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Foreword

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Welcome to the second consecutive[1] symposium on recent developments in military justice. This collection of articles, by the members of the criminal law and procedure department at The Judge Advocate General's School, provides a comprehensive overview and critical analysis of what's new in military justice. Not all articles fit in this month's issue, so the rest of the symposium, which will include articles on search, seizure, and urinalysis, fifth amendment and Article 31, unlawful command influence, and instructions, will run in the May issue.

These are not "year in review" articles because they do not necessarily address every case of the past year. Each article is not so much a digest as a treatment of an area by the person who studies and teaches it. The primary focus is on the justice practitioner, the counsel, judges, and SJAs who work in the military justice system. The pieces are, however, designed to be both "practitioner" pieces, in that they speak directly to those who work in the system, as well as analytical works that deliver the authors' best sense of the state of the law and its likely path in the future.

There have been no changes to the *Manual for Courts-Martial* since last March's symposium. Accordingly, the authors focus on the more than 200 opinions issued by the CAAF and the service courts as well as a few important civilian cases. The recent symposiums follow in the rich tradition of the "COMA Watch" articles of the past,[2] but the authors also address significant opinions of the service courts that might ripen into CAAF opinions or which provide law that is binding on a particular service and instructive to all.

The 1997 CAAF term is well underway and the court has begun to regularly issue opinions. This is unlike its practice in recent years when most opinions have been issued during the last days of September. In addition, the approval of Judge Effron to replace the late Judge Wiss means that this will be the first term in almost two years that all five members of the court will be engaged throughout the term. This should decrease the burden on Senior Judge Everett and the federal judges who sit on the CAAF from time to time. A "regular lineup" of judges may also yield a more cohesive court with more clarity to its opinions and fewer of the concurrences, partial concurrences, and dissents that have become increasingly common.

Finally, a word about citations. As most practitioners know, the military courts changed their names in 1994; regular readers are familiar with the footnotes that have accompanied articles since then that explain this change. In short, nothing but the names of the courts have changed. The service courts became known as courts of criminal appeals, instead of courts of military review, and the Court of Military Appeals became the Court of Appeals for the Armed Forces. Along with the name changes came a change in citation forms. The service courts simply carry different parenthetical identifying information. For example, the old N.M.C.M.R. became N.M.Ct.Crim.App. For the Court of Appeals for the Armed Forces, however, there is no longer any parenthetical information provided in the West's Military Justice Reporters. If an M.J. citation is followed by only a date in the parenthesis (*e.g.*, 45 M.J. 168 (1996)), then the opinion is from the CAAF. The citation will only carry information designating the court if it is one of the service courts. In addition, some of the opinions in the articles have not been published yet in the Military Justice Reporter and still carry slip opinion citations. This is because of a recent delay in the transmission of CAAF opinions to West Publishing.

1. There is always a presumption attached to labeling something "annual," and while that is permissible no sooner than the second year, we will await further iterations before attaching that adjective. *Cf. Military Justice Symposium*, ARMY LAW., Mar. 1996.

2. *See, e.g.*, Criminal Law Division, *Significant Decisions of the Court of Military Appeals: 1982-1983*, 103 MIL. L. REV. 79 (1984).

The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power[1]

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Introduction

There are five elements of court-martial jurisdiction: (1) The court-martial must be convened by an officer empowered to convene it; (2) The court-martial personnel must have the proper qualifications; (3) The charges must be properly referred to it by competent authority; (4) The accused must be a person subject to court-martial jurisdiction; and (5) The offense must be subject to court-martial jurisdiction.[2] In recent decisions addressing court-martial jurisdiction, the courts addressed several of these elements.

In *United States v. Kohut*,[3] the United States Court of Appeals for the Armed Forces (CAAF) addressed the power of the convening authority to convene courts in the face of a service regulation that appears to limit that authority. In other cases, the service courts addressed various aspects of subject matter and personal jurisdiction. The most intriguing case of the year, however, was not decided by a military appellate court. In *Murphy v. Dalton*,[4] the United States Court of Appeals for the Third Circuit considered whether a member of the Reserve Component could be recalled to active duty under Article 2(d)(2)(A) of the Uniform Code of Military Justice[5] to stand trial for crimes committed while formerly a member of the Regular Component. In a decision that directly contradicts the Court of Military Appeals[6] holding on this issue,[7] the United States Court of Appeals for the Third Circuit (Third Circuit) concluded that the Marine Corps lacked personal jurisdiction to try a Reserve Component Marine for crimes he committed while a member of the Regular Component.

Impact of Service Regulations Upon Convening Authority

In *United States v. Kohut*, the CAAF considered the impact of service regulation violations on statutory authorizations to convene courts-martial. The accused pled guilty at a special court-martial to two specifications of assault. The incident giving rise to the charges had previously been the subject of a state criminal prosecution.[8] On appeal, Kohut claimed that the court lacked jurisdiction over these offenses because a Navy Instruction abrogated the power of the convening authority to convene the court. Section 0124 of the Manual of the Judge Advocate General Manual (JAGMAN) provides that, once a servicemember has been tried for an offense in the state court, court-martial is permitted only if essential to the interests of justice and upon permission of the Navy's Judge Advocate General (JAG).[9] The appellant claimed the government violated section 0124 because the Navy JAG did not give permission to court-martial the accused.[10] The appellant's theory was that the Secretary of the Navy, in promulgating section 0124 of the JAGMAN, withheld from the convening authority the power to convene a

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1. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917): "The foundation of jurisdiction is physical power" (Holmes, J.). *See also* United States ex. rel. Mayo v. Satan and His Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971):

> He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall. Plaintiff alleges that by reason of those acts Satan has deprived him of his constitutional rights . . . .We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district.

2. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 201(b)(1)-(5) (1995 ed.) [hereinafter MCM].

3. 44 M.J. 245 (1996).

4. 81 F.3d 343 (3rd Cir. 1996).

5. UCMJ art. 43 (1988).

6. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941 (1995)).

7. Murphy v. Garrett, 29 M.J. 469 (C.M.A. 1990).

8. United States v. Kohut, 41 M.J. 565, 566 (N.M.Ct.Crim.App. 1994).

9. DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0124 (3 Oct. 90) [hereinafter JAGMAN section 0124]. The Army announced a similar policy in DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 4-2 (24 June 96) [hereinafter AR 27-10]. The Army policy differs somewhat from the Navy policy, particularly in the level of approval necessary to try a soldier after a state prosecution. In the Army, the general court-martial convening authority (GCMCA) must give approval to proceed to court-martial. AR 27-10, para. 4-3a.

court-martial in cases where the offenses had been tried in state court.

The CAAF addressed the impact service regulation violations have on the statutory authorization[11] to convene courts-martial. It is a well-settled principle that jurisdictional significance should not attach to implementing service regulations in the absence of express characterization by Congress.[12] The court examined Article 23 of the UCMJ[13] and found that "Congress' specific designation of this commander as a convening authority was not made expressly dependent on service regulations or secretarial designation."[14]

The appellant's attack on jurisdiction also failed on another level. The court noted that section 0124 of the JAGMAN merely stated Navy policy, and as such, "[i]mposed no legal or binding restriction on subordinate commanders that deprived courts-martial convened by them of jurisdiction."[15] Finally, the court held that the Navy Instruction did not create a binding regulatory procedure.[16]

Practitioners should not interpret *Kohut* as an invitation to ignore service regulations.[17] Rather, the case reassures government counsel that mistakes in complying with such policies[18] will not limit a convening authority's statutory right to convene courts.

Valid Discharge After Action with a View Toward Trial Terminates Personal Jurisdiction

Vanderbush v. United States[19] should strike fear in the hearts of those serving as chiefs of military justice, especially those stationed overseas. The jurisdictional issue in this case arose from a common overseas scenario: a soldier is assigned to one unit, but attached to another for administration of military justice. According to the Army Court of Criminal Appeals (ACCA), the government lost personal jurisdiction[20] over the accused when he was validly discharged from the Army after arraignment, but before the trial. The case reminds chiefs of justice that they must understand key personnel regulations and must personally check to ensure completion of appropriate flagging action to prevent an unintended discharge.[21] Even more significant, chiefs of justice must personally secure and monitor the extension of an accused or suspect beyond the individual's expiration of term of service (ETS).[22]

In *Vanderbush*, the accused was assigned to the Eighth United States Army (EUSA), Korea, but performed his military duties in the 2d Infantry Division (2d ID) area of responsibility. In an exceptional series of events, the 2d ID was proceeding to court-martial at the precise time that EUSA was completing the accused's final outprocessing from the Army.[23] The military judge arraigned the accused on 30 May 1996, and set the trial for 26 June 1996. In the meantime, EUSA issued separation

10. *Kohut*, 41 M.J. at 567.

11. In articles 22, 23, and 24 of the UCMJ, Congress specified who may convene general courts-martial, special courts-martial, and summary courts-martial, respectively. UCMJ arts. 22-24 (1988).

12. *Kohut*, 41 M.J. at 569 (quoting United States v. Jette, 25 M.J. 16, 20 (C.M.A 1987)).

13. UCMJ art. 23 (1988). Article 23 enumerates who may convene special courts-martial.

14. United States v. Kohut, 44 M.J. 245, 250 (1996).

15. *Id.*

16. *Id*. Section 0124 expressly states that the policy is "[n]ot intended to confer additional rights upon the accused." JAGMAN section 0124. JAGMAN section 0124, *supra* note 9.

17. Army judge advocates should be particularly mindful of the requirements of AR 27-10. The proponent of the regulation is The Judge Advocate General of the Army.

18. In *United States v. Sloan*, 35 M.J. 4, 8 (C.M.A. 1992), the court considered the jurisdictional impact of noncompliance with an Army policy that retirees not be tried by court martial unless extraordinary circumstances exist and approval is given by the Office of The Judge Advocate General, Criminal Law Division. The court similarly concluded that such a policy did not limit the power of statutorily-designated commanders to convene courts. *Id*. The Army's current policy on trying retirees is largely unchanged. AR 27-10, *supra* note 9, para. 5-2b(3).

19. No. 9601265 (Army Ct. Crim. App. Nov. 13, 1996).

20. Courts-martial may only try those persons when authorized to do so under the code. MCM, *supra* note 2, R.C.M. 202(a).

21. The Army operates a system to guard against the accidental execution of specified favorable personnel actions for soldiers who are not in good standing. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS), para. 1-8 (1 Mar. 1988) [hereinafter AR 600-8-2]. Imposition of charges, pretrial restraint or initiation of an investigation into suspected criminal activity all require that the subject's records be "flagged" to reflect the unfavorable action. *Id*. paras. 1-11 & 1-12.

