conclusions, and was careful throughout the formal court-martial proceedings not to influence the disposition of the case.⁵⁴ As noted by the Navy-Marine Corps Court of Criminal Appeals, the law is clear that we must safeguard not only a fair trial process but the *perception* of a fair trial process as well.⁵⁵

Finally, the continuing role of the military judge as the "last sentinel" against unlawful command influence must never be underestimated.⁵⁶ The service court noted the extensive findings of fact and conclusions of law entered by the military judge, and the great care taken to complete the record in these matters.⁵⁷ These findings rightly played an essential role in the court's ultimate holding - an important reminder that trial judges must be mindful of the importance of completing thorough findings of fact and conclusions of law for the benefit of all parties.

⁴⁷ *Id.*

⁴⁸ *Id.* at *31.

⁴⁹ *Id.* This standard is a bit broader than that usually employed to determine apparent unlawful command influence today.

We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

United States v. Lewis, 63 M.J. 405, 415 (2006).

⁵⁰ *Ashby*, 2007 WL 1893626, at *31.

⁵¹ *Id.*

Similarly, in this case, there is no evidence that the actions taken by various senior members of the Marine Corps in response to the gondola tragedy—including statements to the media and measures taken to prevent future mishaps—were intended in any way to influence the appellant's court-martial, or that they had such an effect.

Id.; see also United States v. Simpson, 58 M.J. 368 (2003); United States v. Ayers, 54 M.J. 85 (2000).

⁵² *Ashby*, 2007 WL 1893626 at *32.

⁵³ *Id.* at *30.

⁵⁴ *Id.* at *23.

⁵⁵ *Id.* at *27 (citing *Ayers*, 54 M.J. at 94–95); see also United States v. Hawthorne, 22 C.M.R. 83, 87 (C.M.A. 1956) ("This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned."). *Id.*

⁵⁶ United States v. Rivers, 49 M.J. 434, 443 (1998).

⁵⁷ *Ashby*, 2007 WL 1893626, at *29.

Potential Witness Intimidation and Remedial Actions

United States v. Bisson⁵⁸

A military judge sitting as a special court-martial convicted Private (E-1) Bisson, pursuant to mixed pleas, of violating a lawful general order, drunk on duty, assault consummated by a battery, indecent assault, and indecent language, in violation of Articles 92, 112, 128, and 134, UCMJ.⁵⁹ Prior to trial, two members of Private (Pvt) Bisson's unit (a Marine Aviation Logistics Squadron) approached the Aviation Supply Officer (ASO) about offering good military character evidence on Pvt Bisson's behalf.⁶⁰ After meeting with his commanding officer,⁶¹ the ASO told the potential witnesses not to provide character statements at that time, but did not tell them when they could provide statements.⁶² The potential witnesses "understood this conversation as an order not to testify or provide statements at *any* time and not to assist the appellant."⁶³ Two days after he learned of this information the commanding officer issued a policy letter titled, "Commanders Intent on Military Justice Matters," emphasizing the right to testify as a witness and that no adverse actions would be taken for doing so.⁶⁴ Both of the potential witnesses ultimately provided favorable evidence for Pvt Bisson.⁶⁵

On appeal the court considered whether the remedial actions of the commanding officer removed the taint of unlawful command influence in this case.⁶⁶ Ultimately the court held that although unlawful command influence was raised in this case, the chain of command's remedial actions effectively remedied any taint.⁶⁷ The record demonstrates that following the remedial measures Pvt Bisson received favorable evidence not only from the affected witnesses but others as well.⁶⁸ The court was ultimately convinced beyond a reasonable doubt that there was no impact upon the findings and sentence of this court-martial.⁶⁹

This case gives practitioners several important lessons. First, and once again, *Bisson* is illustrative of the need for continual training in the area of unlawful command influence. All servicemembers, especially members of the command, must understand the dangers of unlawful command influence and the strict prohibition against interference with the court-martial process.⁷⁰

⁵⁸ United States v. Bisson, No. 20060097, WL 2005077 (N-M. Ct. Crim. App. July 9, 2007).

⁵⁹ *Id.* at *1.

⁶⁰ *Id.* The witnesses were a second lieutenant and gunnery sergeant from Pvt. Bisson's chain of command. *Id.*

⁶¹ *Id.* During this meeting the commanding officer did not order the two Marines not to testify; his concerns appear to have been based on mission accomplishment and accountability. *Id.*

⁶² *Id.* at *2.

⁶³ *Id.*

⁶⁴ *Id.* It stated in part, "At no time was my guidance that a member of this command could or should not testify as a witness at a court-martial, to include testifying favorably on behalf of the accused. **There will be no adverse actions taken against any member of this command for participating in the court-martial process.**" *Id.* (emphasis in original).

⁶⁵ *Id.*

⁶⁶ *Id.* at *3-4.

⁶⁷ *Id.* at *5.

⁶⁸ *Id.*

⁶⁹ *Id.* *But see* United States v. Gore, 60 M.J. 178 (2004) (holding where witness interference without benefit of remedial action ultimately led to dismissal of charges with prejudice).

⁷⁰ UCMJ art. 37(a) (2008) reads in pertinent part:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case

Id.

Second, it underscores the age-old danger of the “message received” rather than the “message intended.”⁷¹ Commanders must be careful when discussing military justice matters, especially pending cases, always considering the potential effect on witnesses. The importance of this caution is not merely to avoid charges being dismissed, but to ensure a fair trial for the servicemembers under their command. “The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective witnesses, it transgresses the accused’s right to have access to favorable evidence.”⁷²

Third, it highlights the importance of early detection and application of remedial measures. The remedial measures enacted in this case were obviously effective and cured any taint of unlawful command influence.⁷³ Finally, it is a great reminder for defense counsel to remain aggressive in finding and documenting unlawful command influence, and seeking other remedies as appropriate.⁷⁴

Examples from the Field

There are several recurring issues from the field that I see in my capacity as the Chair of the Criminal Law Department, and in my role as the primary instructor in the area of unlawful command influence.

Split Operations

The first trend concerns increasing problems with “split operations” and the need to train Judge Advocates and commanders on the need for separation of advice and control as one unit leaves another for deployment purposes. This is increasingly common as rear detachments are formed that end up processing most of the pending UCMJ actions.⁷⁵ If units are separated by specific designation, then the previously higher headquarters must resist the urge to influence the actions left behind. The following portion of an email is the best example of this to date, however numerous anecdotal conversations with members of the Judge Advocate and paralegal communities leads me to believe they are all too common. This is a colloquy between a battalion and company commander, one subordinate to the other in a garrison environment, but at the time of the email in completely separate chains of command:

You are the Battalion Rear Detachment Commander and as such, are my equivalent back there, executing my guidance and acting in my capacity—not your own. There is no command influence—only you doing what you are told to do by me, as my designated representative. You are not a subordinate element of the battalion but are my “other half” in Ft.⁷⁶

Obviously, this email is problematic, whether in a deployed environment or not. Even if they were in the correct jurisdictional alignment, the superior commander is clearly affecting the discretion of the subordinate commander in direct contravention of Article 37(a), UCMJ.⁷⁷ Just as importantly, this provision directs that “no person subject to this chapter” should engage in or be a party to this conduct.⁷⁸ Practitioners should ask themselves how often they do this inadvertently when their higher headquarters deploys; Judge Advocates and paralegals must not “smuggle” unlawful command influence

⁷¹ See generally *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff’d*, 23 M.J. 151 (C.M.A. 1986). The GCMCA made comments concerning “consistency” of forwarding charges to a court-martial capable of a punitive discharge, and then testifying favorably for the Soldier. *Id.* Many subordinate commanders interpreted this to mean they should not testify. *Id.* This is the factual background affecting numerous cases, and ending in part with the bedrock UCI opinion of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986).

⁷² *Thomas*, 22 M.J. at 393.

⁷³ For other cases detailing remedial measures, see *United States v. Southers*, 18 M.J. 795 (A.C.M.R. 1984); *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992); *United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Biagase*, 50 M.J. 143 (1999); and *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim. App. 2000).

⁷⁴ See *Treakle*, 18 M.J. 646. “The events outlined above were brought to light primarily through the efforts of members of the United States Army Trial Defense Service, an independent agency with the mission of providing defense services to soldiers.” *Id.* at 653 n.5.

⁷⁵ It is the author’s perception that the practice of leaving most UCMJ actions behind when deploying is widely followed.

⁷⁶ E-mail from practitioner in the field, to Lieutenant Colonel Mark Johnson, Professor and Chair, Criminal Law Department, The Judge Advocate General’s Legal Ctr. & Sch (TJAGLCS), U.S. Army (8 May 2007, 15:28 EST) (on file with the author).

⁷⁷ See *supra* note 70.

⁷⁸ *Id.*

from one command to another when “guidance” from that office is no longer appropriate.⁷⁹

Vision Statements and E-mails Concerning Military Justice

The second trend concerns the danger of discussing military justice actions or philosophy in emails or vision statements. In one example typical of many others, a commander used “talking points” to address his major concerns.⁸⁰ Among them was the following: “Finally, here are the big things—those things that I will absolutely not tolerate.”⁸¹ The commander went on to list moral/ethical violations, abuse of drugs or driving while intoxicated, sexual offenses, inappropriate relationships, and child/spouse abuse.⁸² The affect of these statements can be deceiving. What does “absolutely will not tolerate” mean, exactly? Does it mean that this commander has an inflexible policy on disposition for certain Soldiers and certain offenses?⁸³ Does it mean that Soldiers convicted or even suspected of these offenses have no chance of retention?⁸⁴ More importantly, what is the effect of statements like these on subordinate commanders, potential witnesses, and panel members?⁸⁵ If not directly influenced, what is the perception of these statements among Soldiers or the general public?⁸⁶

Military justice practitioners should keep in mind several important points from the seminal case in this area, *United States v. Simpson*.⁸⁷ First, the court discussed the need for context. “The implication of the phrase ‘zero tolerance’ to personnel in the military justice process depends on the training and experience of the person hearing the phrase, as well as the specific circumstances of a case.”⁸⁸ After finding no actual improper influence beyond a reasonable doubt as required by *Biagase*,⁸⁹ the court noted, “We emphasize that our conclusions are specific to this case, and that the question whether a ‘zero tolerance’ policy has been presented in a setting that improperly affected the court-martial process must be addressed on a case-by-case basis.”⁹⁰ After discussing the extensive remedial actions by the government in this case and the “extensive ventilation” of the issue at trial the court ultimately held there was no apparent unlawful command influence either.⁹¹ After noting again that the holding was based on the specific circumstances of this case, the court added:

In that regard, we note that senior officials and the attorneys who advise them concerning the content of public statements should consider not only the *needs of the moment*, but also the potential impact of specific comments on the fairness of any subsequent proceedings in terms of the prohibition against unlawful command influence.⁹²

⁷⁹ The danger here is obviously not intentional violation of the prohibitions against UCI, but rather the possibility of a higher headquarters influencing separate convening authority decisions through primary legal advisors.

⁸⁰ E-mail from practitioner in the field, to Lieutenant Colonel Mark Johnson, Professor and Chair, Criminal Law Department, TJAGLCS (27 Nov. 2007, 10:04 EST) (on file with author).

⁸¹ *Id.*

⁸² *Id.*

⁸³ For issues surrounding policy letters and remedial actions, see generally *United States v. Rivers*, 49 M.J. 434 (1998). Allegations of unlawful command influence raised concerning division commander’s five-page policy letter on physical fitness and physical training which addressed other issues such as weight, smoking, drinking and drugs: “there is no place in our Army for illegal drugs *or for those who use them.*” *Id.* at 438 (emphasis added).