22. Soldiers will not be retained past their ETS because they are flagged. AR 600-8-2, *supra* note 21, para. 1-16. The GCMCA, though, may authorize retention beyond ETS for court-martial actions and for charges, pretrial restraint or investigation. *Id*. para 2-8(c).

orders effective on 15 June 1996. On that date, the accused flew to his home of record in the United States in possession of a valid discharge certificate and final accounting of his pay, which was to be mailed to him.[24]

In June, the court-martial reconvened without the accused. The defense counsel moved to dismiss for lack of personal jurisdiction. The military judge denied the motion, finding that the discharge did not terminate jurisdiction.[25] The accused filed a Writ of Prohibition, seeking to have the ACCA dismiss the charges. The ACCA defined the issue as "[w]hether court-martial jurisdiction was severed when the petitioner was discharged after arraignment but before charges were resolved by lawful authority."[26]

The Army court examined the discharge to determine whether it was complete and valid at the time the court-martial reconvened. On the question of completeness, the government contended that the discharge was not complete because the Army had not yet prepared to deliver the accused's final pay.[27] The government argued that a final audit by the Defense Finance and Accounting Service was required before the Army could deliver final pay to the accused.[28] The court easily rejected this argument and concluded that computation of final pay and examination of that amount at the installation level satisfied 10 U.S.C. § 1168(a).[29]

On the question of validity, the court refused to find that the discharge was invalid because of a fraud committed by the accused.[30] The court also rejected the government's mistake of fact argument. The government argued that the discharge authority would never have issued the discharge certificate had she known court-martial charges were pending. The court, however, refused to impute the convening authority's intent to retain the accused to the discharge official who, in the absence of any flagging action and extension approval by the GCMCA, discharged the accused in accordance with the Army procedures.[31]

Likewise, the court rejected the government's argument that the accused's discharge was invalid due to a mistake of law. The court examined the provisions in both *Army Regulation (AR) 600-8-2*[32] and *AR 635-200*[33] for retaining soldiers beyond their ETS while pending court-martial. Contrary to the government's position, the court held that "[a]rraignment by court-martial does not operate automatically either to restrict a soldier's eligibility for ETS discharge or to limit the actual authority of a properly appointed discharge official to issue a valid ETS discharge."[34]

Having decided that the accused's discharge was valid, the court examined what effect the discharge had on jurisdiction. Citing "[b]lack letter law that in personam jurisdiction over a military person is lost upon his discharge from the service

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23. *Vanderbush*, slip op. at 2.

24. *Id.*

25. *Id.* at 2-3.

26. *Id.* at 3.

27. Discharges at ETS are governed by 10 U.S.C. § 1168(a) (1995), which states:

> (a) A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.

10 U.S.C. § 1168(a) (1995). This delivery has significant legal meaning, signifying "[t]hat the transaction is complete, that full rights have been transferred, and that the consideration for the transfer has been fulfilled." United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985).

28. *Vanderbush*, slip op. at 6.

29. *See supra* note 27, 10 U.S.C. § 1168(a) (1995). The court noted that Congress did not intend the statute to be used as a "[m]eans of retaining court-martial jurisdiction when the government cannot or will not meet its obligation to timely deliver the soldier's final pay." *Vanderbush*, slip op. at 7.

30. Citing Article 3, the court concluded that the government had not secured the predicate conviction of the fraudulent discharge at a separate trial. UCMJ art. 3(b) (1988); United States v. Reid, 43 M.J. 906 (Army Ct. Crim. App. 1996); *infra* note 36 and accompanying text.

31. *Vanderbush*, slip op. at 8; s*ee also*, *supra* notes 21 & 22 and accompanying text.

32. *See supra* notes 21 and 22 and accompanying text.

33. Dep't of Army, Reg. 635-200, Enlisted Personnel (17 Oct. 1990) [hereinafter AR 635-200]. AR 635-200 provides that soldiers may be retained after ETS in three circumstances: (1) when an investigation of conduct has been started with a view of trial by court-martial; (2) when charges have been preferred; and (3) when the soldier has been apprehended, arrested, confined, or otherwise restricted by appropriate military authority. *Id*. para. 1-24a(1)-(3). Paragraph 1-24b provides, however, that a soldier who is awaiting trial by court-martial when he or she would otherwise be eligible for discharge will not be discharged until final disposition of the court-martial charges. *Id*. para. 1-24b.

34. *Vanderbush*, slip op. at 9.

absent some saving circumstance or statutory authorization,"[35] the court quickly concluded that no statutory authorization extended jurisdiction over the accused, a discharged person.[36] The court next considered whether some "saving circumstance" allowed jurisdiction despite the discharge.[37] The government argued that jurisdiction attaches at arraignment[38] and that such attached jurisdiction continues until the charges are resolved. The court, however, again disagreed. It distinguished the current case, in which the discharge occurred before trial and sentencing, from cases where jurisdiction survived a valid discharge. In those cases, the discharge occurred after court-martial findings and sentencing, and the courts considered the impact of discharge upon authority to complete post-trial action and appellate review.[39] Here, the court was reluctant to extend the concept of continuing attached jurisdiction where, as in the case at bar, it would result in a "[b]road and unprecedented judicial extension of court-martial jurisdiction."[40] The court held "[t]hat a valid discharge of a soldier from the Army prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge."[41]

Judge advocates will certainly await anxiously the CAAF's resolution of this issue.[42] In the meantime, the prudent chief of justice should personally ensure that appropriate flagging action is completed on all suspects and accuseds. In addition, they must check the ETS of every suspect and accused, and gain timely approval from the GCMCA to extend an accused beyond ETS in compliance with AR 600-8-2.[43] These actions will ensure that the accused is not inadvertently but lawfully discharged due to the absence of these actions.[44]

Fraudulent Discharge

In *United States v. Reid*,[45] the Army Court of Criminal Appeals considered whether a discharged soldier can be tried for both fraudulent discharge[46] and other offenses during the same proceeding. Although appropriately flagged[47] for a variety of crimes, the accused fraudulently secured a discharge and severance pay. The Army prosecuted the accused for all his crimes at the same trial--those committed before the fraudulent discharge, the fraudulent discharge, and the one committed after the fraudulent discharge.[48] Pursuant to the accused's guilty plea, the military judge announced a finding of guilty to

35. *Id.* (quoting United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)).

36. *Id.* at 4. The UCMJ provides explicit statutory authority to try discharged soldiers in a variety of circumstances. First, article 3(a) of the UCMJ provides jurisdiction over discharged soldiers who later reenter the service and become, once again, subject to the code. UCMJ art. 3(a) (1988). Article 3(b) states that a discharged person who is convicted of having obtained the discharge by fraud may be prosecuted for offenses committed prior to the fraudulent discharge. UCMJ art 3(b) (1988). Deserters who later rejoin a service and are discharged may still be prosecuted for the desertion committed before the discharge. UCMJ art. 3(c) (1988). Article 2(a)(7) provides that jurisdiction exists over persons in custody of the Armed Forces serving a sentence imposed by a court-martial even though the prisoner may have been discharged. UCMJ art. 2(a)(7) (1988); *see, e.g.*, United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987) (jurisdiction exists to try prisoner, but punishment may not include another punitive discharge). Jurisdiction continues over retirees from both the Regular Component and the Reserve Component. UCMJ art. 2(a)(4)-(5) (1988). Finally, the Court of Military Appeals has interpreted Article 2(d) as allowing, under limited circumstances, prosecution of members of the Reserve Component who committed offenses prior to their discharge from the active component. *See*, United States v. Murphy, 29 M.J. 469 (C.M.A. 1990); *see also*, discussion to R.C.M. 202. *But see, infra* notes 55 through 85.

37. *Vanderbush*, slip op. at 6.

38. According to R.C.M. 202(c), personal jurisdiction attaches at a much earlier time. It provides that court-martial jurisdiction attaches over a person when action with a view toward trial of that person is taken. MCM, *supra* note 2, R.C.M. 202(c)(1). "The action must be such that one can say that at some precise moment the sovereign had authoritatively signaled its intent to impose its legal processes upon the individual." United States v. Self, 13 M.J. 132, 137 (C.M.A. 1982) (quoting United States v. Smith, 4 M.J. 265, 267 (C.M.A. 1978)). R.C.M. 202(c)(2) states that action with a view toward trial can include apprehension, imposition of restraint such as restriction, arrest or confinement, and preferral of charges. The courts have expanded the list of events which constitute action with a view toward trial. *See, e.g., Self*, 13 M.J. at 137 (criminal investigation by military law enforcement agency which made guilt clear and prosecution likely, fulfills this requirement); United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979) (official advisement of Article 31 and *Miranda* rights is action with a view toward trial).

39. *See* United States v. Speller, 24 C.M.R. 173 (1957) (discharge may terminate military status to be tried but it does not require dismissal of appellate review). *See also* United States v. Engle, 28 M.J. 299 (C.M.A. 1989) (execution of discharge does not deprive Court of Military Appeals of jurisdiction to grant petition for review); United States v. Montesinos, 28 M.J. 38 (C.M.A. 1989) (administrative separation after finding of guilty does not vacate the conviction or terminate process of appellate review); United States v. Jackson, 3 M.J. 153 (C.M.A. 1977) (jurisdiction not lost when accused is administratively discharged while case is pending before an appellate court); United States v. Entner, 36 C.M.R. 62 (1965) (jurisdiction not lost when accused is administratively discharged while case is pending before an appellate court); United States v. Sippel, 15 C.M.R. 50 (1954) (appellate jurisdiction not divested by separation from the service).

40. *Vanderbush*, slip op at 5.

41. *Id.* at 6. Judge Russell, in his dissenting opinion, disagreed with the majority's view of attached court-martial jurisdiction. *Id*. at 11. According to his expansive interpretation, action with a view toward trial attaches *in personam* court-martial jurisdiction, and this attached personal jurisdiction survives a discharge. *Id.* at 11, 12. Accordingly, the only category of ex-soldier who is the constitutionally exempt from court-martial is the "[c]ategory [of] persons who are *validly* discharged without action with a view toward trial and who have not subsequently re-entered the service." *Id.* at 12. (emphasis in original). The accused did not fit into this category because the government took definite "action with a view toward trial"--it arraigned the accused. Further, Judge Russell opined that discharge lacked "[t]he imprimatur of competent judicial authority over the case [and] could not change the status of the petitioner from that of a soldier awaiting court-martial." *Id*. at 13.

42. On 6 February 1997, The Judge Advocate General of the Army filed a certificate for review of the decision of the service court. *Id., appeal docketed*, No. 97-5003/AR (CAAF Feb. 6, 1997).

the fraudulent discharge and then continued the proceeding as to the other charges. On appeal, the Army court affirmed the fraudulent discharge conviction, but reversed the remaining convictions.[49]

The court observed that the plain language of Article 3(b)[50] "[e]stablishes that a court-martial lacks jurisdiction over offenses committed prior to an alleged fraudulent separation until a predicate conviction of fraudulent discharge is obtained."[51] The court concluded that the accused's plea of guilty did not fulfill the requirement for a "conviction." It held that the "conviction" contemplated by the Congress in Article 3(b) is an adjudged sentence based on the finding of guilty to fraudulent separation.[52] Further, because the predicate conviction empowers the court-martial to hear a case it otherwise is powerless to consider, the accused cannot waive the issue through a guilty plea to the later offense.[53]

In dicta, the court also addressed the issue of jurisdiction over the offense[54] that occurred after the discharge.[55] On its face, Article 3(b) explicitly restores jurisdiction only over offenses committed prior to the fraudulent discharge.[56] The question for practitioners is whether jurisdiction exists--after a conviction for fraudulent discharge--over offenses committed after the fraudulent discharge. The court found that such a discharge is void, and absent a valid discharge, the accused remains subject to the UCMJ as a servicemember under Article 2.[57]

Reid instructs government counsel to follow the proper procedures for prosecuting fraudulent discharges and other crimes. Although it is more expedient to try an accused for all offenses at one proceeding, the court-martial simply lacks jurisdiction to try the accused for the pre-discharge offenses until the government secures a conviction for the fraudulent discharge. Government counsel must follow the explicit language of the statute and plan for two trials.

Death Declaration Does Not Equate to Discharge

In *United States v. Pou*,[58] the Air Force Court of Criminal Appeals dealt with the unique question of whether a declaration

43. There is an apparent discrepancy between AR 600-8-2 and AR 635-200 over the proper timing of the GCMCA approval to extend beyond ETS. The former explicitly states that approval of the GCMCA is required to retain a soldier past ETS. Flagging alone does not authorize retention of a soldier past ETS. AR 600-8-2, *supra* note 21, para. 1-16. Further, the steps for retaining beyond ETS include submitting the request for approval to the GCMCA with a suspense of thirty days before the ETS, and telephonic follow-up if the GCMCA does not respond to the request within thirty days of ETS. *Id.*, para. 1-10. AR 635-200, the regulation commonly consulted by judge advocates on this issue, states "[i]f charges have not been preferred, the soldier will not be retained more than 30 days beyond the ETS unless the [GCMCA] approves." AR 635-200, *supra* note 33, para. 1-24b. Because of this provision, most judge advocates think that a soldier can be retained beyond ETS for thirty days *without* approval of the GCMCA. The safest course of action is for government counsel to work closely with the servicing personnel office and to obtain GCMCA approval *prior* to the ETS date. In any event, government counsel absolutely must ensure that the accused is properly flagged.

44. Mere failure by the government to accomplish these actions--in the absence of a valid discharge--normally will have no effect on court-martial jurisdiction. United States v. Hutchins, 4 M.J. 190, 192 (C.M.A. 1978).

45. 43 M.J. 906 (Army Ct. Crim. App. 1996).

46. *See* UCMJ art. 83 (1988); MCM, *supra* note 2, pt. IV, para. 8a.

47. *See supra* note 21.

48. *Reid*, 43 M.J. at 908.

49. *Id.* at 910.

50. Article 3(b) provides, in pertinent part: "Upon conviction [for fraudulent discharge] he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge." UCMJ art. 3(b) (1988).

51. *Reid*, 43 M.J. at 909 (quoting United States v. Banner, 22 C.M.R. 510, 515 (A.B.R. 1956)).

52. *Id.* at 910.

53. *Id.*

54. The accused was charged with having deserted the day after his fraudulent discharge. *Id.* p. 909.

55. The Court of Appeals for the Armed Forces has decided two cases involving Article 3(b). *See* Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981); United States v. Cole, 24 M.J. 18 (C.M.A.) *cert. denied*, 484 U.S. 828 (1987). In both cases the additional offenses occurred prior to the fraudulent discharge.

56. *See supra* note 50.

57. *Reid*, 43 M.J at 910. Article 2(a)(1) provides jurisdiction over members of the Regular Component, including those who are awaiting a discharge after expiration of the term of service. UCMJ, art. 2(a)(1) (1988).

58. 43 M.J. 778 (A.F. Ct. Crim. App. 1995).

that a missing servicemember is dead equates to a discharge from the service for the purpose of terminating jurisdiction. In *Pou*, the accused faked his death and deserted from the Air Force. The Air Force declared him dead soon thereafter. Years later, the Air Force learned of the deceit and tried the accused for a number of offenses that he had committed after the Air Force declared him dead.[59]

On appeal, the accused challenged jurisdiction over the offenses. He contended that because Article 3(b)[60] governed the jurisdiction in the case, the government lacked jurisdiction over offenses that were committed after the "fraudulent discharge." The Air Force Court never addressed the scope of Article 3(b) jurisdiction, though, because it concluded that Article 3(b) did not apply to the case. The court found that the Air Force never discharged the accused; instead, it merely declared him dead. It distinguished between a fraudulent discharge, where the accused induces the service to take an affirmative action to separate the accused, and a death, where the military never effects a separation. With a death, the military merely officially acknowledges an event that is beyond the control of the service.[61]

The CAAF and the Third Circuit Disagree on Article 2

Perhaps the most interesting case involving jurisdiction last year was *Murphy v. Dalton*,[62] although it has questionable applicability to the military practitioner. Murphy served as an officer on active duty in the Marine Corps from April 1981 until May 1988.[63] In May 1988, he simultaneously resigned his commission in the regular Marine Corps and accepted a commission as an officer in the Marine Corps Reserve.[64] In August 1989, Murphy was informed of court-martial charges preferred against him involving his conduct while commissioned in the Regular Component, and of the government's intent to recall him to active duty.[65]

Murphy sought extraordinary relief from the Court of Military Appeals (CMA). He petitioned the court for an injunction and dismissal of the charges for lack of personal jurisdiction.[66] In particular, he alleged that the Marine Corps lacked the authority under Article 2 of the UCMJ to recall him to active duty for the Article 32 investigation. In Article 2(d)(1) Congress provided the express authority to recall to active duty, involuntarily, members of the Reserve Component for the purpose of an Article 32 investigation, trial by court martial, and nonjudicial punishment.[67] Article 2(d)(2) places a limitation on the power to recall these members of the Reserve Component. It states that "A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was (A) on active duty; or (B) on inactive-duty training . . . ."[68]

The court denied Murphy's petition and held that Article 2(d)(2)(A) authorized the Marine Corps to recall the accused for offenses that he had committed while he was on active duty, regardless of whether he was on active duty in the Reserve Component or in the Regular Component.[69] Furthermore, it held that since the accused was commissioned in the reserves simultaneously with resigning from the Regular Component, that there was no break in service which would normally have terminated jurisdiction over the accused for the offenses.[70] Murphy was recalled to active duty and pled guilty at a general court-martial.[71] After exhausting his appellate rights, Murphy

59. *Id.* at 779.

60. *See supra* note 50 and accompanying text.

61. *Pou*, 43 M.J. at 780.

62. 81 F.3d 343 (3rd Cir. 1996).

63. Murphy v. Garrett, 29 M.J. 469, 470 (C.M.A. 1990). From 1986 until 1987, the accused attended law school under the Marine Corps Funded Law Education Program (FLEP). In June 1987, he requested to be dropped from the FLEP and was reassigned to a recruiting unit. Unknown to the Marine Corps, he continued his law school studies and neglected his full-time military duties. *See also* Murphy v. Garrett, 729 F. Supp. 461, 463 (W.D. Pa. 1990).

64. *Murphy*, 29 M.J. at 470. As a reservist, the accused frequently participated in inactive duty training until his transfer into the Individual Ready Reserve. *Id.*

65. *Id.* The accused immediately filed suit in federal district court, asserting jurisdiction under the habeas corpus statute. 28 U.S.C. § 2241(c)(1). He sought first a temporary restraining order, Fed. R. Civ. P. 65(b), and then a preliminary injunction, Fed. R. Civ. P. 65(a), to enjoin the Marine Corps from ordering him to active duty for an Article 32 investigation into the charges. *Murphy*, 729 F. Supp. at 462. Article 32 of the Uniform Code of Military Justice (UCMJ) provides that no charges may be referred to a general court-martial until a thorough and impartial investigation of the allegations has been conducted. This investigation is commonly referred to as an Article 32 investigation. UCMJ art. 32 (1988). The district court denied the petition for a preliminary injunction and dismissed the complaint, in part, for failure to exhaust military administrative remedies. *Id.* at 461.

66. 29 M.J. 469, 470 (C.M.A. 1990).

67. UCMJ art. 2(d)(1) (1988).

68. *Id.* at 2(d)(2).

69. The court found that the term "active duty" should be given its plain and ordinary meaning, to include active duty in both the Regular Component and the Reserve Component. *Murphy*, 29 M.J. at 471.

again sought relief in the federal courts.[72] The district court granted summary judgment in favor of the Secretary of the Navy.[73] On appeal, the Third Circuit reversed, concluding that the court-martial lacked personal jurisdiction over Murphy.[74]

The Third Circuit, like the CMA,[75] focused on the applicability of Article 2(d)(2)(A) and the meaning of the term "active duty." Unlike the CMA, the Third Circuit concluded that, based on the legislative history of Article 2(d), the term "active duty" means active duty in the Reserve Component. According to the court, "[n]owhere is there evidence of a congressional intent to subject a reservist to court-martial jurisdiction for offenses committed on active duty while in the regular component."[76] The Third Circuit held since Murphy had committed the offenses while a member of the Regular Component and not the Reserve Component, the Marine Corps could not use Article 2(d)(2)(A) as a mechanism to recall Murphy and secure personal jurisdiction over him.[77]

The Third Circuit also addressed the issue of whether Murphy's resignation and simultaneous commission amounted to a break in service which would terminate personal jurisdiction. The Third Circuit again disagreed with the CMA[78] and held that personal jurisdiction over Murphy terminated upon his resigning his commission in the Regular Component.[79] It found that there was a clear and complete break in Murphy's service because at the time of his resignation, Murphy had no further military obligation and his discharge was not conditioned upon further military service.[80] Having concluded that personal jurisdiction over Murphy did not survive the discharge, the Third Circuit next examined whether jurisdiction was restored under either Article 3(a)[81] or Article 3(b).[82] It concluded that Article 3(a) was not applicable because neither of the two charges to which Murphy pled guilty was punishable by confinement for five years or more.[83] Article 3(b) was likewise inapplicable because Murphy was never convicted of fraudulent separation.[84] As such, the Third Circuit held that the Marine Corps lacked personal jurisdiction over Murphy and

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70. *Id.*

71. The accused was fined and dismissed from the service. Murphy v. Dalton, 81 F.3d 343 (3d Cir. 1996).

72. He sought, *inter alia*, compensatory and punitive damages, and declaratory and equitable relief. *Murphy*, 81 F.3d at 345. The district court had jurisdiction under 28 U.S.C. § 1331 (1980), which states that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1980).

73. *Murphy*, 81 F.3d at 345.

74. *Id.* at 352. The Third Circuit vacated the district court's order granting summary judgment in favor of the Secretary of the Navy and remanded the case for further proceedings. *Id.*

75. *Supra* notes 69 and 70 and accompanying text.

76. 81 F.3d at 351.

77. *Id.* In her dissenting opinion, Judge Mansmann stated that she could "[f]ind no support . . . for majority's holding that the term 'active duty' should apply only to periods of active duty while Murphy was a member of the reserve component and not the regular component." *Id.* at 353-54 (Mansmann, J., dissenting).

78. *Supra* note 70 and accompanying text.

79. *Murphy*, 81 F.3d at 349.

80. *Id.* at 348. Judge Mansmann also disagreed with the majority on this issue. She concluded that there was never a lapse in Murphy's military status. *Id.* at 354 (Mansmann, J., dissenting).

81. The version of Article 3(a) applicable to this case stated:

> [N]o person charged with having committed, while in a status which he was subject to under this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

UCMJ art. 3(a) (1988). Congress amended Article 3(a) in 1992, which now states:

> [A] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of the chapter for that offense by reason of a termination of that person's former status.

The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1059(a) (1992).

82. Article 3(b) provides personal jurisdiction over a former servicemember who fraudulently obtained the discharge. UCMJ art. 3(b) (1988). *See supra* notes 45 through 57 and accompanying text.

vacated the order of the district court granting summary judgment on behalf of Murphy.[85]

It is unlikely that military practitioners will confront an accused similarly situated to Murphy because the current version of Article 3(a), in effect since 1992, will provide personal jurisdiction in the majority of cases where the accused has had a break in service.[86] Further, the CAAF has previously stated that it does not consider itself to be bound by decision of federal courts of appeals.[87] Still, when representing a Reserve Component accused whom the government recalls under Article 2(d)(2)(A) for crimes committed while a member of the Regular Component, defense counsel should consider whether to fashion an argument consistent with the Third Circuit's interpretation of Article 2(d)(2)(A). In making such an argument, defense counsel must be aware of Rule for Professional Conduct 3.3,[88] which requires counsel to disclose to the tribunal legal authority in the controlling jurisdiction which is directly adverse to the position of the client.[89] Defense counsel, therefore, must always disclose to the trial court the CMA decision in conjunction with urging the trial court to apply the analysis from the Third Circuit decision.