⁸⁴ See *United States v. Fowle*, 22 C.M.R. 139, 141 (C.M.A. 1956) (“A policy directive may be promulgated to improve discipline; however, it must not be used as leverage to compel a certain result in the trial itself.”).

⁸⁵ See generally *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); see also *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983) (“A judicial system operates effectively only with public confidence—and, naturally that trust exists only if there also exists a belief that triers of fact act fairly.”) *United States v. Stringer*, 17 C.M.R. 122 (C.M.A. 1954). This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences.” (citing *Fowle*, 22 C.M.R. at 142)).

⁸⁶ “Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with ‘eliminating even the appearance of unlawful command influence at courts-martial.’” *United States v. Lewis*, 63 M.J. 405, 415 (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

⁸⁷ 58 M.J. 368 (2003). Unlawful command influence alleged, in part, based upon improper emphasis on zero tolerance policies regarding sexual harassment in the context of a publicized investigation and possible trial of servicemembers for trainee sexual abuse. *Id.* at 375.

⁸⁸ *Id.*

⁸⁹ See *United States v. Biagase*, 50 M.J. 143 (1999).

⁹⁰ *Simpson*, 58 M.J. at 376.

⁹¹ *Id.* at 376–77.

⁹² *Id.* at 377 (emphasis added).

Practitioners are thus reminded to consider whether a commander's intent can be met another way, or whether the danger of confusion and apparent influence outweighs the benefit of any discussion at all.⁹³ If commanders must address these problems they are reminded to talk about the offense, rather than the offender, and the process, rather than the result.⁹⁴ The CAAF has never held that a convening authority need be "indifferent to crime."⁹⁵ However, when addressing these issues they must be balanced, and not portray an inflexible disposition.⁹⁶ If commanders issue troubling policy statements or comment on cases inappropriately, remedial action through the form of explanatory memoranda or retractions will often save the case and maintain the perception of a fair and impartial justice system.⁹⁷

The Military Judge

The third and final example is not a trend (hopefully), but serious and worth comment nonetheless. Recently at a large installation a commander approached a military judge in chambers following a court-martial to discuss the sentence.⁹⁸ During this conversation the commander made it clear that he was not happy with the sentence and the problems that the military judge had apparently left him with by not adjudging a discharge.⁹⁹ The commander insisted in talking about the sentence despite repeated warnings from the military judge that it was improper to do so.¹⁰⁰ At the Army Chief Trial Judge's direction, a subsequent military judge presided at a post-trial 39(a) session and found that unlawful command influence had been committed.¹⁰¹ The military judge also found that a judge advocate legal advisor knew of the commander's intent to approach the military judge, and did nothing to stop him.¹⁰² This incident is a stark reminder that continual training of commanders and judge advocates concerning unlawful command influence is absolutely essential.¹⁰³ No matter your role as Judge Advocate or paralegal, primary advisor or courtroom observer, in the area of unlawful command influence "everyone is a safety,"¹⁰⁴ and should immediately seek guidance or clarification from supervisors if necessary. Commanders should never contact the military judge concerning the sentence at a court martial; even if no actual influence occurs and the commander's intent is benign, the danger of improper public perception is too great.¹⁰⁵

⁹³ See *United States v. Treacle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986).

Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, *several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits.*

Id. at 653 (emphasis added) (citations omitted).

⁹⁴ See Lieutenant Colonel Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006, at 53, 66.

⁹⁵ See *United States v. Davis*, 58 M.J. 100, 103 (2003) ("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.").

⁹⁶ *Id.*

⁹⁷ These facts foreshadow a recent CAAF case from the present term, thus beyond the scope of this article. *United States v. Reed*, 65 M.J. 487 (2008), addresses issues of UCI including an e-mail and attached slide show containing the phrase, "Senior NCO and Officer Misconduct—I am absolutely uncompromising about discipline in the leader ranks." *Id.* at 489. One of the listed examples concerned the offense for which the appellant had been tried at court-martial. *Id.* The CAAF found no UCI based in part on government remedial actions and corrective actions taken by the military judge to ensure a fair trial, including the perception of a fair trial. *Id.* at 491–92.

⁹⁸ *United States Army Trial Judiciary, Fourth Judicial Circuit, Fort Carson, Colorado, Ruling of the Court, Allegation of Possible Unlawful Command Influence* (5 Mar. 2008) (on file with author). This incident did not take place at Fort Carson.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The military judge also found beyond a reasonable doubt that the proceedings had not been tainted and granted no relief. *Id.*

¹⁰² *Id.*

¹⁰³ This is a responsibility shared by TJAGLCS and all supervisors in the field. In this case, SJA's were sent a cautionary e-mail with a policy letter on UCI and an attachment of the "10 Commandments" of UCI. E-mail from Practitioner to LTC Mark Johnson, Professor and Chair, Criminal Law Department, TJAGLCS (18 Apr. 2008, 14:18 EST) (on file with author).

¹⁰⁴ Referring to standard practice on firing ranges of allowing any participant to stop operations if they observe a safety violation.

¹⁰⁵ The role of the Judge Advocate here is crystal clear. See *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, The Judge Advocate and his representatives

Conclusion

The prevention of unlawful command influence is a primary reason we exist as a JAG Corps today, and is certainly the main reason Congress created the Court of Appeals for the Armed Forces (CAAF).¹⁰⁶ As illustrated by the cited cases and examples from the field, it is still with us, requiring vigilance by everyone practicing within the military justice system. They also remind us of the need for aggressive action by all parties, and the ameliorative effects of prompt and thorough remedial measures. The need for fairness in our military justice system was recognized long ago by General George Washington in one of his first general orders: “No Connections, Interests, or Intercessions . . . will avail to prevent strict execution of justice.”¹⁰⁷ This quotation is contained within a memorandum written by then Chief of Staff General John A. Wickham, Jr., emphasizing the importance of prohibiting unlawful command influence with senior commanders throughout the Army.¹⁰⁸ His memorandum and this article end with the following sentences. “It is incumbent upon you, together with your legal advisor, to assure that your subordinate commanders understand and adhere to the provisions of Article 37. *Our system of justice demands no less.*”¹⁰⁹

should not function as a commander’s alter ego but instead are obliged to assure that *all* judicial officers remain insulated from command influence before, during, and after trial.

Id. at 42 (emphasis in original).

¹⁰⁶ See generally *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Service*, 81st Cong. (1949).

¹⁰⁷ Memorandum, General John A. Wickham, Jr., Chief of Staff, U.S. Army Chief of Staff, subject: Unlawful Command Influence (n.d.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

Annual Review of Developments in Instructions—2007

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Introduction

This annual installment of developments in instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2007 term¹ and focuses on crimes, defenses, and evidence. It is written for military trial practitioners, and frequently refers to the relevant paragraphs in the *Military Judges' Benchbook (Benchbook)*.² The *Benchbook* remains the primary resource for drafting instructions.

Crimes

Constructive force for Rape

In *United States v. Terry*,³ a rape case that predated the recent amendments to Article 120, Uniform Code of Military Justice (UCMJ)⁴ the CAAF considered whether the evidence in the case raised the issue of constructive force.⁵

Air Force Staff Sergeant (SSgt) Terry worked as a hospital radiology technician.⁶ As part of his duties, he performed an ultrasound on Airman First Class (A1C) S.⁷ While chatting, SSgt Terry told A1C S that he was taking college classes and asked if she would help by letting him take ultrasound pictures of the veins in her arm.⁸ Airman First Class S agreed to come to the hospital the next day, a Saturday, to let him do so.⁹

When A1C S arrived, the radiology clinic was relatively deserted.¹⁰ Staff Sergeant Terry led her to the ultrasound room by a circuitous route and after examining her arms, told her that he was having trouble seeing veins and asked if he could examine her legs instead.¹¹ Airman First Class S agreed and the exam progressed in stages with SSgt Terry next requesting to examine A1C S's groin and finally her ovaries with an internal probe.¹²

¹ The 2007 term began on 1 October 2006 and ended on 30 September 2007. See U.S. Court of Appeals for the Armed Forces, Calendar, <http://www.armfor.uscourts.gov/Calendar.htm> (last visited June 16, 2008).

² U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

³ 64 M.J. 295 (2007) (reversed for erroneous denial of challenge against a member).

⁴ UCMJ art. 120 (2008) (replacing the offenses in the previous Article 120 and some of the other sexual misconduct offenses in other articles with a new, comprehensive scheme of sexual misconduct offenses under Article 120, effective for offenses that occur on or after 1 October 2007).

⁵ See *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (judge may instruct on the concept of constructive force, if raised by the evidence); *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987).

⁶ *Terry*, 64 M.J. at 297.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 297-98.

During this portion of the exam, SSgt Terry asked A1C S if she had ever had sex with a black man or had a one-night stand.¹³ He asked what she would do if he had a condom, and she felt his penis penetrate her vagina while simultaneously he pressed his hands on her back and grabbed her breast with his right hand.¹⁴ He told her not to scream.¹⁵ She crawled away from him and put her clothes back on.¹⁶ Terry told her not to tell anyone what happened.¹⁷

At trial, A1C S testified that she never intended on having intimate contact with SSgt Terry, and she did not leave the room because she was scared and felt trapped in the small room.¹⁸ After all the evidence, the military judge informed counsel that she intended to give an instruction on constructive force; the defense objected.¹⁹ The military judge overruled the objection, concluding there was some evidence that the accused threatened or intimidated the victim.²⁰

Constructive force exists when intimidation or threats of death or physical injury make resistance futile.²¹ The threats may be express or implied.²² In this case, the military judge instructed the members as follows:

Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, thus satisfying the requirement of force. Hence, when the accused's actions and words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that resistance would be futile, the act of sexual intercourse has been accomplished by force.²³

This was a correct statement of the law, if constructive force was raised. Constructive force is raised if "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."²⁴ In this case, there was "some evidence" on which the members could rely to find that the accused intimidated A1C S into sexual intercourse without her consent and that her perception of the intimidation and her fear was reasonable.²⁵ As the CAAF noted, that evidence included the accused using his position to gain A1C S's trust for the purported test, the accused luring her to an isolated part of the hospital during off-duty hours, the accused telling her not to scream, and A1C's being scared.²⁶ Because there was some evidence of constructive force, the CAAF held the military judge did not abuse her discretion in giving the constructive force instruction.²⁷

This case reminds trial practitioners that, at least for rape offenses occurring before 1 October 2007, the intimidation or threats required for constructive force can be implied by the surrounding circumstances.²⁸ This case also presents an example of the application of the standard used by military judges in deciding whether to instruct on an issue. If the relatively low standard of "some evidence" is met, the military judge must instruct.

¹³ *Id.* at 298.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 920(e) discussion (2008) [hereinafter MCM].

²⁵ *Terry*, 64 M.J. at 299.

²⁶ *Id.*

²⁷ *Id.*

²⁸ The statutory amendments to Article 120 are effective for offenses that occur on or after 1 October 2007.

Military Judge's Responsibility to Determine Lawfulness of Order

In *United States v. Mack*,²⁹ the CAAF reiterated³⁰ that the lawfulness of an order is a question of law for the military judge to resolve.