Conclusion

Surprisingly, the jurisdiction cases from the last year oftentimes limited the long arm of military justice. These cases should energize defense counsel to place renewed emphasis on the more sophisticated jurisdictional issues. Although failure to raise a jurisdictional issue does not waive the issue on appeal,[90] defense counsel should carefully examine and raise any potential jurisdictional issue. The cases also hold lessons for trial counsel, particularly, the *Vanderbush* case. Trial couns el cannot automatically rely on the long arm of military justice to reach the accused. Trial counsel must insure that jurisdiction is preserved by gaining timely approval from the GCMCA to extend an accused beyond ETS.

83. *Murphy*, 81 F.3d at 349. The government had preferred five offenses against Murphy, but dropped three when Murphy pled guilty to violations of Articles 92 and 133. UCMJ arts. 92 and 133 (1988). The only offenses which carried a sentence over five years were among the three the government dropped.

84. *Murphy*, 81 F.3d at 349. The government originally preferred a fraudulent separation charge against Murphy, but later dismissed it. *Id.* Since the government failed to secure a conviction for fraudulent separation, jurisdiction was never restored for the remaining offenses Murphy allegedly committed prior to the discharge. *See supra* note 51 and accompanying text.

85. The court remanded the case to the district court for further proceedings consistent with the decision. *Id.* at 351

86. Due to the five-year statute of limitations, most crimes the government will prosecute will not have occurred earlier than 1992. UCMJ art. 43(b) (i) (1988). There is no statute of limitations, though, for crimes punishable by death. UCMJ 43(a) (1988).

87. In *Garrett v. Lowe*, with respect to a decision by the Court of Appeals for the Tenth Circuit, the CAAF stated:

> [T]his court is not bound by the decision [of the Tenth Circuit] . . . .This appellate court of the United States is as capable as is a Court of Appeals of the United States of analyzing and resolving issues of Constitutional and statutory interpretation. In fact, to the extent that an issue involves interpretation and application of the Uniform Code of Military Justice and the *Manual for Courts-Martial* in the sometimes unique context of the military environment, this Court may be better suited to the task.

Garrett v. Lowe, 39 M.J. 293, 296 n.4 (C.M.A. 1994).

88. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.3 (1 May 92) [hereinafter AR 27-26].

89. AR 27-26, rule 3.3(a)(3) and comment. The rule technically does not require disclosure unless the opposing party neglects to bring the authority to the attention of the tribunal. The most prudent course of action, though, is to acknowledge the CMA decision immediately and then seek to distinguish the case at bar from the decision.

90. MCM, *supra* note 2, R.C.M. 907(b)(1)(A).

Walking the Fine Line Between Promptness and Haste:[1] Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence

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Introduction

There are six sources of the right to a speedy trial in the military: (1) statute of limitations;[2] (2) the Due Process Clause of the Fifth Amendment;[3] (3) the Sixth Amendment;[4] (4) Articles 10 and 33 of the UCMJ;[5] (5) Rule for Courts-Martial (R.C.M.) 707;[6] and (6) case law.[7] The 1991 amendments to R.C.M. 707[8] significantly changed the 120-day speedy trial rule,[9] particularly in the area of excludable delays.[10] In last year's most significant speedy trial case, *United States v. Dies*,[11] the Court of Appeals for the Armed Forces (CAAF) returned in part to the "catalog-of-excluded-periods approach," by determining that the period of time that an accused absents himself without leave (AWOL) is automatically excludable from government accountability. In *United States v. Hatfield*,[12] the CAAF also shed new light on the "reasonable diligence"[13] standard for governmental compliance with Article 10[14] speedy trial rights.

The CAAF also issued three opinions dealing with the related topic of pretrial restraint.[15] In *United States v. Gaither*,[16]

1. *See* Powell v. Alabama, 287 U.S. 45, 59 (1932):

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of a mob.

See also Henderson v. Bannan, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting): "The prompt and vigorous administration of the criminal law is to be commended and encouraged. But swift justice demands more than just swiftness . . ."

2. UCMJ art. 43 (1988).

3. U.S. CONST. amend V.

4. *Id.* amend VI.

5. UCMJ arts. 10, 33 (1988).

6. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1995 ed.) [hereinafter MCM].

7. United States v. Reed, 41 M.J. 449 (1995).

8. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1984) (C5, 6 Jul 91).

9. For example, the amendment changed one event that triggers the clock from notice of preferral of charges to preferral; it changed the sole remedy from dismissal with prejudice to dismissal with or without prejudice and it eliminated the separate ninety day clock for pretrial confinement and arrest cases. *Id.*

10. Prior to Change 5 to R.C.M. 707, the government was not accountable for either periods of time covered by defense delays or for periods enumerated in the rule as excludable periods. MCM, *supra* note 8, R.C.M. 707 (1984). The drafters abandoned this "catalog-of-excluded-periods approach" in favor of a "contemporaneous-ruling approach." United States v. Dies, 45 M.J. 376 (1996).

11. 45 M.J. 376 (1996).

12. 44 M.J. 22 (1996).

13. *See* United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) (holding that reasonable diligence is the standard for measuring government compliance with Article 10).

14. UCMJ art. 10 (1988).

15. Pretrial restraint law is closely related to speedy trial law because several forms of pretrial restraint enumerated in R.C.M. 304 trigger the R.C.M. 707 speedy trial clock. MCM, *supra* note 6, R.C.M. 304(a)(2)-(4), 707(a)(2). Arrest, R.C.M. 304(a)(3), and pretrial confinement, R.C.M. 304(a)(4), trigger Article 10 speedy trial rights. UCMJ art. 10 (1988).

16. United States v. Gaither, 45 M.J. 349 (1996).

the CAAF resolved the disagreement among the service courts on the proper standard of review a military judge should apply in conducting pretrial confinement reviews. The CAAF also addressed the issue of *Rexroat*[17] sentence credit for restraint tantamount to pretrial confinement in *United States v. Perez*.[18] Finally, in *United States v. Tilghman*,[19] the court refused to grant additional sentence credit for illegal pretrial confinement imposed during the recess of the case.

Speedy Trial

The CAAF Creates an Automatic Delay Under R.C.M. 707(c)

Prior to the R.C.M. 707 amendment in 1991, speedy trial motions[20] often degraded into "[p]athetic side-shows of claims and counter-claims, accusations and counter-accusations, proposed chronologies and counter-proposed chronologies, and always the endless succession of witnesses offering hindsight as to who was responsible for this minute of delay and who for that over the preceding months."[21] The 1991 amendments eliminated the list of automatic excludable delay periods and adopted the contemporaneous-ruling approach to handling delays. The drafters of the amended rule intended to eliminate such "[a]fter-the-fact determinations as to whether certain periods of delay are excludable."[22]

According to the amended rule, a party should request a delay from competent authority,[23] providing notice to the opposing party,[24] at the time of the desired delay. There are times, however, when the government may not have secured a proper, contemporaneous delay in advance, yet asks to be relieved from accountability for the time. The most compelling situation in favor of the government's position occurs when the accused goes AWOL during the preparation of the case.[25] According to *Dies*, the government is not accountable for periods when the accused is AWOL, even if it has not secured a delay from competent authority covering the period.[26]

In *Dies*, the accused was AWOL for twenty-three days after unrelated charges were preferred against him.[27] Preferral of charges triggered the R.C.M. 707(a) speedy trial clock.[28] Although the speedy trial clock had begun, the government neglected to secure a delay for the accused's twenty-three-day AWOL. The accused was arraigned 146 days after preferral, and the defense moved to dismiss the charges for violation of the R.C.M. 707(a) 120-day rule. The military judge, relying on the Court of Military Appeals (CMA)[29] decision in *United*

17. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1296 (1994) (holding that the forty-eight hour time limit for judicial reviews of continued confinement after warrantless arrests applies to the military.)

18. 45 M.J. 323 (1996).

19. 44 M.J. 493 (1996).

20. Speedy trial issues are usually raised as motions to dismiss under R.C.M. 907. MCM, *supra* note 6, R.C.M. 907(b)(2)(A).

21. United States v. Dies, 45 M.J. 376, 377-78 (1996).

22. MCM, *supra* note 6, R.C.M. 707 analysis, app. 21, at 21-40.

23. Prior to referral, the convening authority is the only competent authority to grant delays. After referral, the military judge resolves delay requests. MCM, *supra* note 6, R.C.M. 707(c)(1).

24. *See* United States v. Duncan, 38 M.J. 476, 479-80 (C.M.A. 1993) (holding that, absent extraordinary circumstances, government should inform accused of all government-requested pretrial delays in advance and give accused an opportunity to respond).

25. *See* United States v. Powell, 38 M.J. 153 (C.M.A. 1993) (government not accountable for period that accused is AWOL when preferral occurred prior to 1991 R.C.M. 707 amendment and arraignment occurred after change in rule). *Powell* presented unique facts. Preferral occurred under the old rule, where preferral was an irrelevant event for speedy trial purposes. The accused went AWOL before he could be notified of the charges, which was the relevant event under the old rule. The accused was caught and later arraigned with the new rule in effect. The court sorted through the confusion and avoided an "absurd" result by concluding that the government was not obliged to secure a delay for the AWOL period when, under the old rule, the clock had not even been triggered. *Id.* at 154-55. Clearly, none of the compelling facts and blameless complacency that occurred in *Powell* are present in *Dies*.

26. *Dies*, 45 M.J. at 377.

27. *Id.*

28. MCM, *supra* note 6, R.C.M. 707(a)(1), states the following:

> (a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:
>
> (1) Preferral of charges;
>
> (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or
>
> (3) Entry on active duty under R.C.M. 204.

States v. Powell,[30] found that the government was not accountable for the period of time that the accused was AWOL.[31]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) disagreed with the trial judge's interpretation of *United States v. Powell*. The NMCCA opined that the holding in *Powell* was limited to the unique case in which the charges were preferred prior to the amendment of R.C.M. 707.[32] No such situation arose in *Dies*, because both the preferral and arraignment of the accused occurred under the amended rule. The NMCCA found *Powell* inapplicable and held that the military judge could not relieve the government of accountability for the AWOL period by granting an after-the-fact delay.[33]

The CAAF set aside the NMCCA decision and clarified its position on speedy trial accountability for periods of AWOL.[34] It held that "[a]n accused who is an unauthorized absentee is estopped from asserting a denial of speedy trial during the period of his absence, at a minimum."[35] While an accused is AWOL, the court refused to force the government to make efforts to proceed to trial, which the court described as "futile."[36]

The opinion did not stop with equities, though. The court also explained how its holding was consistent with the language of R.C.M. 707(c).[37] The court opined that R.C.M. 707(c) merely lists *one* category of period excluded from the speedy trial count; "the rule does not say that those, and only those, stays and delays are excludable."[38] It rejected the notion that R.C.M. 707(c) is intended to be an exhaustive list of periods that are excludable from government accountability.[39] The court also justified its holding by claiming that it was "consistent" with both the Federal Speedy Trial Act (FSTA) [40] and the American Bar Association (ABA) Standards for Criminal Justice, Speedy Trials.[41]

Dies is significant because it displays, at least with respect to the current R.C.M. 707, the CAAF's lack of deference to the President's rule-making authority under Article 36.[42] In promulgating the current version of R.C.M. 707(c), the President specifically eliminated the list of periods of time that presumptively qualified as excludable delay under the prior rule.[43] In doing so, it put practitioners on clear notice that the government was accountable for all periods of time--regardless of the equities[44]--unless an "excludable delay" had been granted by competent authority.[45] It enabled the government, though, to secure delays by setting out a detailed procedure for the parties to fol-

29. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941 (1995)).

30. 38 M.J. 153 (C.M.A. 1993).

31. United States v. Dies, 42 M.J. 847, 850 (N.M.Ct.Crim.App. 1995).

32. *Id.* at 851.

33. *Id*. The court left open the possibility that in extraordinary circumstances, such as unforeseeable military exigencies, military judges may grant an after-the-fact delay. *Id*. at 850 n.2.

34. United States v. Dies, 45 M.J. 376, 378 (1996).

35. *Id.*

36. *Id.*

37. R.C.M. 707(c), excludable delay, states, "all periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge shall be excluded when determining whether the period in subsection (a) of this rule has run." MCM, *supra* note 6, R.C.M. 707(c).

38. *Dies*, 45 M.J. at 378.

39. *Id.*

40. 18 U.S.C. § 3161 (1988). The Federal Speedy Trial Act (FSTA) contains a specific exemption for any time that the accused is absent. *Id.* § 3161(h)(3)(A). In order to be considered absent, the prosecution must show that accused's whereabouts are unknown and that the accused is attempting to avoid apprehension or prosecution, or that his whereabouts cannot be determined by due diligence. *Id.*

41. American Bar Association, Standards for Criminal Justice, Speedy Trials, standard 12-2.3(e) (1986) [hereinafter ABA Standards]. This ABA standard provides that periods of delay resulting from absence or unavailability of the defendant are excluded in computing the time for trial.

42. UCMJ art. 36 (1988). In Article 36, the Congress delegated to the President the power to prescribe pre-trial, trial and post-trial procedures.

43. Prior to Change 5 to R.C.M. 707, R.C.M. 707(c) contained nine periods that were automatically excluded when determining whether the 120 days had run. Many of those reasons are now enumerated in the discussion to R.C.M. 707(c). The CAAF's efforts, therefore, to interpret this rule consistently with the FSTA, section 3161(h)(3)(A), and ABA Standard 12-2.3 are strained. *See supra* notes 40 and 41 and accompanying text. Both the FSTA and the ABA Standards contain lists of automatic excludable periods, just like the *old* R.C.M. 707. It is illogical to suggest that if the President explicitly rejected this scheme, he nevertheless intended the new rule to be interpreted consistently with the previous one.

low.[46] Finally, it created a new remedy--dismissal without prejudice--for the military judge to apply when the equities weighed in favor of the government.[47] In short, the new rule eliminated the uncertainty and protracted litigation about which the CAAF was so critical.

The CAAF, however, has rejected the President's regulatory scheme and created an automatic exclusion for the government. The question for practitioners is whether, based on *Dies*, there are other periods of time that are also automatically excluded from government accountability. Although the court characterized its holding in *Dies* as "limited," it clearly opened the door to the creation of additional categories of "excludable delays" where the same equitable arguments apply on behalf of the government.[48] Notwithstanding *Dies*, the most prudent course of action for government counsel is to secure a contemporaneous ruling from competent authority for any periods of delay.

Speedy Trial Under Article 10

Article 10 mandates that, after confinement or arrest, the government must take immediate steps to try a prisoner or to release him.[49] In *United States v. Kossman*, the CMA held that the standard for measuring government compliance with Article 10 is "reasonable diligence."[50] Since *Kossman*, practitioners and the courts have wrestled with the question of what actions reflect "reasonable diligence" on the part of the government.[51] The overwhelming majority of recent cases addressing this issue have found that the government proceeded with reasonable diligence.[52] In *United States v. Hatfield*,[53] the CAAF, for the first time, has reversed a service court's finding of reasonable diligence.

The central issue in *Hatfield* was whether the military judge abused his discretion[54] when characterizing five periods of delay, totaling forty-eight days. The military judge characterized the entire period as "inordinate delay" and dismissed the charges.[55] The government appealed the ruling and the NMCCA reversed.[56] The NMCCA examined the reasonable diligence standard in depth and concluded that the military judge abused his discretion in dismissing the charges under Article 10.[57]

44. The analysis clearly states that the excludable delay subsection follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. R.C.M. 707(c), Analysis, app. 21, at 21-40, *supra* note 6. The CAAF interpreted the rule differently, concluding that there is "[n]othing even in the current version of R.C.M. 707 that assesses the Government for an accused's unauthorized absence." *Dies*, 45 M.J. at 378.

45. Prior to referral, the convening authority normally rules on requests for pretrial delay. After referral, the military judge rules on such requests. MCM, *supra* note 6, R.C.M. 707(c)(1). The discussion to this subsection states that prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer. Absent express delegation, though, the Article 32 investigating officer does not have independent, inherent authority to grant delays which will be considered "excludable delays" under R.C.M. 707(c). *See* United States v. Thompson, 44 M.J. 598, 602 (N.M.Ct.Crim.App. 1996).

46. Rule 305(c)(1), when read in conjunction with the discussion, sets out a detailed procedure which prescribes the timing and form of requests for delays, the content of requests, the appropriate approval authorities, and reasons to grant delays. MCM, *supra* note 6, R.C.M. 707(c)(1) and discussion. The CAAF, though, chided the drafters of the new rule for sending to the President a rule "sans substantive guidelines." *Dies*, 45 M.J. at 378.

47. MCM, *supra* note 6, R.C.M. 707(d). The government could make a compelling argument for dismissal without prejudice if the government violated the 120-day rule solely because it was held accountable for the accused's AWOL period.

48. The government may consider the accused "beyond the control" of the government where the crime occurs overseas and the host country asserts jurisdiction. A significant period of time may elapse while the host country and the United States military determine who will prosecute the case. In *United States v. Youngberg*, 38 M.J. 635 (A.C.M.R. 1993), *aff'd on different grounds*, 43 M.J. 379 (C.M.A. 1995), the Army Court of Military Review (ACMR) held that the government is not accountable for such periods, even though it neglected to secure a delay to cover the time.

49. UCMJ art. 10 (1988).

50. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993).

51. In *Kossman*, the CMA described reasonable diligence as something other than constant motion by the prosecution. Brief periods of inactivity were found to be permissible so long as they were not unreasonable or oppressive. *Id*. at 262. The court observed that an Article 10 issue would be raised where government could have gone to trial but negligently or spitefully chose not to. *Id*. at 261.

52. *See, e.g.*, United States v. Strouse, 1996 WL 255855 (A.F. Ct. Crim. App. May 8, 1996) (government proceeded with reasonable diligence when it brought accused to trial 116 days after imposition of pretrial confinement); United States v. Butler, 1996 WL 84607 (A.F. Ct. Crim. App. Feb. 23, 1996).

53. United States v. Hatfield, 44 M.J. 22 (1996).

54. Appellate courts apply an abuse of discretion standard in reviewing Article 10 rulings by the military judge. *See Kossman*, 38 M.J. at 262.

55. *Hatfield*, 44 M.J. at 23.

56. United States v. Hatfield, 43 M.J. 662, 663 (N.M.Ct.Crim.App. 1995).

57. *Id.*

The NMCCA first examined the sufficiency of the military judge's factual findings. It determined that the evidence did not support the judge's computation of forty-eight days of government inactivity because the government took specific steps toward trial on many of the days.[58] The court then examined the military judge's characterization of the "delay" as "inordinate." It concluded that because many steps needed for court-martial were accomplished on the disputed days, the military judge erred in concluding that the government lacked reasonable diligence.[59] Finally, the court also determined that the military judge misapplied the law, reiterating that the test for reasonable diligence is *not* whether the government could have gone to trial sooner, because absent evidence of negligence or spite, mere delay does not establish that the government violated Article 10.[60]

The CAAF, however, disagreed with the NMCCA finding that the military judge had not abused his discretion.[61] First, the court highlighted some of the conditions it expects military judges to consider in evaluating the chronologies of military cases. These include: case complexity; logistical challenges inherent in a mobile, world-wide system; operational necessities; ordinary judicial impediments, such as crowded dockets; and judge and attorney availability.[62] Practitioners should be mindful of this list of relevant events in preparing their chronologies.

The CAAF validated what it considered the two primary concerns that the military judge had in the case: the overall lack of forward motion in the case,[63] and the specific delays associated with appointing a military defense counsel. In particular, the Navy Legal Service Office responsible for appointing the defense counsel refused to accept the case file because some documents were missing.[64] Instead of taking immediate steps to secure the documents, the file sat untouched for several days.[65] The CAAF was also extremely critical of the lackadaisical government effort to secure a defense counsel for the accused.

In evaluating the significance of this case, counsel may conclude that it has little value because the facts were a true aberration--a worst case scenario of delay due to an unusual sequence of events and circumstances. Certainly, the military judge and the CAAF focused on this fact.[66] Practitioners, though, can learn more.

First, the CAAF printed the detailed findings of fact entered by the military judge.[67] It appears from the findings that the parties kept adequate records and were able to marshal the evidence at the hearing. When litigating Article 10 motions, counsel should not limit their efforts to filing a brief and presenting evidence. Counsel should look at the findings of fact as another opportunity for advocacy and, in every case, should submit to the military judge proposed findings of fact on the disputed facts.[68] While it may require additional work on the part of counsel, this practice ensures that the military judge does not overlook any evidence, and it provides a beneficial rendition of the facts that the military judge may draw from in entering the findings.

It also may be helpful to practitioners to contemplate the fundamental difference in how the NMCCA and the military judge viewed the delays. The military judge added the individual delay periods together and then evaluated the 48-day period. He found that, as a whole, the total period demonstrated inordinate delay because the government had neglected to move the case toward trial during this period.[69] The military

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58. *Id.* at 666.

59. *Id.*

60. *Id.* at 667.

61. *Hatfield*, 44 M.J. at 24-25.

62. *Id.* at 23 (quoting United States v. Kossman, 38 M.J. 258, 261-62 (C.M.A. 1993)).

63. For example, there were delays associated with all of the following events: re-preferring the original charges; compiling the paperwork for delivery to the appropriate Naval Legal Service Office; preparing the appointment letter for the Article 32 investigating officer; securing the availability of counsel for the Article 32 hearing; and preparation of the SJA's recommendation for forwarding of the charges to the general court-martial convening authority. *Id.* at 25.

64. *Id.*

65. A clerk went on leave for a few days, and no one else worked on the file. *Id.* at 25-26.

66. *Id.* at 24.

67. *Id.* at 25-16.

68. The parties should consider entering a stipulation of fact for the undisputed portions of the case chronologies. *See* United States v. Laminman, 41 M.J. 518, 522 n.2 (C.G.Ct.Crim.App. 1994) (en banc).

69. *Hatfield*, 44 M.J. at 23.

judge stated a concern even for brief periods of inactivity, which often can add up to lengthy periods of confinement.[70]

In contrast, the NMCCA analyzed each period of delay independently and found that none of them amounted to more than a "[p]eriod of inactivity . . . [that] can fairly be described as brief in length."[71] Comparing the facts to pre-*Burton*[72] cases, the NMCCA concluded that the longest single delay period (21 days) was far shorter than the typical length of delay where pre-*Burton* courts dismissed the charges for violations of Article 10.[73] It is noteworthy that the CAAF did not adopt this methodology in its review.

Pretrial Restraint

Standards of Military Judge Reviews of Pretrial Confinement

Military judges review pretrial confinement under essentially three circumstances: (1) when ruling on whether the accused is entitled to administrative credit for a violation of various subsections of R.C.M. 305;[74] (2) when ruling on whether the accused is entitled to administrative credit because the pretrial confinement was served as the result of an abuse of discretion;[75] and (3) when determining whether the accused should be released from pretrial confinement.[76] These issues are normally raised in a motion for appropriate relief.[77] In the first two circumstances, the question is whether the confinement already served was proper; in the third, it is whether the accused should be released.[78]

In *United States v. Gaither*,[79] the CAAF resolved the disagreement between the service courts[80] on the different standards of review for military judges reviewing pretrial confinement, particularly under R.C.M. 305(j).[81] The court clarified that the appropriate standard of review depends on whether the military judge is conducting a review under R.C.M. 305(j)(1)(A) or R.C.M. 305(j)(1)(B).[82]

In *Gaither*, the accused requested additional sentence credit[83] for illegal pretrial confinement.[84] He alleged that the R.C.M. 305(i) reviewing officer[85] erred in deciding to continue the pretrial confinement on the basis that the accused was a flight risk.[86] The military judge held a *de novo* hearing on the issue, allowing the government to present the same evidence

70. *Id.*

71. *Hatfield*, 43 M.J. at 667 (N.M.Ct.Crim.App. 1994).