Because Aviation Machinist's Mate Airman Mack was under investigation for selling drugs at his place of work and from his personal vehicle on the military installation, his commander imposed certain conditions of restraint upon him.³¹ The terms of the restriction required the accused to stay on the installation and to abide by eleven other conditions.³² These conditions included muster at specified times; no telephone calls, except for monitored calls with his wife and legal representative; only supervised visits with his wife; and a prohibition on operating or riding in a car.³³ The accused was charged with breaking restriction by failing to muster; operating or riding in a car; and making phone calls to individuals other than his wife and lawyer.³⁴

The defense moved, both before trial and after the government's case-in-chief, to dismiss all the specifications of breaking restriction, arguing that the conditions of the restriction were unlawful.³⁵ The military judge denied the motion because the legality of the restriction presented a mixed question of law and fact that he would give to the members to decide.³⁶ The military judge instructed the members on the elements of breaking restriction and the factors affecting the legality of the restriction.³⁷ The members found the accused not guilty of both specifications involving making telephone calls, but guilty of all five specifications involving failing to muster and both specifications involving operating or riding in a car.³⁸

The CAAF held that the military judge erred by having the members resolve the issue of legality of the order.³⁹ "As a matter of law, the presence of factual questions did not relieve the military judge of his responsibility to decide, as a preliminary matter, whether the order was lawful."⁴⁰ When the defense moves to dismiss a charge on the grounds that the order was unlawful, the military judge must first determine whether there is an adequate factual basis for the allegation that the order was lawful.⁴¹ If the military judge makes a preliminary finding that a specific set of words under a specific set of circumstances would constitute a lawful order, the prosecution must still prove beyond a reasonable doubt the facts necessary to establish the elements of the offense.⁴²

The CAAF found that there was a sufficient record for it to resolve the issue of the legality of the restriction order, without returning the case for further proceedings,⁴³ and concluded that the accused failed to rebut the presumption of

²⁹ 65 M.J. 108 (2007).

³⁰ See *United States v. New*, 55 M.J. 95 (2001) (holding that lawfulness of an order is not a separate and discrete element under Article 92 and, the military judge properly decides the issue of lawfulness of the order as a question of law); *United States v. Jeffers*, 57 M.J. 13 (2002) (holding that that lawfulness is a question of law); *United States v. Deisher*, 61 M.J. 313 (2005) (holding that the military judge erred when he ruled that the lawfulness of a no-contact order was to be resolved by the members).

³¹ *Mack*, 65 M.J. at 109–10.

³² *Id.* at 110.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 111.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 112.

⁴⁰ *Id.*

⁴¹ *Id.* at 111.

⁴² *Id.* at 111–12.

⁴³ *Id.* at 112.

lawfulness by demonstrating that the conditions did not fulfill a military duty or were otherwise unlawful.⁴⁴ Therefore, the CAAF found that the military judge's error, in submitting the question of lawfulness to the members, was harmless.⁴⁵

Mack reiterates that the lawfulness of an order is a question of law that must be decided by the military judge. The case also confirms that a military judge need not instruct the members on what is required for an order to be lawful.⁴⁶ It is the military judge who must resolve any necessary preliminary factual questions relating to lawfulness, and the military judge alone determines the lawfulness of the order.

***Mens Rea* Requirement for Wrongful Introduction of Drugs**

In *United States v. Thomas*,⁴⁷ the CAAF addressed whether the offense of wrongful introduction of drugs requires actual knowledge that a military installation was being entered.

Seaman Recruit Thomas pled guilty to wrongfully introducing marijuana onto an installation used by the armed forces.⁴⁸ During the providence inquiry, the accused admitted he drove onto a military installation with the marijuana.⁴⁹ However, he said he did not go through a security gate, and was unaware that he was actually driving onto military property.⁵⁰ While the accused's responses caused the military judge to briefly pause, he ultimately concluded the offense did not require that the accused had actual knowledge that he was taking drugs onto a military installation and accepted his plea.⁵¹

The CAAF set aside the conviction for wrongful introduction of drugs and affirmed the lesser included offense of wrongful possession of drugs holding that, for the offense of introduction of drugs onto a military installation, Article 112a, UCMJ, requires that the accused have actual knowledge that he was entering the installation.⁵²

Thomas is important in cases where knowledge of entry onto a military installation is in issue. The current model instruction in the *Benchbook* is accurate and sufficient. That instruction lists as the second element, "(2) That the accused actually knew (he) (she) introduced the substance."⁵³ The instructions later define the term "introduction" as "to bring into or onto a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)."⁵⁴ In addition, the recently approved Interim Update to paragraphs 3-37-4 and 5-11-4 of the *Benchbook* explains the defense of ignorance of fact, as it pertains to entry onto a military installation.⁵⁵ The updated model instruction should assist the military judge in explaining to the members the nuances of the offense of wrongful introduction of drugs.⁵⁶

⁴⁴ *Id.* at 113.

⁴⁵ *Id.*

⁴⁶ On 20 April 2006, in order to reflect the holding in *United States v. Deisher*, the Army Trial Judiciary approved updates to the model instructions in paragraphs 3-14-2, 3-15-2, 3-16-1, 3-16-2, and 3-16-3 of the *Benchbook*. Based on the CAAF's opinion in *Deisher*, Note 5 and its instruction in ¶ 3-14-2, and identical notes and instructions in paragraphs 3-15-2, 3-16-1, 3-16-2, and 3-16-3 of the *Benchbook*, were deleted, because they did not accurately state the law. Those notes provided an instruction for those circumstances where the question of lawfulness, which was intertwined with questions of fact, was submitted to the members. However, the issue of lawfulness does not need to be submitted to the members, and that instruction was appropriately deleted from the *Benchbook*. Interim updates to the *Benchbook*, along with the 2008 *Electronic Benchbook* and the 2008 *Manual for Courts-Martial*, can be found on the public accessible Army Trial Judiciary homepage at www.jagcnet.army.mil/usatj.

⁴⁷ 65 M.J. 132 (2007).

⁴⁸ *Id.*

⁴⁹ *Id.* at 133.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 135.

⁵³ BENCHBOOK, *supra* note 2, ¶ 3-37-4c.

⁵⁴ *Id.* ¶ 3-37-4d. Since the *Thomas* opinion, the Army Trial Judiciary approved an interim update to ¶ 3-37-4 of the *Benchbook*, and part of that update was a change to the definition of "introduction." See BENCHBOOK, *supra* note 2, ¶ 3-37-4 (IC, n.d.). However, the only change was the addition of "(installation)" and "(vehicle)," which are in the actual language of the statute. This change is unrelated to the mens rea issue in *Thomas*. *Id.*

⁵⁵ In 2007, after the *Thomas* opinion, the Army Trial Judiciary approved interim updates to ¶ 3-37-4 and ¶ 5-11-4 of the *Benchbook*, which are provided in Appendix A of this article.

⁵⁶ However, if the evidence raises the issue of whether the accused knew that the substance was entering a military installation, then the military judge may want to further tailor the instructions to further clarify the mens rea requirement. The military judge may want to tailor the next to last sentence before Note 4 in paragraph 3-37-4d of the *Benchbook* as follows.

Defenses

Escalation of the Conflict and the Right to Self-Defense

In *United States v. Lewis*,⁵⁷ the CAAF revisited an issue concerning self-defense, addressed the year prior in *United States v. Dearing*.⁵⁸ In *Dearing*, the court relied on precedent in *United States v. Cardwell*⁵⁹ and held that the initial aggressor is entitled to defend himself if the adversary escalates the level of the conflict.

Private First Class Lewis was involved in a fight outside a club.⁶⁰ Eyewitness testimony offered differing accounts. There was evidence that, after some words, Private Harvey started to punch the accused, but the accused charged at Private Harvey and they both ended up on the ground.⁶¹ Private Harvey picked up the accused and slammed him to the ground.⁶² They wrestled, with Private Harvey on the top and apparently getting the better of the accused.⁶³ Private Harvey's friend, a power lifter, kicked the accused in the face.⁶⁴ The accused then stabbed Private Harvey multiple times.⁶⁵ When the accused could get up, he stopped stabbing Private Harvey, and left the area.⁶⁶

The government charged the accused with attempted murder.⁶⁷ At trial, the military judge instructed the members on self-defense, including the standard instruction on mutual combatants and initial aggressors.⁶⁸ The civilian defense counsel objected to that instruction and argued that a mutual combatant is not required to withdraw, if the situation escalated to a point where the accused is in fear of death or grievous bodily harm.⁶⁹ The military judge overruled the objection.⁷⁰ The accused was convicted of the lesser included offense of aggravated assault with a dangerous weapon against Private Harvey.⁷¹

On appeal, the Army court reversed the conviction and the case was certified to the CAAF.⁷² The government argued that Rule for Courts-Martial (RCM) 916(e)(4) does not allow the use of self-defense when the accused was an aggressor and

Knowledge by the accused of the presence of the substance, ~~and~~ knowledge of its contraband nature, and knowledge that the substance was entering a military installation may be inferred from the surrounding circumstances including but not limited to _____. However, you are not required to draw these inferences.

Also, in such a case, the military judge may want to add an instruction such as the following:

The accused must know that the substance was entering a military installation. A person who drives or walks onto a military installation without knowing it is a military installation, even if the person is aware of the presence and nature of a controlled substance, is not guilty of wrongful introduction of (_____) (a controlled substance).

⁵⁷ 65 M.J. 85 (2007).

⁵⁸ 63 M.J. 478 (2006).

⁵⁹ 15 M.J. 124 (C.M.A. 1983).

⁶⁰ *Lewis*, 65 M.J. at 86.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 87.

⁶⁷ *Id.*

⁶⁸ The military judge gave the following instruction to the members.

There exists evidence in this case that the accused may have been a person who voluntarily engaged in mutual fighting. A person who voluntarily engaged in mutual fighting, is not entitled to self defense *unless he previously withdrew in good faith*. The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that *the accused voluntarily engaged in mutual fighting, then you have found that the accused gave up the right to self defense*.

Id. (emphasis added by the CAAF).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

did not first withdraw in good faith.⁷³ The government also argued that *Cardwell* and *Dearing* must be overruled because they conflict with RCM 916(e)(4), which the government claimed was not substantive criminal law.⁷⁴

The CAAF found that neither *Cardwell* nor *Dearing* conflicted with RCM 916(e)(4) because it does not address escalation in general or the specific situation where the original aggressor or mutual combatant is not able to withdraw in good faith.⁷⁵ The court found this silence on inability to withdraw to be an ambiguity that could be resolved with common law self-defense principles, as it did in *Cardwell* and *Dearing*.⁷⁶ The CAAF stated that it did not believe the President intended the rule to require a mutual combatant, or even an initial aggressor, to withdraw in good faith, when he is physically incapable of doing so.⁷⁷

The court found that the military judge erred by not instructing that a mutual combatant can regain the right to self-defense when the conflict is escalated or, as in this case, he is unable to withdraw in good faith.⁷⁸ After concluding that the instructional error was not harmless beyond a reasonable doubt, the CAAF affirmed the decision of the Army court.⁷⁹

This is an important issue for trial practitioners because mutual affrays are common in the military. If there is some evidence that the accused is an aggressor or mutual combatant, and there is also some evidence that the adversary escalated the level of the conflict or the accused was physically incapable of withdrawing, the military judge must give such an instruction, unless affirmatively waived by defense counsel. The *Benchbook* was updated in 2007 to include instructions on the concepts of escalation of the conflict and physical inability to withdraw in good faith.⁸⁰ Trial practitioners should become familiar with these model instructions.

Affirmative Waiver of Mistake of Fact Instruction

In *United States v. Gutierrez*,⁸¹ the CAAF confirms that an affirmative waiver by the defense of an instruction on an affirmative defense is permissible.

Based on allegations that he held the victim down and touched her breasts and vagina, Private First Class Juan Gutierrez was charged with assault with intent to commit rape.⁸² All the parties agreed that the evidence raised the two lesser included offenses of indecent assault and assault consummated by a battery.⁸³ The defense requested a mistake of fact instruction for assault with intent to commit rape and indecent assault.⁸⁴ After discussing those two requested instructions, the following exchange took place.

MJ: And there doesn't appear to be any mistake of fact instruction with regard to battery. Are you requesting one?

DC: Your Honor, I simply do not want to request one for the battery.⁸⁵

⁷³ *Id.* at 87–88. Rule for Courts-Martial 916(e)(4) states, “The right to self-defense is lost . . . if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.” MCM, *supra* note 24, R.C.M. 916(e)(4).