72. United States v. Burton, 44 C.M.R. 166 (1971). In *Burton*, the CMA created a presumption that Article 10 is violated whenever an accused is held in confinement or arrest for longer than 90 days. The CMA overruled *Burton* in *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). The court articulated the new standard for compliance with Article 10 in terms of pre-*Burton* law; therefore, the courts and practitioners continue to consider pre-*Burton* law as guidance in sorting out the "reasonable diligence" standard of Article 10.

73. *Hatfield*, 43 M.J. at 667.

74. An accused is entitled to administrative credit for failure to comply with R.C.M. 305(f) (right to military counsel); R.C.M. 305(h) (notification and action by commander); or R.C.M. 305(i) (review by neutral and detached official). MCM, *supra* note 6, R.C.M. 305(l)(2). The remedy for noncompliance with these subsections is one day of administrative credit, credited against the sentence adjudged, for each day of confinement served as a result of such noncompliance. *Id.* at 305(k).

75. An accused is entitled to administrative credit for pretrial confinement served as a result of an abuse of discretion. *Id.* at 305(j)(2). Depending on the timing of the motion, the defense may request that the accused be released from pretrial confinement in addition to the sentence credit. *See* id. at 305(j)(1)(A).

76. First, if the reviewing officer's decision was an abuse of discretion *and* the government fails to present sufficient evidence to justify continued confinement, then the military judge will release the accused. *Id.* at 305(j)(1)(A). The accused is also entitled to administrative sentence credit. Second, the military judge must release the accused if there was no abuse of discretion, but information not presented to the reviewing officer establishes that the prisoner should be released. *Id.* at 305(j)(1)(B). The last situation where the military judge will examine this issue is where no reviewing officer has reviewed the pretrial confinement. In that case, the military judge will conduct a review and release the accused if the government fails to present information to establish sufficient grounds for continued confinement. *Id.* at 305(j)(1)(C).

77. *Id.* at 906(b)(8).

78. United States v. Gaither, 45 M.J. 349, 351 (1996).

79. *Id.*

80. *Compare* United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990) (de novo review proper in conducting R.C.M. 305(j) reviews of pretrial confinement), *with* United States v. Gaither, 41 M.J. 774 (A.F. Ct. Crim. App. 1995) (appropriate standard of review depends on the type of R.C.M. 305(j) review).

81. MCM, *supra* note 6, R.C.M. 305(j).

82. *Gaither*, 45 M.J. at 351-52.

83. Apparently Gaither was not asking to be released, so his situation fits into the second category of inquiry. *See supra* note 75 and accompanying text.

84. United States v. Gaither, 41 M.J 774, 776 (A.F. Ct. Crim. App. 1995).

that the reviewing officer had considered at the R.C.M. 305(i) hearing. Additionally, the military judge considered evidence that was not available to the reviewing officer during the R.C.M. 305(i) hearing.[87]

The military judge concluded that, based solely on the evidence presented at the R.C.M. 305(i) hearing, the reviewing officer abused his discretion in determining that the accused was a flight risk.[88] Relying on the additional information gleaned from the providence inquiry, though, the military judge concluded that pretrial confinement was necessary to prevent the accused from committing additional offenses.[89] The military judge denied the request for sentence credit due to illegal pretrial confinement.[90]

The Air Force Court of Criminal Appeals (AFCCA) determined that the military judge erred by conducting a *de novo* review instead of applying an abuse of discretion standard.[91] The CAAF agreed and settled the confusion over how military judges should review pretrial confinement issues. It held that when a military judge reviews "[t]he legality of confinement previously served . . .," he "[s]hould limit his review to the information before the magistrate at the time of the decision to continue confinement,"[92] an abuse of discretion review. In contrast, when the military judge is deciding whether the accused should be released, the military judge should hold a *de novo* hearing.[93]

The standards are logical and simple to apply except in those potentially confusing situations when the military judge must decide *both* questions. Specifically, whenever the defense requests release under R.C.M. (j)(1)(A),[94] counsel should be prepared to advise the military judge on the application of both standards. The military judge must first decide whether there was an abuse of discretion and, second, whether a *de novo* review of additional information justifies continued confinement.

Gaither also emphasizes how important it is for both trial and defense counsel to ensure all matters presented to the reviewing officer are made part of the record of the R.C.M. 305(i) hearing.[95] A complete record will facilitate counsel's arguments regarding the reviewing officer's exercise of discretion in continuing pretrial confinement.[96]

Applicability of Rexroat *to Pretrial Restriction?*

In another pretrial restraint case, *United States v. Perez*,[97] the CAAF struggled with an appellant who arguably received a windfall at trial and was seeking additional relief on appeal. The defense moved for sentence credit, claiming that the accused had been subjected to restriction tantamount to confinement when he was ordered not to leave the installation without permission.[98] The trial counsel presented no evidence on the matter. He merely pointed out that the restriction to the installation is normally regarded as restriction in lieu of arrest[99] under R.C.M. 304(a)(2) and not tantamount to pretrial confinement under R.C.M. 305.[100] The military judge granted the motion, criticizing the government for declining to present any evidence on the motion. The military judge, however, never awarded a specific amount of credit against the accused's sentence.[101]

On appeal, the AFCCA agreed with the appellant that he was entitled to day-for-day credit for each day spent on restriction,[102] but that he had not received the credit from the military judge. The appellant also contended that he was entitled to additional day-for-day credit because a neutral and detached official had not conducted a probable cause review of his "confinement"within forty-eight hours.[103] The AFCCA refused to award *Rexroat* credit, though, because the defense counsel's motion for appropriate relief did not raise the issue.[104] The CAAF granted review to consider whether the AFCCA had erred in deciding the defense had not preserved the *Rexroat* issue.

85. R.C.M. 305(i) requires that a neutral and detached official review the necessity for continued pretrial confinement within 7 days of the imposition of confinement under military control. MCM, *supra* note 6, R.C.M. 305(i)(1).

86. *Gaither*, 45 M.J. at 350. The requirements for pretrial confinement include either that the accused will not appear at trial and pretrial proceedings, or that the prisoner will engage in serious criminal misconduct. MCM, *supra* note 6, R.C.M. 305(h)(2)(B)(iii)(a), (b).

87. Specifically, the military judge considered responses that the accused made during the providency inquiry. *Gaither*, 45 M.J. at 351.

88. *Id.*

89. *Id.*

90. *Id.*

91. United States v. Gaither, 41 M.J 774, 778 (A.F. Ct. Crim. App. 1995).

92. *Gaither*, 45 M.J. at 351.

93. *Id.*

94. MCM, *supra* note 6, R.C.M. 305(j)(1)(A).

The CAAF left the issue unresolved because it decided that the government did not need to conduct a *Rexroat* review at all in this case, stating, "[w]e have never extended the requirement for a probable-cause hearing to pretrial restriction."[105] The court then proceeded to find that the facts in this case did not impose a duty on the government to make a *Rexroat* determination.[106] The court distinguished between restrictions that were as onerous as actual pretrial confinement and those, like the one in the case, that were not.[107] It commented that the requirements of *Rexroat* were "[f]ounded upon constitutional notions of due process to address the evil of police confining citizens in a common jail without the benefit of a judicial officer considering the facts and evidence to determine if probable cause exits,"[108] a circumstance not present here.

The *Perez* opinion does not provide clear guidance for practitioners. It appears to hold that an accused who is subjected to pretrial restraint tantamount to confinement[109] is not necessarily entitled to a *Rexroat* review or to sentence credit in the absence of a review. Unfortunately, the court did not clearly state this conclusion in its decision. Instead, it focused on not extending "[t]he requirement for a probable cause hearing to pretrial restriction." It discussed the many examples of when restriction does not equal confinement. The problem with this discussion is that, at the point the CAAF reviewed the case, the issue was no longer restriction, but restriction tantamount to confinement.

95. Neither MCM, *supra* note 6, R.C.M. 305(i), nor DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 96) [hereinafter AR 27-10], dictate a form for the reviewing officer's written decision and for the recording of evidence.

96. The military judge will only review the reviewing officer's decision to *continue* pretrial confinement; the reviewing officer's decision to release a soldier from pretrial confinement is not reviewable by the military judge. Keaton v. Marsh, 43 M.J. 757 (Army Ct. Crim. App. 1996).

97. 45 M.J. 323 (1996).

98. The accused could leave the installation with permission. The defense counsel requested the relief after the accused's unsworn statement and before the sentencing argument. The defense counsel said he had just learned that his client had been restricted to the installation. United States v. Perez, 1995 WL 126663 (A.F. Ct. Crim. App. Mar. 10, 1995).

99. The trial counsel was on firm legal ground in his argument. *See* United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (denial of pass privileges and requirement to get permission to leave post was not restraint tantamount to confinement); United States v. Calderon, 34 M.J. 501 (A.F.C.M.R. 1991) (restriction to installation and requirement to check in by phone was not restriction tantamount to confinement); United States v. Callinan, 32 M.J. 701 (A.F.C.M.R. 1991) (terms of restraint included restriction to base, removal from duties, and order not to contact victim; court agreed proper characterization of restraint was restriction); United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *petition denied* 28 M.J. 230 (C.M.A. 1989) (limitation of movement to the general confines of the installation was condition on liberty as defined under R.C.M. 304(a)(1)); United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994) (pulling pass privileges is normally a condition on liberty unless the restraint significantly disrupts the soldier's ability to carry out spousal and parental responsibilities).

100. United States v. Perez, 1995 WL 126663 (A.F. Ct. Crim. App. Mar. 10, 1995). The common thread that exists in cases where credit is due for pretrial restraint tantamount to confinement is a "[s]ubstantial impairment of the basic rights and privileges enjoyed by service members." *See* United States v. Smith, 20 M.J. 528, 530-31 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985).

101. *Perez*, 1995 WL 126663.

102. The court assumed that the military judge found the restriction to be tantamount to confinement. *Id*.

103. In *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), the C.M.A. held that the requirement for a probable cause review of pretrial confinement within forty-eight hours announced by the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), applies in the military. *Rexroat*, 38 M.J. at 298. The probable cause review may be completed by any neutral and detached official. *Id*. The remedy for noncompliance by the government is day-for-day credit under R.C.M. 305(k). *See* United States v. Taylor, 36 M.J. 1166, 1167 (A.C.M.R. 1993); MCM, *supra* note , R.C.M. 305(k). The provisions of R.C.M. 305 apply to pretrial confinement. United States v. Gregory, 21 M.J. 952, 956 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). The Army Court of Military Review has held that the requirements of *Rexroat* likewise apply to restraint tantamount to confinement. *Taylor*, 36 M.J. at 1167. This article will refer to the credit associated with noncompliance with *Rexroat* as "*Rexroat* credit."

104. *Id*. Failure to specifically request *Rexroat* credit results in waiver of the issue. *See* United States v. McCants, 39 M.J. 91 (C.M.A. 1994) (request for sentence credit for failure to complete R.C.M. 305(i) review in timely fashion did not preserve *Rexroat* issue).

105. United States v. Perez, 45 M.J. 323, 324 (1996).

106. *Id.*

107. *Id*.

108. *Id.*

109. The accused in this case was probably not subjected to pretrial restraint tantamount to confinement, either. The military judge appeared to be either overly cautious or irritated with the government when awarding sentence credit. According to the AFCCA decision, the military judge did not even articulate that he was awarding credit based on restriction tantamount to confinement. *Perez*, 1995 WL 126663. The court assumed, though, that the military judge found the restriction to be tantamount to confinement. *Id*.

Did the court simply refuse to characterize the restraint as tantamount to confinement? If that is the basis for the decision, then the case does not change the law. An accused is not entitled to sentence credit under *Allen*[110] or R.C.M. 305 credit for restriction. It has been long established in the Army, though, that an accused is entitled to both *Allen* credit and R.C.M. 305 credit for restraint tantamount to confinement.[111]

Perez contains other lessons for counsel and the military judge. First, defense counsel should always ask their clients whether any restraint has been imposed and instruct their clients to immediately notify them of any changes in the terms of the restraint. Second, defense counsel must be certain to request every applicable type of sentence credit on behalf of a client or risk waiver.[112] The defense counsel's motion for appropriate relief in this case can best be characterized as inarticulate and confusing[113] and, as a result, did not preserve the *Rexroat* issue. The military judge was equally imprecise in his ruling. He did not clearly articulate the basis of his ruling, nor did he return to the issue to indicate how he assessed the credit.

Trial counsel, however, have the most to learn from the case. Trial counsel should always know whether any form of pretrial restraint has been imposed in a case and monitor the status of that restraint throughout the pretrial period. Trial counsel should counsel commanders to put the terms of restraint in writing and to supply the trial counsel with a copy of the memorandum.[114] At a minimum, trial counsel should have the commander and first sergeant on-call and prepared to testify about the exact terms of the restraint. Trial counsel should insist that the defense clarify the exact grounds for any motion for appropriate relief. This practice will ensure that any defense waiver of sentence credit for pretrial restraint will be clear from the record. Finally, trial counsel should always remind military judges to effectuate their rulings. In *Perez*, the trial counsel should have reminded the military judge to award the sentence credit; silence in such cases will seldom serve the government's goal of seeking justice.

Illegal Pretrial Confinement During a Recess of the Trial

In *United States v. Tilghman*,[115] the government paid a stiff price for imposing illegal pretrial confinement in direct contravention to the military judge's disapproval of a confinement request. After the findings and before sentencing, the trial counsel informed the military judge that the accused's commander issued an order confining the accused for the evening. The military judge, acting as a reviewing officer,[116] examined the basis for the pretrial confinement. He determined that the accused was not a flight risk, nor was he likely to commit future serious criminal misconduct.[117] Since the requirements for pretrial confinement were not met, the military judge disapproved the confinement order. Despite the military judge's order, the commander placed the accused in pretrial confinement.[118] Eventually, the accused was credited to eighteen months and twenty days against his sentence for the government's actions in the case.[119]

One issue addressed by the CAAF was whether the commander's order placed the accused in "pretrial confinement" under R.C.M. 304(a)(4).[120] The court decided that it had done so, holding that pretrial confinement includes any period prior to completion of the trial.[121] This determination is significant because, once placed in pretrial confinement, the accused is entitled to all of the rights and reviews set out in R.C.M. 305.[122] The trial counsel, therefore, properly requested that the military judge review the pretrial confinement pursuant to R.C.M. 305(i).[123]

What the trial counsel did not anticipate, and perhaps the best practice tip to learn from the case, is that a military judge may be a tough reviewing officer.[124] During the R.C.M. 305(i) hearing, the trial counsel indicated that the confinement order was based upon the finding of guilty, the accused's mental health, and upon the risk that the accused may flee. The trial counsel, though, declined the opportunity to present additional evidence[125] to the military judge. When confronted with the accused's freedom preceding and during the trial, the accused's

110. United States v. Allen, 17 M.J 126 (C.M.A. 1984) (holding accused is entitled to day-for-day sentence credit for any pretrial confinement).

111. United States v. Smith, 20 M.J. 274 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985) (holding day-for-day credit is due for every day spent in restriction tantamount to confinement based on the totality of circumstances).

112. *See* United States v. McCants, 39 M.J. 91 (C.M.A. 1994); MCM, *supra* note 6, R.C.M. 905(e).

113. *Perez*, 1995 WL 126663.

114. The best practice is for trial counsel to assist commanders in designating the terms of pretrial restraint and in drafting the memorandum.

115. 44 M.J. 493 (1996).

116. The military judge reviewed the adequacy of probable cause to believe the prisoner had committed an offense and the necessity for pretrial confinement. *See* MCM, *supra* note 6, R.C.M. 305(i).

117. *Id.* at 305(h)(2)(B)(iii)(a) & (b).

118. After a prisoner has been released by the R.C.M. 305(i) reviewing officer, reconfinement is allowed before the completion of trial only upon the discovery of evidence or misconduct which, either alone or together with other evidence, justifies confinement. *See id.* at 305(l). There is no indication that the commander discovered any such evidence or misconduct that would justify his confinement of the accused later in the day. *Tilghman*, 44 M.J. at 494.

assurances that he would not flee, and the government's inability to present any evidence that the accused was a flight risk, the military judge disapproved the request for confinement.[126]

Trial counsel can anticipate this situation ahead of time by raising the issue with the commander and discussing whether pretrial confinement would become necessary in cases in which sentencing is delayed until some period after findings have been entered. If so, and assuming the issue comes before the military judge, counsel must be prepared to present evidence of the change in circumstances that justifies pretrial confinement at the late date. Trial counsel should try not to rely solely on the finding of guilty as a basis for a claim that the accused now poses a flight risk. Trial counsel should be prepared to present evidence, such as the statements of the accused that he "won't go to prison" for the crime, or any other indications that the accused will flee. Of course, defense counsel should always consider whether to request that the military judge conduct the R.C.M. 305(i) hearing if confinement is imposed after a finding of guilt. Defense counsel should also refer military judges to the *Tilghman* case because the CAAF found no abuse of discretion in the military judge's disapproval of the confinement order.

119. *Tilghman*, 44 M.J. at 494. The CAAF refused to award additional relief. *Id.* at 495.

120. MCM, *supra* note 6, R.C.M. 304(a)(4).

121. *Tilghman*, 44 M.J. at 495.

122. *See* MCM, *supra* note 6, R.C.M. 304(a)(4).

123. *See supra* note 76 and accompanying text.

124. One school of thought is that the government should not approach the military judge at all in such cases. The commander has the authority to confine the accused pursuant to R.C.M. 304(b). MCM, *supra* note 6, R.C.M. 304(b). There would be no requirement that the R.C.M. 305(i) hearing occur the same night because the first review required in the military system is a review of the pretrial confinement by a neutral and detached official within 48 hours. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993). Still, in some locales, it is customary to bring all matters concerning the case to the military judge after referral.

125. The military judge did consider the evidence presented during the findings portion of the trial, and he questioned the accused. *Tilghman*, 44 M.J. at 494.

126. *Id.*

Conclusion

One clear message continues to emerge from recent speedy trial cases: practitioners must maintain detailed, comprehensive case-processing chronologies. With R.C.M. 707, it is still preferable that the government' s chronology reflect contemporaneous delays, approved by competent authority, for all periods of delay. In the absence of a contemporaneous delay, though, the CAAF has announced at least one period of time--an AWOL period--for which the government is not accountable. The comprehensive chronology is also an indispensable tool for proving government compliance or noncompliance with the "reasonable diligence" standard of Article 10.

The recent CAAF pretrial restraint cases also emphasize attention to detail, particularly on the part of the government. When the command has imposed some form of pretrial restraint, the trial counsel should be prepared to present detailed evidence describing the exact terms of the restraint and the justification for it.

Restating Some Old Rules and Limiting Some Landmarks: Recent Developments in Pre-Trial and Trial Procedure

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Introduction

The more things change, the more they stay the same; in many respects this phrase describes developments in the law of military pretrial and trial procedure in 1996. Compared to 1995, the most recent pretrial and trial procedure cases may not be of "landmark" proportion.[1] The Court of Appeals for the Armed Forces[2] (CAAF) and intermediate service courts refined the law of pretrial and trial procedure and reminded practitioners that some old rules are still viable and useful.

This article reviews recent developments in the law relating to pleas and pretrial agreements, Article 32 pretrial investigations, court-martial personnel, and voir dire and challenges. This article focuses on cases that establish a significant trend or change in the law and are most important to practitioners.

Pleas and Pretrial Agreements

With its 1995 decision in *United States v. Weasler,*[3] the CAAF shook the foundations of our military justice system when it decided that a defense-initiated waiver of unlawful command influence that occurred in the accusatory stage was a permissible term in a pretrial agreement.[4] Despite the majority's assurance that it was not opening a Pandora's box to pretrial agreements that violate public policy,[5] Chief Judge Sullivan wrote, in a strongly worded concurrence, that the case was a "landmark decision"[6] that would permit wholesale blackmailing of the Government whenever an unlawful command influence issue arose. One could view *Weasler* as a first step toward a *laissez faire* system of pretrial agreements: accused, counsel, and the government would be permitted to negotiate a deal that the accused believed was in his or her best interest, and the accused's benefit of the bargain would be the most important factor the appellate court would examine on review.[7] Two

1. *See, e.g,* United States v. Weasler, 43 M.J. 15 (1995); United States v. Conklan, 41 M.J. 800 (Army Ct. Crim. App. 1995); United States v. Marrie, 43 M.J. 35 (1995); United States v. Algood, 41 M.J. 492 (1995); United States v. Ryder, 115 S. Ct. 2031 (1995); Purkett v. Elem, 115 S. Ct, 1769 (1995). For a review of the significance of these decisions concerning trial procedure, see Major John Winn, *Recent Developments in Military Pretrial and Trial Procedure,* ARMY LAW., Mar. 1996, at 40.

2. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals (CMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. This article will use the name of the court in existence at the time the decision was rendered.

3. 43 M.J. 15 (1995). The accused was charged with writing $8920 in bad checks. Prior to departing on leave, the company commander told the acting commander to "sign" the charges pertaining to Weasler when they came through. The company commander testified that she would have re-preferred the charges if the acting commander recommended something other than a general court-martial. Instead of pursuing a motion to dismiss based on unlawful command influence, the defense successfully proposed to waive the motion in exchange for a three month limitation on adjudged confinement.

4. *Id.* at 19.

5. *Id.* at 17. The majority stated that it "will be ever vigilant to ensure unlawful command influence does not play a part in our military justice system."

6. *Id*. at 20. The late Judge Wiss also cautioned that "I believe this court will witness the day when it regrets the message that this majority opinion implicitly sends to commanders." Id. at 22.

7. This observation is based on my contacts and discussions with other judge advocates. *See also*, Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries,* ARMY LAW., Aug. 1996, at 3 n.70. Major Kohlmann concludes that the CAAF, in deciding *Weasler,* extended "[t]he rapidly evolving free-market approach to pretrial negotiations . . . to negotiated waivers of unlawful command influence affecting the accusatory phase of courts-martial." The interpretation is based on text of the opinion, which indicates that a primary consideration for the majority's holding was that accused ought to be able to waive an allegation of unlawful command influence to secure the benefit of a favorable pretrial agreement when the accused could waive forever the same allegation by failing to raise it at trial. There was no public policy reason, therefore, to prohibit the more affirmative, intelligent and knowing waiver in a pretrial agreement. Additionally, there is no suggestion that the courts would let *any* pretrial agreement containing a "maverick term" pass muster. What I do suggest is that some viewed *Weasler* as an opportunity to argue that the courts would be more inclined to favorably examine a questionable term on a "benefit of the bargain" analysis, especially considering that the trend in the 1990s is to carefully widen the list of permissible terms. *See* United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (government mandated waiver of members sentencing hearing in exchange for two-year limitation on confinement); United States v. Spriggs, 40 M.J. 158 (C.M.A. 1994) (promise to conform conduct to certain conditions of probation); United States v. Andrews, 38 M.J. 650 (A.C.M.R. 1993) (government proposed waiver of members linked to quantum portion); United States v. Gansemer, 38 M.J. 340 (C.M.A. 1993) (waiver of administrative separation board if court-martial failed to impose a punitive discharge).

intermediate service court opinions appear to contradict this spective.