⁷⁴ *Lewis*, 65 M.J. at 88.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 89.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ In 2007, after the *Dearing* opinion, the Army Trial Judiciary approved interim updates to ¶ 5-2-6 of the *Benchbook*, which are provided in Appendix B of this article. See BENCHBOOK, *supra* note 2, ¶ 5-2-6.

⁸¹ 64 M.J. 374 (2007).

⁸² *Id.* at 375.

⁸³ *Id.*

⁸⁴ *Id.* at 376.

⁸⁵ *Id.*

The military judge subsequently instructed the members on mistake of fact for the offenses of assault with intent to commit rape and indecent assault, but not for assault consummated by a battery.⁸⁶ The members convicted the accused of assault consummated by a battery.⁸⁷

The military judge is required, under RCM 920, to instruct the members on any special defenses found in RCM 916 that are in issue.⁸⁸ An accused does not waive the instruction by failing to request it or by failing to object to its omission.⁸⁹ However, if it is affirmatively waived, the military judge is not required to give the instruction.⁹⁰ There are not magic words required for an affirmative waiver.⁹¹ However, there must be a “purposeful decision.”⁹²

Finding that the evidence in the record raised the defense of mistake of fact, the CAAF looked at whether the statement by the defense counsel constituted an affirmative waiver.⁹³ It found the military judge’s question and the defense counsel’s answer were clear.⁹⁴ The military judge presented the defense with an opportunity to request the instruction or to decline it.⁹⁵ The defense counsel made a decision to decline it.⁹⁶ The court concluded that this decision was a purposeful decision and, thus, an affirmative waiver.⁹⁷

Gutierrez is helpful to trial practitioners because the CAAF applied the same analysis for waiver of affirmative defenses as it did previously with waiver of lesser included offenses and unambiguously stated the defense can waive affirmative defense instructions. However, the judge must ensure the defense counsel clearly states on the record that the defense is actually waiving the instruction. A failure to request an affirmative defense instruction is insufficient.

Evidentiary Instructions

Character Evidence

In *United States v. Brooks*,⁹⁸ the CAAF revisited the issue of human lie detector testimony. Human lie detector testimony involves an opinion by a witness that a person was truthful or untruthful when he or she made a specific statement. Human lie detector testimony is improper.⁹⁹ One of the dangers of this type of testimony is that it invades the province of the court members to determine witness credibility. Although this issue can come in a number of ways, in *Brooks* it came up in a novel context; this issue was raised during expert testimony explaining the statistical probability of false allegations of child sexual abuse.

Staff Sergeant Brooks was convicted of two specifications of indecent liberties with a female under the age of sixteen.¹⁰⁰ He was sentenced to a dishonorable discharge, eighteen months confinement, total forfeitures of all pay and allowance, and reduction to E1.¹⁰¹ The allegations were made by a five-year-old girl whom Brooks and his wife baby-sat.¹⁰²

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MCM, *supra* note 24, R.C.M. 920(e)(3), R.C.M. 916.

⁸⁹ *Gutierrez*, 64 M.J. at 376.

⁹⁰ *Id.*

⁹¹ *Id.* at 376–77.

⁹² *Id.* at 377.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 377–78.

⁹⁶ *Id.* at 378.

⁹⁷ *Id.*

⁹⁸ 64 M.J. 325 (2007).

⁹⁹ *United States v. Kasper*, 58 M.J. 314 (2003).

¹⁰⁰ *Brooks*, 64 M.J. at 326.

¹⁰¹ *Id.*

¹⁰² *Id.* at 326–27.

During the government's case-in-chief, the trial counsel called an expert witness in the field of clinical psychology.¹⁰³ During direct examination, the expert testified generally about the cognitive skills of children, the ability of children to tell the difference between what is true and untrue, and suggestibility.¹⁰⁴ The expert testified that he performed an examination of the five-year-old girl and determined that she was a normal little girl that could tell the difference between the truth and lies.¹⁰⁵ On cross-examination, the defense asked the expert about the ability of a child to fabricate a story and the impact of repeated interviews.¹⁰⁶ In response to the cross-examination, the trial counsel elicited that it would require a significant degree of sophistication for a child to make up a sexual abuse allegation from thin air.¹⁰⁷ The expert continued that the frequency of false allegations of child sexual abuse is about 5%.¹⁰⁸ The expert added that if you take away false allegations based on misinterpretation, the rate of purely fabricated allegations might be as low as 2%.¹⁰⁹ There was no defense objection and no limiting instruction was given at the time of the testimony.¹¹⁰ Before the court closed, the military judge gave the standard instructions on witness credibility and expert witnesses.¹¹¹

The CAAF explained that the Military Rules of Evidence (MRE) allow a witness to give an opinion or testify to the reputation of another witness's character for truthfulness, but the court reiterated the impropriety of human lie detector testimony.¹¹² The court defined human lie detector testimony as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case," and noted such testimony is inadmissible whether the witness is a lay or expert witness.¹¹³ In *Brooks*, the expert never gave an opinion about whether the girl was truthful when she made the allegations, but he did quantify the percentage of children who lie when making child sexual abuse allegations.¹¹⁴ To the court, quantifying the probability of the victim's truthfulness was the same thing: "This testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony."¹¹⁵

Finding plain error, the court set aside the findings and the sentence.¹¹⁶ The court concluded that the trial judge erred by "allowing testimony that was the functional equivalent of vouching for the credibility or truthfulness of the victim."¹¹⁷ The court found that the error materially prejudiced a substantial right of the accused because the case hinged on the victim's credibility.¹¹⁸ Although there was some medical evidence, there were no other witnesses, no confession, and no physical evidence to corroborate the victim's testimony.¹¹⁹ The court's concern was that "[a]ny impermissible evidence reflecting that the victim was truthful may have had a particular impact upon the pivotal credibility issue and ultimately the question of guilt."¹²⁰

The first lesson to learn from *Brooks* is timing. While the military judge gave the standard instructions on credibility of witnesses and expert testimony, to include the instruction that experts may not testify that they believe the victim, the CAAF

¹⁰³ *Id.* at 327.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 327.

¹¹¹ *Id.*

¹¹² *Id.* at 328.

¹¹³ *Id.* (quoting *United States v. Kasper*, 58 M.J. 314, 315 (2003)).

¹¹⁴ *Id.* at 327.

¹¹⁵ *Id.* at 329.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 326–27.

¹¹⁸ *Id.* at 330.

¹¹⁹ *Id.*

¹²⁰ *Id.*

reversed anyway.¹²¹ The court found that the instructions did not counteract the credibility quantification testimony because the victim's credibility was a central issue and the court was unable to tell if the members were impermissibly affected by the evidence.¹²² If this situation arises, the lesson for trial judges is that the only way a curative instruction will be effective is if it is given at the time of the impermissible testimony. "[T]he military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony."¹²³ A prompt instruction may not be sufficient in some cases, but unless the instruction is given at the time of the testimony, the members may misuse the testimony and make a favorable credibility judgment about the victim, which may affect the way they view the other evidence. Military judges frequently struggle with the decision about when to intervene in a trial when it appears that counsel have missed an issue. When it comes to human lie detector testimony, military judges should not hesitate to do so.

Of course, intervening means that the judge must first recognize the issue in the context of a fast-moving trial. This requires trial judges to understand the rules for when a witness's credibility can be attacked or supported, and how. In child sexual abuse cases that involve expert testimony, the judge also has to understand the appropriate limits of expert testimony. These limits are laid out in *United States v. Harrison*¹²⁴:

An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. He or she may also "discuss 'various patterns of consistency in the stories of child sexual abuse victims and compar[e] those patterns with patterns in . . . [the victim's] story.'" However, to put "an impressively qualified expert's stamp of truthfulness on a witness' story goes too far." An expert should not be allowed to "go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."¹²⁵

Human lie detector testimony comes up in a number of ways. It can take the form of credibility quantification testimony, as in *Brooks*. It can take the form of a law enforcement agent explaining what behaviors he has been trained to look for during interviews to assess credibility and then stating whether a witness exhibited those behaviors during an interview.¹²⁶ Another frequent way human lie detector testimony comes up is when the accused testifies, his testimony conflicts with a number of prosecution witnesses, and, on cross-examination, the trial counsel wants to ask a question like, "So if you are telling the truth, then SGT Jones lied when he testified. Correct?" It is improper to ask any witness to comment on the credibility of another witness's testimony. Judges should be extra vigilant in child abuse cases and sexual assaults, where experts may be called to explain counter-intuitive behavior. In these cases, it may be wise to ask the proponent of an expert witness before trial, "What do you think your expert is going to be allowed to say?" If a judge can recognize when human lie detector testimony is likely to come up, he or she can usually head-off trouble.

Military Rule of Evidence (MRE) 414

In *United States v. Schroder*,¹²⁷ the accused was convicted of raping his twelve-year-old daughter, JPR, and committing indecent acts with his twelve-year-old neighbor, SRS. The evidence against the accused included testimony by his step-daughter, SJS, who was nine at the time of the acts, of other acts of child molestation; and JPR, the same daughter he was convicted of raping.¹²⁸ The judge ruled that the uncharged acts of child molestation were admissible to prove the accused raped JPR and committed indecent acts with the neighbor.¹²⁹ The acts alleged in the indecent act specification were that the accused had the young girl sit on his lap, placed his hand on her leg, placed his hand on her buttocks, placed his hand upon

¹²¹ According to the opinion, the trial judge also gave a cautionary instruction at another point in the trial after a defense objection to credibility testimony by Dr. Acklin. *Id.* at 329. The opinion does not say what the testimony was or give the judge's instruction. Apparently, the instruction addressed character evidence other than the human lie detector testimony. *Id.*

¹²² *Id.* at 330.

¹²³ *United States v. Kasper*, 58 M.J. 314, 315 (2003).

¹²⁴ 31 M.J. 330 (C.M.A. 1990).

¹²⁵ *Id.* at 332 (citations omitted).

¹²⁶ *See, e.g., Kasper*, 58 M.J. 314.

¹²⁷ 65 M.J. 49 (2007).

¹²⁸ *Id.* at 51-52.

¹²⁹ The judge also ruled the charged rape of JPR was admissible to prove that Schroder had committed indecent acts with the neighbor. *Id.* at 52.

her groin area, kissed her neck, grabbed her buttocks, and pulled her toward his groin.¹³⁰ The accused was sentenced to a dishonorable discharge, ten years' confinement, reduction to E4, and total forfeiture of all pay and allowances.¹³¹

The court considered two instructional issues.¹³² The first issue was whether the judge had to craft an MRE 414¹³³ instruction separating the three charged acts that constituted acts of child molestation from the two charged acts that did not.¹³⁴ The second issue was whether the judge's instruction was correct about how the members could consider the MRE 414 evidence.¹³⁵

Before admitting MRE 414 evidence, a trial judge must make three findings: (1) that the accused is charged with an act of child molestation as defined by MRE 414; (2) that the proffered evidence is evidence of another act of child molestation; and (3) that the evidence is relevant under MREs 401 and 402.¹³⁶ The military judge must also conduct a MRE 403 balancing test, applying the factors from *United States v. Wright*.¹³⁷ The term "offense of child molestation" is defined by MRE 414(d)-(g).¹³⁸ When the definition is applied to the acts alleged in the indecent acts specification of the *Schroder* case, three acts are offenses of child molestation and two, kissing her on the neck and placing his hands upon SRS's leg, are not.

The defense first argued that the trial judge was required to tailor his instructions in a way that told the members they could only consider the uncharged acts of child molestation as it related to the three charged acts in the specification that met the definition in MRE 414.¹³⁹ The court disagreed.

The court pointed out that the specification, as a whole, alleged an offense of child molestation because it included allegations that met the definition in MRE 414.¹⁴⁰ The rule provides that evidence of other acts of child molestation is admissible "in a court-martial in which the accused is charged with an offense of child molestation."¹⁴¹ The court held that the trial judge was not required to disaggregate the instructions.¹⁴² First, the court looked at the rule itself. Military Rule Evidence 414(a) allows evidence of other acts of child molestation in a case where the accused is charged with an *offense* of child molestation.¹⁴³ The court pointed out that Congress did not limit application of the rule to specific acts. The court equated "offense" with the specification as a whole. The court also noted that its decision is consistent with the policy behind MRE 403; disaggregating the instruction might confuse the members.¹⁴⁴ Finally, the court feared that a different result might

¹³⁰ *Id.* at 51.

¹³¹ *Id.*

¹³² The military judge's instructions to the court members included:

Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense. However, you may consider the similarities in the testimony of [SJS] and [JPR] concerning any alleged offensive touching with regard to the offense of rape. And you may consider the similarities in the testimony of [SRS], [SJS], and [JPR] concerning any alleged offensive touching with regard to the offense of indecent acts with a child.

Id. at 54.

¹³³ MCM, *supra* note 24, MIL. R. EVID. 414.

¹³⁴ *Schroder*, 65 M.J. at 54.

¹³⁵ *Id.*

¹³⁶ *Id.* at 52 (citing *United States v. Wright*, 53 M.J. 476, 482 (2000)).

¹³⁷ *Id.* The *Wright* factors include: the strength of the proof of the prior act, the probative weight of the evidence, the potential for less prejudicial evidence, distraction of the fact-finder, the time need for the uncharged acts, the temporal proximity between the acts, the frequency of the acts, intervening circumstances, and the relationship between the parties. *Wright*, 53 M.J. at 482.

¹³⁸ MCM, *supra* note 24, MIL. R. EVID. 414(d)-(g).

¹³⁹ *Schroder*, 65 M.J. at 54.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ MCM, *supra* note 24, MIL. R. EVID. 414(a).

¹⁴⁴ *Schroder*, 65 M.J. at 54; MCM, *supra* note 24, MIL. R. EVID. 403.

encourage prosecutors to charge multiple offenses separately where the interests of justice are served with a single specification.¹⁴⁵

The court's decision on this issue is clear, and, on its face, applies to all cases. Trial judges are not required to examine specifications charged act-by-act when drafting instructions on the use of MRE 414 evidence. However, there may be danger hiding in the weeds. It is impossible to tell from CAAF's opinion whether the five acts alleged in the indecent acts specification happened at the same time and place. If all five of these acts happened at the same time and place, then the court's decision is obviously correct. The five acts could be seen as a single offense, and the court's equation, offense equals specification, is right. But, assume for argument's sake that the kissing on the neck and placing of hands on the leg happened on one day and the other three acts occurred two months later. Now a single specification alleges two separate offenses, and the court's analysis appears less convincing. This could result in court members' considering MRE 414 evidence as proof of an offense that is not within the definition of "offense of child molestation" simply because an inexperienced prosecutor drafted a duplicitous specification.¹⁴⁶ Moreover, the court's policy concerns about confusion and over-charging do not apply to duplicitous specifications. This issue would not arise if prosecutors followed MRE 307¹⁴⁷ and limited each specification to one offense, but they frequently do not. Trial judges should look for this situation and try to find a way to explain it to the members without confusing them.¹⁴⁸

As to the sufficiency of the judge's instruction, the CAAF noted that admission of MRE 414 evidence is contrary to our historical reluctance to admit evidence of specific acts of bad character. Bad character evidence might relieve the government of its burden of proving each element of each offense beyond a reasonable doubt. The court identified instructions as one of the procedural safeguards to prevent court members from using MRE 414 evidence in an unconstitutional way. In *Schroder*, the court found the judge's instruction deficient. Although the judge instructed on the prosecution's burden of proof and the fact that proof of one offense does not carry an inference of guilt of another offense, the judge then told the members that they could consider the similarities in the testimony of the three victims. The court found that the instruction was "susceptible to unconstitutional interpretation."¹⁴⁹ The instructions permitted the members to conclude that the similarities between the charged and uncharged acts were sufficient evidence to convict the accused. The court makes the requirements clear: "the members must . . . be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone."¹⁵⁰ While the court found error in the instructions, it concluded there was no material prejudice to a substantial right of the accused and affirmed the conviction.¹⁵¹

The court points out that a formulaic instruction is not necessary, but cites *United States v. Dacosta*¹⁵² and Instruction 7-13-1¹⁵³ as good references to instruct the members properly on this issue. Trial judges should be aware that the instruction quoted in *Schroder* has been superseded. After *Dacosta*, the *Benchbook* Committee redrafted the instruction to address the requirements imposed on Army judges. Last year's instructions update¹⁵⁴ contains a good discussion of *Dacosta* and reprints the newly approved instruction. *Dacosta* deals with MRE 413 evidence, but the same principles apply to both MRE 413 and MRE 414. The conventional wisdom to follow the *Benchbook* is good advice in this area.

¹⁴⁵ *Schroder*, 65 M.J. at 54.

¹⁴⁶ A duplicitous specification is a specification that alleges more than one offense. MCM, *supra* note 24, R.C.M. 906(b)(5) discussion. "Each specification shall state only one offense." *Id.* R.C.M. 307(c)(4). "One specification should not allege more than one offense . . . However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively." *Id.* R.C.M. 307(c)(3) discussion (G)(iv).

¹⁴⁷ *Id.* MIL. R. EVID. 307.

¹⁴⁸ One remedy judges and defense counsel should keep in mind is a motion for severance. *See id.* R.C.M. 906(b)(5).

¹⁴⁹ *Schroder*, 65 M.J. at 55.

¹⁵⁰ *Id.* at 56.

¹⁵¹ *Id.* at 51.

¹⁵² 63 M.J. 575 (Army Ct. Crim. App. 2006).

¹⁵³ BENCHBOOK, *supra* note 2, ¶ 7-13-1.

¹⁵⁴ Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2006*, ARMY LAW., May 2007, at 48, 60.

Expert Witness Instruction

In *United States v. Foster*,¹⁵⁵ the appellant did not challenge the propriety of the judge's instructions directly; the appellant challenged the military judge's impartiality. The appellant claimed the judge was not impartial primarily because of the way the judge treated one of the defense's expert witnesses.¹⁵⁶ The appellant claimed that the judge improperly limited the expert's testimony; that the judge questioned the expert in a hostile, combative and scathing way; that the judge unfairly summarized the expert's testimony and failed to identify the witness as an expert in his instructions; and that the judge made intemperate remarks about the expert witness outside of the presence of the jury.¹⁵⁷ While discussing two instructional issues, *Foster's* importance is again emphasizing the importance for judges to follow the *Benchbook*.

Personnelman First Class Foster was convicted of committing indecent acts with a child on divers occasions and communicating a threat.¹⁵⁸ Foster had inappropriate sexual contact with his six-year-old stepdaughter and threatened her if she told her mother about the abuse.¹⁵⁹ The government's case centered on the stepdaughter's testimony, and the defense claimed that the story was not true.¹⁶⁰ The testimony of a developmental research psychologist with experience in evaluating children's testimony was a critical part of the defense's case. This is the expert that the judge supposedly mistreated. Foster was sentenced to a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.¹⁶¹

After the parties questioned the defense's developmental research psychologist, the judge asked a series of questions based on court member questions.¹⁶² The opinion details the questions asked by the trial judge. The court was concerned about their tenor.¹⁶³ Many of the questions were leading and several were preceded by comments about the witness's earlier

¹⁵⁵ 64 M.J. 331 (2007).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 333.

¹⁵⁸ *Id.* at 332.

¹⁵⁹ *Id.* at 333.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 332–33.

¹⁶² *Id.* at 335.

¹⁶³ *Id.* at 335–36. The judge's questions included:

Q: Have you ever interviewed [the victim]?

A: I have not.

Q: All right. I'm sure it wasn't your intent to gloss over this, but it was kind of glossed over early on in your testimony. I think they were just kind of rushing through to get to the crux of your testimony, but I understood you to say that in preparation for your testimony here today, you reviewed some paperwork but you were primarily interested in the number of times the children were interviewed, something along those lines. Tell me if you will what it is that you reviewed about this case before coming in to testify?

A. What I typically review would be a videotape—

Q. No, what have you reviewed in this case?

A. In this case, I was not—there was no documentation given to me from the forensic interviewer -- interview that was conducted with [the victim] or [the victim's brother]. That information was lost so, therefore, I was sent police reports and different things like that, but I—honestly, I did not even look at that because I'm mostly interested in the forensic interview and there was no documentation on that. So what I asked for was a list of documented interviews and who conducted them. So that's mostly what I reviewed.

Q: All right. So you had a list of the people involved in conducting interviews?

A. Right.

Q. Okay. But you did not review the police report or anything else that had been submitted to you?

A. That is correct. I did not review those.

Q. So you, therefore, do not know what was contained within the police report?

A. Right. Because to me, the time delay between when that interview was conducted and what was actually contained—what was contained in the report, there's such a delay that even the interviewer could reconstruct how they asked questions, what was asked, what was said, but that wasn't of value to me.

testimony and pretrial preparation. The court cautioned trial judges to be circumspect in what they say to the parties and how they examine witnesses because the members watch the judge.¹⁶⁴ Specifically, the court said, “Military judges should take care to elicit information in a neutral manner and to avoid the kind of approach reflected in this record that so closely resembles the tenor of cross-examination.”¹⁶⁵ The court noted favorably, however, that the military judge gave the instruction on the proper use of expert testimony and to disregard any statement by the judge that might indicate a personal opinion on his part.¹⁶⁶ The court found that the judge’s exchange with the expert witness, in the context of the whole record, did not cast doubt on the court-martial’s legality, fairness, and impartiality.¹⁶⁷

Q. It wasn’t, okay. On cross-examination you did indicate that if a child tells the same story over time, notwithstanding a number of interviews, intervening interviews, that that is not a suggestive interview. None of those interviews would be suggestive, in your opinion.

A. That is correct. But the caveat needs to be said that in that first interview, leading—which we don’t have documentation on, leading questions, misleading questions, that the child could get clear messages as far as details and what needs to be said, and that that could be false information that’s then maintained from interview to interview. And because I didn’t have that first interview, again, I can’t say, “Here are the original things and here’s how they were carried through.”

Q. Sure. Would it be important to you, for example, to talk to the person who conducted that first interview and determine the types of questions [which] were asked?

A. No, because they are reconstructing how an interview should be asked and what should—and I believe most interviewers would know enough [to know that] you shouldn’t ask leading questions, you should ask open-ended questions, but –

Q. So you—

A. —what actually happened is, we don’t know.

Q. So, in other words, you wouldn’t believe the person if that person told you that, “Gee, I asked non-leading questions.”

A. As a memory expert, years down the road I don’t know that they are going to reconstruct correctly because they’ve interviewed other people since then, and they don’t have documentation from how that interview—

Q. So you just chose, instead, just to ignore the whole thing, not even inquire as to how that interview is conducted.

A. I would look at it, but I would know that there are going to be memory errors incorporated because it wasn’t conducted—correctly done.

Q. And that’s why you didn’t read the police report, that’s why you didn’t contact the person or persons who conducted these interviews. Because you assumed there would be errors in how they would report to you how they conducted the interview?

A. Legally and ethically, I never contact the people that conduct the interview.

Q. So you got a list of names of people who conducted interviews with [the victim], you didn’t speak with those people; all you have is names?

A. Out of less—

Q. So you know the number of interviews, and a list of the people who conducted the interviews, and that’s it? With regard to the fact of the—this case?

A. That is correct, and then personal communication with defense counsel as far as other facts of the case and what was contained in those other things.

Q. So you don’t know, then, whether there was any source misattribution error at all in this case, do you?

A. I don’t think anyone can say that there was and I don’t think anyone can say that there was not.

Q. Okay. Understand. But you have no basis at all to state that that error that you identified is, in fact, an issue in this case.

A. If a forensic interviewer is not careful enough to record the testimony—

Q. I understand that, but you don’t know that. You don’t know that’s so, in this case, you don’t know if source attribution error is, in fact, an issue in this case?

A. That we never could know whether it is or isn’t.

Id.

¹⁶⁴ *Id.* at 336.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 337.

The defense also claimed that the judge's expert witness instruction was evidence that the judge was not impartial.¹⁶⁸ The defense complained that, although the judge gave the standard expert testimony instruction, the judge did not refer to the defense experts as "experts."¹⁶⁹ Further, the defense claimed that the judge failed to summarize accurately the testimony of the developmental research psychologist.¹⁷⁰ While the judge did not call the defense's experts "experts," the trial judge told the parties from the beginning of the trial that he would not refer to the expert witnesses on either side as experts.¹⁷¹ The trial judge explained, "he [did not] like to use the word 'expert' because he thought 'that puts kind of an imprimatur on the weight to be given to their testimony.'"¹⁷² Instead, the judge described the testimony of the defense's developmental research psychologist and forensic psychologist as "educational testimony."¹⁷³ The judge described the testimony of the government's clinical psychologist as "specialized testimony."¹⁷⁴ The court found this to be error but not evidence of partiality; the error affected both sides. However, the court did send a clear warning:

In moving beyond benchbook instructions, . . . military judges must use caution not to do so in a manner that either places undue emphasis on or minimizes the importance of expert testimony.

. . . The members are entitled to be informed of [the expert witness] designation and a military judge must not impose his or her own views to either diminish or enhance that important role."¹⁷⁵

In other words, follow the *Benchbook*.

The lessons for trial judges are clear. First, when framing questions for a witness based on court member questions, be careful not to advocate. A military judge can and should ask questions of some witnesses to develop the testimony. However, the questions should be couched in a way that does not call into question the judge's impartiality. Second, follow the *Benchbook*. Here, the trial judge gave the expert witness instruction, albeit with some deviation, and told the members to disregard his statements and demeanor during the course of the trial.¹⁷⁶ These instructions were part of the "context of the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ The court does not settle this issue except to say that the summary was not challenged at trial, that on appeal the defense does not articulate what was wrong with the instruction, and that the complaint focuses on the use of the term "general information." *Id.* at 338. The court seems to merge the two claims together. *Id.*

¹⁷¹ *Id.* at 337.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 338.

¹⁷⁵ *Id.*

¹⁷⁶ The findings instructions included:

You have also heard the testimony of Dr. Mary Huffman and Lieutenant Commander Steven Talmadge who were allowed to testify in this case because their knowledge, skill, training, education and experience in their respective fields may assist you in understanding the evidence or in determining a fact in issue; however, you are not required to accept their testimony or give it more weight than the testimony of any other witness. You should, however, consider their qualifications in determining the weight you will accord their testimony.

. . . .

You will recall that Dr. Huffman did not testify about the nature of the pretrial interviews of [the victim] and [the victim's brother] that were conducted by various individuals in this case, nor about the types of questions that were used in conducting those interviews. Dr. Huffman did testify that because the videotape recording of a forensic interview of [the victim] by Special Agent Dillard had a blank audio track she was unable to perform an assessment of the types of questions asked during that interview. However, she did provide general information that suggestibility can cause memory errors, that every child is different in this regard with some children being more susceptible to suggestion than others, that age is a factor regarding the degree to which children are susceptible to suggestion, and that the type of questions employed during the interview process is significant in achieving a reliable result.

Dr. Huffman's testimony was permitted solely for its educational value to provide general information about children's memory in the courtroom due to repeated interviews and the effects of suggestion on memory to assist you in evaluating the evidence and determining the facts.

. . . .

Using the general educational information supplied by Lieutenant Commander Talmadge and Dr. Huffman, the specific information regarding the clinical evaluations of [the victim and her brother] supplied by Dr. Heidt-Kozisek, your own observations in

trial” that the court relied on to conclude that the court’s legality, fairness and impartiality were not in doubt. Even the most routine and minor instructions can be important.

Leniency Instruction

In *United States v. Carruthers*,¹⁷⁷ the CAAF considered whether the trial judge committed error by not giving a defense-requested leniency instruction. Staff Sergeant Carruthers was convicted of conspiracy and larceny for stealing over one million dollars worth of military property from the Fort Bragg Defense Reutilization and Marketing Office (DRMO). At trial, two of Carruthers’ co-conspirators testified against him.¹⁷⁸ One co-conspirator, Sergeant First Class (SFC) Rafferty, entered into a favorable pretrial agreement to plead guilty to a single count of larceny in federal district court.¹⁷⁹ At the time of trial, SFC Rafferty had not been indicted. Sergeant First Class Rafferty admitted all this during cross-examination.¹⁸⁰

The defense submitted a tailored leniency instruction to the military judge, which was more favorable than the standard *Benchbook* instruction.¹⁸¹ The judge declined to give the instruction because the standard leniency instruction was adequate.¹⁸² However, it appears that the judge was confused and was talking about the accomplice instruction.¹⁸³ The defense apparently thought the judge was talking about the witness-testifying-under-a-grant-of-immunity-or-promise-of-leniency instruction.¹⁸⁴ The judge’s instructions included an instruction based on the model accomplice instruction, but the instructions did not include the immunity-leniency instruction. The defense complained that the judge promised to give the leniency instruction and did not.¹⁸⁵ The CAAF disagreed¹⁸⁶ and held that the instruction given substantially covered the leniency issue.¹⁸⁷

Comparing the model instruction on accomplice testimony¹⁸⁸ to the immunity-leniency instruction,¹⁸⁹ the immunity-leniency instruction adds only three things: an explanation of what immunity is, a summary of the leniency terms, and an

court, your own experience in dealing with people, and all other factors I mentioned in determining witness credibility, it is your function to determine the credibility of the witnesses, the believability of their testimony and, ultimately, the facts of this case.

Id. at 337.

¹⁷⁷ 64 M.J. 340 (2007).

¹⁷⁸ *Id.* at 342.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 345.

¹⁸² *Id.*

¹⁸³ See BENCHBOOK, *supra* note 2, ¶ 7-10.

¹⁸⁴ See *id.* ¶ 7-19.

¹⁸⁵ *Carruthers*, 64 M.J. at 346.

¹⁸⁶ “[C]arruthers’ claim that the military judge agreed to issue the ‘standard instruction’ on leniency mischaracterizes the record.” *Id.* at 346.

¹⁸⁷ “We hold that the instructions in this case ‘substantially covered’ the leniency offered Rafferty and Nunes and addressed their possible motives to lie as a result of their favorable pretrial agreements.” *Id.*

¹⁸⁸ 7-10. ACCOMPLICE TESTIMONY

NOTE: Using this instruction. Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

A witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness’ believability, that is, a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances.

(For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)

In deciding the believability of (*state the name of the witness*), you should consider all the relevant evidence (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides*)).

explanation about what happens if the witness does not tell the truth. Moreover, the accomplice testimony instruction contains a caution that an accomplice might be motivated to lie based on a self-interest in receiving immunity or leniency, the immunity-leniency instruction does not.¹⁹⁰ In this case the instruction the judge gave¹⁹¹ addressed the issue of an

Whether (*state the name of the witness*), who testified as a witness in this case, was an accomplice is a question for you to decide. If (*state the name of the witness*) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice.

As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self contradictory, uncertain, or improbable.

BENCHBOOK, *supra* note 2, ¶ 7-10.

¹⁸⁹ 7-19. WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY OR PROMISE OF LENIENCY

NOTE 1: *Using this instruction.* When a witness testifies under a grant of immunity or promise of leniency, the following instructions should be given. Careful tailoring is required depending on the type and terms of immunity given or the leniency promised. One or more of the instructions following NOTES 2, 3, or 4 should be given. The instruction following NOTE 5 is always given. These instructions should be given immediately after the Instruction 7-7, *Credibility of Witnesses*.

NOTE 2: *Witness granted use (testimonial) immunity.* If the terms of the immunity are that the witness' testimony cannot be used against him, the following should be given:

(*Name of witness testifying under grant of immunity*) testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

NOTE 3: *Witness granted transactional immunity.* If the terms of the immunity are that the witness will not be prosecuted, the following should be given:

(*Name of witness testifying under grant of immunity*) testified under a grant of immunity. Under the terms of this grant, the witness was ordered to testify truthfully by the convening authority and cannot be prosecuted for any offense about which he/she testified.

NOTE 4: *Witness promised leniency.* When a witness has been promised leniency in exchange for testimony, the following instruction may be useful in preparing a tailored instruction:

(*Name of witness testifying under promise of leniency*) testified in exchange for a promise from the convening authority to ((reduce) (suspend) (_____) the sentence the witness received in another court-martial by _____) (_____).

NOTE 5: *Mandatory instruction.* The following instruction is always given:

If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a (grant of immunity) (promise of leniency) along with all the other factors that may affect the witness' believability.

NOTE 6: *Accomplice instruction.* Witnesses who testify under a grant of immunity or in exchange for leniency are often accomplices. When an accomplice testifies, Instruction 7-10, *Accomplice Testimony*, must be given upon request. *United States v. Gillette*, 35 M.J. 468 (C.M.A. 1992).

Id. ¶ 7-19.

¹⁹⁰ See *supra* notes 188 and 189.

¹⁹¹ The judge gave the following instruction:

A witness is an accomplice if he was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his testimony in whole or in part, because of an obvious self-interest under the circumstances.

For example, an accomplice may be motivated to falsify testimony in whole or in part because of his own self-interest in receiving immunity from prosecution or leniency in a forthcoming prosecution.

The testimony of an accomplice, even though it may be corroborated and apparently credible, is of questionable integrity and should be considered by you with great caution.

In deciding the believability of Sergeant First Class Paul Rafferty, Mr. Grandy Hooper, Mr. Bob Nunes, Mr. Paul Morgan, and Mr. Jerry Roach, you should consider all the relevant evidence in this case and the extent to which their respective testimony is either corroborated or contradicted by other evidence in this case.

Whether Sergeant First Class Rafferty, Mr. Hooper, Mr. Nunes, Mr. Morgan, and/or Mr. Roach were accomplices is a question for you to decide. If those individuals shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved themselves with the offenses with which the accused is charged, they would be an accomplice whose testimony must be considered with great caution.

Carruthers, 64 M.J. at 345.

accomplice's credibility; it merely omitted some nuts-and-bolts explanation about how immunity or leniency works. The instruction was clearly sufficient, and addressed the points in the defense-proposed instruction.¹⁹²

The lesson for trial judges is that there are two separate instructions for accomplice testimony and immunity-leniency. In some cases you will have an accomplice testify without immunity or a promise of leniency. The accomplice instruction alone is appropriate. There will be cases where a witness, not an accomplice, will testify under a grant of immunity or promise of leniency. The instruction on immunity-leniency alone is appropriate in that case, and might be given at the time of the witness's testimony. Finally, there will be cases where an accomplice testifies under a grant of immunity or promise of leniency. Ideally, a trial judge will give both instructions.¹⁹³ A trial judge could blend the two instructions into one, but must be careful to include the critical principles of both instructions.

Curative Instructions

Although not technically instructions cases, several 2007 opinions are worth reading to give judges an insight into curative instructions. For example, *United States v. Erickson*¹⁹⁴ illustrates how the appellate courts evaluate material prejudice where there has been prosecutorial misconduct. In *Erickson*, the issue was whether the trial counsel committed plain error during his sentencing argument by comparing the accused to Hitler, Saddam Hussein, and Osama bin Laden, and characterizing him as a demon that belonged in Hell.¹⁹⁵

Erickson sexually abused his two daughters over a six year period and pled guilty to those offenses.¹⁹⁶ During sentencing, the trial counsel argued:

What is evil? It's a dramatic question. It is not a concrete question and it defies a scientific answer. It likely means something different to virtually everyone. History, current events, are replete with examples of people who have been argued who are the embodiments of evil, Adolph Hitler, Saddam Hussein, Osama bin Laden. Men who have killed innocent women and children, poisoned the world with their rage and their fanaticism. Well, as awful as those men and those actions are there is an advantage, frankly, to evil that eventually becomes so open and notorious. You can see it coming. You can prepare your defenses. It has been quipped countless times that the greatest trick the devil ever performed was convincing the world that he didn't exist. The message there is that the evil that you can't see coming, the evil that is hidden, that is so insidious. Evil can hide the pitchfork, hide the horns, hide the tail. It can hide behind a façade of respectability, a façade of caring. Even a façade of, well, this accused. Staff Sergeant Erickson, sitting here in this courtroom, right here, right now, is evil. The insidious type.

....

This demon so masterfully manipulated his victims for so long a period of time, the little girls still don't see the evil.

....

¹⁹² The defense proposed the following instruction:

There is evidence and indeed it is not in dispute and all the evidence shows that SFC Paul Rafferty and Robert Nunes testified under an agreement with the Government to give truthful testimony in any proceeding when requested by the government in order to have their charges and sentences reduced. It is uncontroverted that SFC Paul Rafferty and Robert Nunes testified in whole or in part for this reason. You should therefore examine SFC Paul Rafferty's and Robert Nune's testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe their testimony, in whole or in part, you should treat what you believe the same as any other believable evidence.

Id.

¹⁹³ "Although it would have been better to give the *Benchbook* leniency instruction once the issue was raised, the military judge did not err because the instruction he gave covered its 'critical principles.'" *Id.* at 346.

¹⁹⁴ 65 M.J. 221 (2007).

¹⁹⁵ *Id.* at 222.

¹⁹⁶ *Id.* at 223.

He is evil. The place for evil, of course, is hell. His children should not suffer him a single day of freedom before he goes there. Society should not suffer him a single day of freedom before he goes there.”¹⁹⁷

The military judge sentenced the accused to confinement for life with eligibility for parole.¹⁹⁸ On appeal, the Air Force Court of Criminal Appeals (AFCCA) held that the trial counsel’s sentencing argument “went well outside the bounds of fair comment and amounted to plain and obvious error,” but found no material prejudice to the accused.¹⁹⁹ The CAAF reviewed the case. To assess the prejudice, the CAAF used the test from *United States v. Fletcher*.²⁰⁰

[W]e look at the cumulative impact of any prosecutorial misconduct on the accused’s substantial rights and the fairness and integrity of his trial. . . . We believe the best approach involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.²⁰¹

The CAAF determined that the impermissible part of the argument was not severe because it was a small portion of the trial counsel’s overall argument and it was part of a permissible theme.²⁰² The court determined the evidence of the harm done to the accused’s girls was significant and supported the sentence adjudged.²⁰³ Even though this was a judge-alone trial, the CAAF also discussed the second part of the *Fletcher* test. The military judge took no curative measures, meaning the judge did not say on the record that he would disregard the improper argument.²⁰⁴ The court applied the presumption that military judges know and follow the law. The court even expanded the presumption to include that the military judge is able to distinguish between proper and improper sentencing arguments.²⁰⁵ In the end, the court finds no material prejudice, but, in a footnote, the court sends a clear signal to trial judges. “While not the case here, if a defendant introduced evidence to rebut the presumption, we would then consider whether the military judge undertook ‘curative measures,’ such as a clear statement on the record that he would not consider the improper comments.”²⁰⁶

This opinion makes clear that it is worthwhile for trial judges to state on the record that he will disregard improper evidence or argument. Doing so ensures the record reflects that the judge caught the error, validating the presumption that the judge knows the law and making it much harder on appeal to rebut the presumption. This idea that the accused can offer evidence to rebut the presumption of judicial competence reminds judges to be temperate in their discussion of the case, including during Bridging the Gap sessions.

*United States v. Paxton*²⁰⁷ also involved a potentially improper sentencing argument. Technical Sergeant Paxton was convicted by members of rape, forcible sodomy, indecent liberties, indecent acts and indecent language, all with a child under sixteen.²⁰⁸ He was also convicted of providing alcohol to a minor, possession of child pornography, and incest.²⁰⁹ The sentence included a dishonorable discharge and confinement for twenty-six years.²¹⁰

Paxton did not testify on the merits or at the sentencing hearing. Paxton also did not make an unsworn statement. However, the defense did present the testimony of a clinical psychologist, who interviewed Paxton and performed several

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 222.

¹⁹⁹ *Id.* at 223. The test for plain error is: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.*

²⁰⁰ 62 M.J. 175 (2005).

²⁰¹ *Erickson*, 65 M.J. at 224.

²⁰² *Id.*

²⁰³ *Id.* at 226.

²⁰⁴ *Id.* at 224.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 225 n.2.

²⁰⁷ 64 M.J. 484 (2007).

²⁰⁸ *Id.* at 486.

²⁰⁹ *Id.*

²¹⁰ *Id.*

tests.²¹¹ The psychologist's testimony about the test results was "that Paxton had an inability or unwillingness to disclose personal information, that he engaged in 'impression management' to present himself more favorably, that he believed other people were largely responsible for his problems, and that he has a lack of initiative and an avoidance of adult forms of autonomy."²¹² Without objection from the defense counsel, the trial counsel later argued

You have to look at this individual and see that he really is a worthy candidate for rehabilitation. The MMPI tells you that he was trying to fake himself looking better The test he was taking for you to know more about him, he is trying to bamboozle you. He doesn't want you to know what kind of person he really is, the child rapist, the child pornography, that's the kind of person he is. It also tells you he is unwilling and has an inability to accept responsibility and to disclose personal information. He needs severe punishment and long-term treatment to make sure he is never going to do this again. Rehabilitation, as we know it, the doctor told us, we have long-term treatment facilities in our military disciplinary barracks. He needs to be there. We know it is going to take him a while, because he won't admit what he has done. He won't admit it to his doctor. He won't admit it to himself and until he admits it, he can't even get into the treatment. He has to volunteer to get into the treatment. You saw all the other things from the doctor's testimony that shows he is the kind of person who is not going to be proactively seeking that out. He has to get over that hurdle. He has to be punished long-term to make sure that he gets treatment and that he never does this again.²¹³

If an accused testifies or makes an unsworn statement and expresses no remorse or his expression of remorse is insincere, the trial counsel may properly comment on the accused's lack of remorse and urge the court members to consider the lack of remorse when evaluating the accused's rehabilitative potential.²¹⁴ Moreover, if the defense presents evidence that gives rise to an inference of no remorse or insincere remorse, the trial counsel may similarly comment.²¹⁵ However, the inference of no remorse cannot be drawn from the accused's decision to exercise his constitutional right to remain silent or his right to plead not guilty.²¹⁶ In *Paxton*, the court found no error because most of the trial counsel's argument was fair comment on the psychologist's testimony.²¹⁷ However, the trial counsel went too far by arguing that the accused had not admitted to the doctor or himself what he had done.²¹⁸ The psychologist's testimony did not address any conversations he had with Paxton about the offenses, so this part of the argument was beyond the facts established in the record.²¹⁹ The court found this portion of the argument was error.²²⁰ However, Paxton did not establish that the error was plain and obvious.²²¹

This case shows how carefully trial judges must follow the evidence and argument of counsel. It is a rare case where the accused will neither testify nor make an unsworn statement. However, in cases where the accused pleads not guilty and remains silent, judges must be alert and identify improper comments of the accused's exercise of his rights. In cases where the defense does not present evidence giving rise to an inference of no remorse, the judge's job is easy. However, in cases like *Paxton*, where the defense does present evidence that shows that the accused is not sorry for what he has done, the judge's job is much more difficult. The judge must pay careful attention to ensure that the scope of the argument does not exceed the scope of the evidence.

Finally, in *United States v. Moran*,²²² the court considered whether the trial counsel's comment during findings argument about the accused's invocation of his Fourth and Fifth Amendment rights materially prejudiced the accused. Airman First

²¹¹ *Id.*

²¹² *Id.* at 487.

²¹³ *Id.*

²¹⁴ *Id.* (citing *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 488.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 487–88. *But see id.* at 491–92 (Effron, C.J., concurring in part and dissenting in part) (arguing that the trial counsel's argument was plain error and suggesting the case should be returned for a rehearing on sentence).

²²² 65 M.J. 178 (2007).

Class Moran was convicted by members of drunk driving and several specifications of drug use and distribution.²²³ During trial, three prosecution witnesses, all law enforcement officers, commented on the Moran's refusal to consent to give a hair sample, a blood sample, and his invocation of the Fifth Amendment right to counsel.²²⁴ The CAAF found admission of this testimony to be harmless beyond a reasonable doubt.²²⁵

The CAAF then considered the findings argument by the trial counsel, which included:

Now these drug charges. *What's probably certainly close to the some of the most damning evidence that you have in this courtroom today is the fact that on March 20th he is called into [the] investigations [office]* The OSI says, "We would like to take your hair." He says, "No, thank you. I want to speak to my attorney first."²²⁶

The first problem is that the argument misrepresents the evidence; the accused did decline to give a hair sample, but he did not say he wanted to speak to his attorney when he did so.²²⁷ The invocation of counsel came later.²²⁸ The bigger problem, of course, is that the trial counsel is commenting on the accused's invocation of his constitutional rights and presenting the invocation as substantive evidence of guilt.²²⁹ The defense counsel failed to object, and the military judge did not give a curative instruction.²³⁰ The CAAF held that the trial counsel and military judge committed plain error, but the error was harmless beyond a reasonable doubt.²³¹

The first lesson for trial judges is whether the testimony about the accused invoking his constitutional rights is admissible in the first place. Unfortunately, the CAAF did not resolve this issue because the court assumed error and then found the error harmless. Interestingly, the AFCCA concluded the witnesses' testimony was necessary to describe the events about which the officer was testifying.²³² In his concurring opinion, Chief Judge Effron sends a clear warning about this type of testimony:

Despite the "if error, harmless" resolution, the majority suggests that the admission of statements about Moran's invocation of rights may have been admissible. I certainly recognize that in some cases, testimony about a defendant's invocation of rights may be admissible. However, routine disclosure of the fact that an accused has asserted his constitutional rights should not be sanctioned under the guise of setting forth a chronology of events or merely to establish the "res gestae" of an offense. The rules dealing with admissibility of assertions of constitutional rights are rules of prohibition. *See, e.g., Military Rule of Evidence (M.R.E.) 301(f)(1); United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (assertion of Fifth Amendment rights generally inadmissible); *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994) (refusal to consent may not be considered as evidence of criminal conduct). Exceptions to these rules of prohibition are carved out of unique circumstances not present in this case.²³³

Judges should be very careful about allowing testimony that is otherwise inadmissible for the purpose of "showing how the investigation unfolded" or "showing the effect on the listener." Before admission, this testimony should be subjected to a MRE 403 balancing test²³⁴ to determine if the probative value is substantially outweighed by unfair prejudice.

²²³ *Id.* at 179.

²²⁴ *Id.*

²²⁵ *Id.* at 182–85.

²²⁶ *Id.* at 186 (emphasis added by the court).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 186–88.

²³² *Id.* at 183–84.

²³³ *Id.* at 188–89.

²³⁴ MCM, *supra* note 24, MIL. R. EVID. 403.

The second lesson is that judges must recognize improper argument and take appropriate action. As *Erickson*, *Paxton*, and *Moran* attest, counsel often miss issues, but the plain error doctrine puts the burden on the military judge to spot them and take corrective action. This often puts the judge in the uncomfortable position of deciding when, or even whether, to interject himself or herself into the case. *Erickson*, *Paxton*, and *Moran* illustrate that uncorrected, improper arguments by the trial counsel are plain and obvious error. The court gave no relief in *Erickson*, *Paxton* or *Moran* because there was no material prejudice to that accused. However, an improper argument will inevitably come up in a close case, and the trial judge's corrective action, or lack of it, may make the difference. Judges should think through in advance of trial the issue of when to interject themselves. *Paxton* and *Moran* are easy cases; the military justice system simply does not allow the exercise of a constitutional right to be used as substantive evidence of guilt or a lack of remorse. Judges should feel comfortable stopping testimony and argument about the accused's invocation of his rights. Judges should be comfortable instructing the members that the exercise of a constitutional right is not evidence of guilt or aggravation and that the members are required to disregard the testimony or argument. *Erickson* is a much closer case. All the trial counsel did wrong in *Erickson* was misstate the evidence. The trial counsel's argument included a permissible theme and used some hard-hitting historical examples.²³⁵ It is hard to fault a trial judge for not interfering in a situation like *Erickson*, but the trial judge might have addressed the factual misstatement²³⁶ and cautioned the members not to allow the argument to inflame their passions to the point that it affects their judgment. These cases illustrate that, in a close case, the judge's remedial action can make a difference, even in a judge-alone trial.

Conclusion

Although this year's cases contain many discrete lessons, all reinforce two broad themes. First, military judges must be careful when drafting instructions. Instructions ensure accurate fact-finding and serve as a procedural safeguard against unfairness. Second, military judges should follow the *Benchbook*. Deviating from the pattern instructions may be necessary from time to time because of legal developments or an unanticipated situation, but it should only be done with great care and after thoughtful deliberation.

²³⁵ Since it wasn't appealed, the CAAF applied the law of the case doctrine and accepted the court of criminal appeals' determination that there was plain error in *United State v. Erickson*, 65 M.J. 221, 224 n.1 (2007). One can reasonably wonder if the CAAF would have found plain error in this case:

[T]hese comments were made in the context of a permissible theme—that unseen evil is worse than open and obvious evil. It reflected both the general belief of young children that their father would not wish to do them harm and Erickson's actions to conceal his conduct. While we do not condone the references, in this context, and in view of the limited number of references in a lengthy argument, we do not consider the misconduct to be 'severe.'

Id. at 224.

²³⁶ One possible way is: "Members of the court, you must base the decisions in this case on the evidence as you remember it and apply the law as I instruct you. If counsel exaggerates or mis-states the evidence during argument, you do not have to accept their summary of the facts as correct. You must base your decisions on the evidence as you remember it."

Appendix A

Instruction 3-37-4, Drugs – Wrongful Introduction

Add a parenthesis before the word “Article” in the title of Instruction 3-37-4, page 377.

Replace the definition of “introduction” in paragraph d of Instruction 3-74-4, page 378, with the following:

“Introduction” means to bring into or onto a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft).

Replace NOTE 14 of Instruction 3-74-4 page 383, with the following:

NOTE 14: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. A tailored circumstantial evidence instruction on intent is normally applicable if intent to distribute is alleged. If there is evidence the accused may have been ignorant of or mistaken about his or her presence on a military installation, or an issue of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake—Drug Offenses, should be given.

Add the following before the period at the end of paragraph e(4) of Instruction 3-74-4, page 383:

; United States v. Thomas, 65 M.J. 132 (2007) (in order to be convicted of introduction of drugs onto a military installation under Article 112a, the accused must have actual knowledge that he or she was entering onto the installation)

Instruction 5-11-4, Ignorance or Mistake - Drug

Replace Instruction 5-11-4, pages 792 and 793, with the following:

5-11-4. IGNORANCE OR MISTAKE—DRUG OFFENSES

NOTE 1: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction. Actual knowledge by the accused of the presence and nature of contraband drugs is necessary for a finding of guilty of Article 112a offenses. Ignorance can arise with respect to the presence of drugs, and mistake can be raised as to knowledge of their identity. Ignorance or mistake of the fact that a particular substance is contraband (i.e., that its possession, distribution, use, etc., was forbidden by law, regulation, or order) is not a defense. For a finding of guilty of wrongful introduction, the accused must also have actual knowledge that he or she entered into or onto a military unit, base, station, post, installation, vessel, vehicle, or aircraft. When the evidence raises such issues, the military judge must instruct upon them, sua sponte. A suggested guide follows:

The evidence has raised the issue of (ignorance) (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused (did not know that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (did not know that (he) (she) had (state name of substance) (on (his) (her) person) (in (his) (her) belongings) (_____)) (did not know that (state name of substance) was in (his) (her) (food or drink) _____)) (was under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____) (was unaware that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____).

(I advised you earlier that the (possession) (distribution) (manufacture) (importation) (exportation) (introduction) must be knowing and conscious.) If the accused was in fact (ignorant that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (ignorant of (the presence of (state name of substance) in (his) (her) belongings) (_____)) (under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____), then (he) (she) cannot be found guilty of the offenses(s) of (state the alleged offense(s)). The accused’s actual (unawareness) (erroneous belief), no matter how unreasonable, is a defense.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not (ignorant of the fact that _____) (under the mistaken belief that _____), then the defense of (mistake) (ignorance) does not exist.

NOTE 2: When the accused believed the substance to be a different contraband from the one charged. The accused's belief that the substance possessed, used, distributed, etc., was a contraband substance different from the one charged is not a defense. An instruction to this effect should be given when the evidence raises the issue as to whether the accused had such belief.

Appendix B

Instruction 5-2-6, Self-Defense (18 Jul 07)

ADD THE FOLLOWING BEFORE THE PERIOD AT THE END OF THE FIRST SENTENCE IN NOTE 5 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 760:

, if it is physically impossible for the accused to withdraw in good faith, or if the adversary escalates the level of conflict

ADD THE FOLLOWING BEFORE THE PERIOD AT THE END OF THE FIRST PARAGRAPH IN THE INSTRUCTION FOLLOWING NOTE 5 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 760:

(unless it was physically impossible for (him) (her) to withdraw in good faith) (unless the adversary escalated the level of conflict)

ADD THE FOLLOWING AFTER THE FIRST COMMA IN THE FIRST PARAGRAPH IN THE INSTRUCTION FOLLOWING NOTE 7 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

(if the accused was physically unable to withdraw in good faith) (or)

REPLACE THE CURRENT NOTE 6 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761, WITH THE FOLLOWING:

NOTE 6: Burden of proof – provocateur or mutual combatant issue. Either the instruction following this NOTE, or one of the instructions following NOTE 7 or NOTE 8, or a combination of those instructions, is ordinarily required if any instruction in NOTE 5 is given.

ADD THE FOLLOWING AS NOTE 8 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

NOTE 8: Escalation as reviving right to self-defense. The following instruction covers the burden of proof when there is an issue of whether the adversary escalated the level of the conflict. United States v. Dearing, 63 M.J. 478 (2006); United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983); United States v. Lewis, 65 M.J. 85 (2007).

Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), if the adversary escalated the level of the conflict, then the accused was entitled to act in self-defense if (he) (she) was in reasonable apprehension of immediate death or grievous bodily harm. Therefore, if the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), and the adversary escalated the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to use force (he) (she) actually believed was necessary to prevent death or grievous bodily harm.

Accordingly, even if you find beyond a reasonable doubt that the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), but you have reasonable doubt that the adversary did not escalate the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to act in self-defense. You must then decide if the accused acted in self-defense.

ADD THE FOLLOWING AS NOTE 9 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

NOTE 9: Escalation as reviving right to self-defense in homicide case. In a homicide case, the military judge should consider whether the evidence raises a LIO of Article 119(c)(2). If the accused initially was perpetrating or attempting to perpetrate an offense directly affecting the victim e.g., battery, the evidence may raise Article 119(c)(2) as an LIO if the escalation of the level of the conflict by the victim may have been reasonably foreseeable under the circumstances.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. 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. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	176th JAOBC/BOLC III (Ph 2)	18 Jul – 1 Oct 08
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	203d Senior Officer Legal Orientation Course	8 – 12 Sep 08
5F-F1	204th Senior Officer Legal Orientation Course	20 – 24 Oct 08
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09

5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
5F-JAG	2008 JAG Annual CLE Workshop	6 – 10 Oct 09
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES

5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
600-BNCOC	1st BNCOC Common Core (Ph 1)	6 – 27 Oct 08
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	5th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09

WARRANT OFFICER COURSES

7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09

ENLISTED COURSES

512-27D/20/30	20th Law for Paralegal Course	23 – 27 Mar 09
512-27D-BCT	27D BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09

512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	8th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09

ADMINISTRATIVE AND CIVIL LAW

5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	63d Legal Assistance Course	27 – 31 Oct 08
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	14 – 17 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08

CONTRACT AND FISCAL LAW

5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	79th Fiscal Law Course	20 – 24 Oct 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09

8F-DL12	1st Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	14th Military Justice Managers Course	25 – 29 Aug 08
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	30th Criminal Law Advocacy Course	15 – 26 Sep 08
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F42	91st Law of War Course	9 – 13 Feb 09
5F-F42	92d Law of War Course	6 – 10 Jul 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	17 -21 Nov 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47	51st Operational Law Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law Course	27 Jul – 7 Aug 09
5F-F47E	2008 USAREUR Operational Law CLE	9 – 12 Sep 08
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	8 – 12 Jun 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
BOLT	BOLT (030) BOLT (030)	4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)

900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (020)	28 Jul – 8 Aug 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (050) Senior Officer (060) Senior Officer (070)	21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22 – 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08

748A	Law of Naval Operations (020)	15 – 19 Sep 08
748K	USMC Trial Advocacy Training (040)	15 – 19 Sep 08 (San Diego)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
03RF	Legalman Accession Course (030)	9 Jun – 22 Aug 08
4040	Paralegal Research & Writing (030)	14 – 25 Jul 08 (San Diego)
627S	Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

**Naval Justice School Detachment
Norfolk, VA**

0376	Legal Officer Course (070) Legal Officer Course (080)	7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (060) Legal Clerk Course (070)	7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (060) Senior Officer Course (070)	4 – 8 Aug 08 (Millington) 25 – 29 Aug 08

**Naval Justice School Detachment
San Diego, CA**

947H	Legal Officer Course (070) Legal Officer Course (080)	28 Jul – 15 Aug 08 8 – 26 Sep 08
947J	Legal Clerk Course (070) Legal Clerk Course (080)	28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (080)	25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Legal Assistance Course 3 (Family Law), Class 08-C (Montgomery, AL)	7 – 11 Jul 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Legal Assistance 4 (Family Law), Class 08-D (Dayton, OH)	21 – 25 Jul 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08
Area Defense Counsel Orientation Course, Class 09-A	6 – 10 Oct 08
Defense Paralegal Orientation Course, Class 09-A	6 – 10 Oct 08
Judge Advocate Staff Officer Course, Class 09-A	6 – 12 Oct 08
Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Reserve Forces Judge Advocate Course, Class 09-A	25 – 26 Oct 08
Advanced Environmental Law Course, Class 09-A (Off-Site, Wash DC)	27 – 29 Oct 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09

Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095

NDA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at <https://jag.learn.army.mil>. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is *NLT 2400, 1 November 2008*, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. 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 additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General’s Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the

National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
 ** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. 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 6 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 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.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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 XP Professional and Microsoft Office 2003 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) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that

your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. 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 XP Professional and Microsoft Office 2003 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) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the

Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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