In *United States v. Rivera,*[8] the Air Force Court of Criminal Appeals reviewed a pretrial agreement that contained a defense proposed term requiring the accused to "waive all pretrial motions" and "to testify at any trial related to my case without a grant of immunity,"[9] in exchange for a very favorable limitation on confinement. The accused was charged with multiple drug offenses that exposed him to the possibility of receiving a sentence that included twelve years' confinement, but the pretrial agreement limited confinement to fourteen months. After acceptance of his guilty plea, Rivera convinced the court-martial that the Government's request for lengthy confinement was inappropriate, and he was sentenced to twelve months' confinement, a bad-conduct discharge, reduction to E-1, and total forfeitures.

On appeal, Rivera attempted to secure the benefit of his bargain and more. He argued that, while he intelligently and voluntarily entered a guilty plea based on the pretrial agreement, both should be invalidated because Air Force regulations and military case law prohibited including the "waiver of all motions" provision in a pretrial agreement.[10] The AFCCA determined that, under the facts of this case, Rivera suffered no harm under the agreement because the record indicated an absence of Government overreaching during the negotiations. The AFCCA, however, concluded that the term constituted "explosive language"[11] and cautioned against its use in other cases. Under different facts the term would violate R.C.M. 705(c)(1)(B)[12] and public policy because it was too broad and purported to deprive the accused of the right to make motions that could not be waived in a pretrial agreement.

The court rejected Rivera's argument that his promise to testify in related cases required the convening authority to issue a written grant of immunity. The court concluded that R.C.M. 705(c)(2)(B) did not implicitly or explicitly require the convening authority to issue a grant of immunity to support Rivera's promise to testify. Similarly, the "waiver of all motions" provision was a lawful term. Nothing in the record indicated that the accused had any viable motions to make. There was no violation of public policy, and the accused got the favorable agreement he desired.

The Air Force Court communicates some important practical lessons for staff judge advocates (SJA), military justice managers, and counsel. First, in the absence of government overreaching, the CAAF's tendency is to expand the list of permissible terms that may be included in pretrial agreements. This tendency is based on the recognition of the accused's competence to more fully understand negotiations and agreements.[13] The accused's understanding, however, is dependent on counsel's knowledge, experience, and judgment. The CAAF is willing to validate novel, but appropriate, pretrial agreement terms that are tactically sound and based on good judgment.[14] Nevertheless, counsel must pay close attention to and review "maverick provisions"[15] to ensure that the accused

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8. 44 M.J. 527 (A.F. Ct. Crim. App. 1996), *petition for review granted*, 45 M.J. 13 (1996). The CAAF granted the petition for review on the following issue: "Whether the pretrial agreement purporting to require appellant to 'make no pretrial motions' and to 'testify at any trial related to my case without a grant of immunity' violates public policy."

9. This pretrial agreement term requiring the accused to testify without a grant of immunity in related cases raises Fifth Amendment considerations, the discussion of which is beyond the scope of this article.

10. The accused's argument was based on prior Air Force policy, which was more restrictive than MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 705 (1995) [hereinafter MCM], regarding permissible terms for pretrial agreements. The court mentioned that Air Force Instruction 51-201, Chapter 6, Section C was updated in 1987 and now mirrors R.C.M. 705. *Rivera*, 44 M.J. at 528.

11. *Rivera*, 44 M.J. at 527.

12. MCM, *supra* note 10, R.C.M. 705(c)(1)(B), provides:

> A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

Further, the Discussion to the rule provides: "A pretrial agreement provision which prohibits the accused from making certain pretrial motions (*see* R.C.M. 905-907) may be improper." R.C.M. 705(c)(1)(b) Discussion. One can interpret the court's holding and lesson to be that the better practice is to specifically list in pretrial agreements the motions that the parties contemplate waiving. This may tend to obviate the need for appellate review.

13. In *Weasler*, the CAAF placed great reliance on the fact that accused and counsel knew what they were doing. The fact that the accused thought up and then proposed the term was another important factor to consider in validating the pretrial agreement. *See* United States v. Weasler, 43 M.J. 15, 19 (1995). In *Rivera*, the AFCCA also noted this trend, theorizing that "[a]s the military justice system has grown less paternalistic, the military accused has been given more room to bargain at the trial level." *Rivera*, 44 M.J. at 530.

14. There is no suggestions that the court thought less of counsel in the past. *Weasler* is indicative of the court publicly stating that it is now willing to defer to counsel's judgment regarding pretrial agreement terms. Both trial and defense counsel are better trained than in the past. Additionally, the military accused is better educated. It is common to find many accuseds who have completed some form of post-secondary school education. The courts have implicitly recognized these factors and are comfortable with the idea that counsel and accused know the impact of the pretrial agreements they sign.

and government have not violated R.C.M. 705. Military justice managers and staff judge advocates must also take advantage of their experience and judgment and give special attention to the propriety and legal ramifications of novel provisions before taking them to the convening authority for signature. [16]

During the trial, military judges must be careful to discuss the term with the accused in great detail to determine who proposed it and whether the accused truly understands the impact of the maverick provision. In *Rivera*, the court said the military judge could have terminated the issue at trial if he had asked the accused about the term, where it originated, and whether he understood the impact of the term.[17] *Rivera* indicates that, in this era of expanding pretrial agreement terms, the courts are proceeding carefully and slowly.

In *United States v. Perlman*,[18] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed a pretrial agreement term that appeared to release the government from the obligation to forward a vacation of suspension action to the general court-martial convening authority (GCMCA) for review and action.[19]

From the NMCCA opinion, it is not clear what offenses the accused initially committed that placed him before a special court-martial empowered to adjudge a bad-conduct discharge.[20] In exchange for his guilty pleas, however, the accused secured an agreement that required the convening authority to suspend all confinement in excess of thirty days. In the event that the accused committed any post-trial misconduct, the agreement purported to release the convening authority from the sentencing limitation.[21] The agreement also provided that the hearing provisions of R.C.M. 1109 would apply to any action contemplated that resulted from post-trial misconduct.[22]

The court-martial sentenced the accused to reduction to E-1, forfeitures, a bad-conduct discharge, and confinement for fourteen weeks.[23] When the accused was released from confinement, he violated the law by possessing liquor in the barracks, and the special court-martial convening authority dissolved the suspension provision of the pretrial agreement. The accused was ordered to serve the remaining confinement.[24] On appeal, the accused protested that the convening authority violated the pretrial agreement by requiring him to serve confinement that was to be suspended.

The court agreed with the accused on two bases. First, the vacation action was premature because the convening authority had not taken action on the sentence. Second, only a *general court-martial convening authority* can cause a vacation of suspension to take effect under Article 72, UCMJ, and R.C.M. 1109. The government argued that the suspension terms in the agreement did not implicate Article 72 considerations, but independently permitted the convening authority to vacate the suspension only after holding a hearing under R.C.M. 1109. The court held that R.C.M. 705(c)(2)(D)[25] specifically provides that an accused must be given complete sentencing proceedings. Read together, R.C.M. 705(c)(2)(D) and R.C.M. 1109 require not only a hearing, but also proper process to comply with the congressionally mandated substantive rights created in Article 72, UCMJ. There was no indication that Congress intended to give an accused the authority to waive these rights, even if

15. *Rivera*, 44 M.J. at 530.

16. The court referred to *United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995), and warned practitioners to be on the lookout for terms that "attempt to take the accused's bargaining power too far." *Rivera*, 44 M.J. at 530.

17. *Rivera*, 44 M.J. at 530.

18. 44 M.J. 615 (N.M.Ct.Crim.App. 1996).

19. *See* UCMJ art. 72(b) (1988); R.C.M. 1109 (providing the substantive and procedural law for vacation of suspensions). R.C.M. 1109(d)(2)(D) requires that a vacation of a suspended general court-martial sentence or a suspended special court-martial sentence including a bad-conduct discharge must be forwarded to the general court-martial convening authority after the hearing for a determination of whether the probationer violated the condition of suspension and whether to vacate the suspension.

20. *Perlman*, 44 M.J. at 616.

21. *Id.*

22. *Id.*

23. *Id.*

24. This article will not address the post-trial or sentencing considerations of the case. Those considerations are discussed in the post-trial update. See Lieutenant Colonel Lawrence J. Morris, *Just One More Thing . . . and Other Thoughts on Recent Developments in Post-Trial Processing*, ARMY LAW., Apr. 1997, at 129.

25. MCM, *supra* note 10, R.C.M. 705(c)(2)(D), permits, as part of a pretrial agreement:

> A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement.

desired.[26] The government's failure to forward the record of the hearing to the GCMCA for action was fatal.[27]

Perlman reminds counsel to ensure that the accused and the government understand the precise meaning of terms in a pretrial agreement. Presumably, the government had a different interpretation of the suspension term than the defense.[28] Additionally, *Perlman* underscores the cautious disposition of the courts as they review novel pretrial agreement terms. While R.C.M. 705(c)(2) may not be an exhaustive list of permissible pretrial agreement terms,[29] the courts will move slowly in validating a pretrial agreement term that appears to encumber a right, especially where there is a strong indication that Congress created a nonwaivable substantive right, no matter what great benefit accrues to the accused.

Limitations on the Providence Inquiry

During 1996, the Army Court of Criminal Appeals (ACCA) and the CAAF issued two significant opinions that further define the limits regarding the use of information from an accused's providence inquiry. Since *United States v. Holt*,[30] the CMA permitted the government liberal use of information from the providence inquiry against the accused during the sentencing phase of the trial.[31] *United States v. Ramelb*[32] reminds practitioners of the conservative construction placed on the *Holt* rule; when an accused chooses to retain his right against self-incrimination for a particular offense, the accused's providence inquiry statements relating to that offense may not be used during another phase of the trial to assist the government in obtaining a conviction on contested offenses.[33] Conversely, *United States v. Figura*[34] cautions counsel that the door is wide open for the government to use the providence inquiry during sentencing where an accused has waived all rights by pleading guilty.[35]

United States v. Ramelb

In *Ramelb*, a mixed plea case, the ACCA wrestled with the issue of whether the government should be permitted to use information gained from the accused's providence inquiry relating to a lesser included offense to prove the distinct elements of a contested greater offense.

In *Ramelb*, the accused negotiated a pretrial agreement that permitted him to plead guilty to wrongful appropriation of government funds by exceptions and substitutions as to each specification in exchange for the convening authority's promise to suspend all confinement in excess of eighteen months.[36] The agreement specifically authorized the government to present evidence on the greater offense of larceny. During the providence inquiry, Ramelb told the military judge that he and his father shared the savings account where the government funds had been deposited and withdrew money from the account to "set it aside."[37] When the military judge asked Ramelb what he meant, Ramelb replied that he "spent it and some of it we just, you know, h[e]ld for cash."[38]

26. *Perlman*, 44 M.J. at 617.

27. *Id.* The dissent said that the case law did not yet require both a hearing and forwarding a record of the hearing to the GCMCA for action. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), was cited for the proposition that the law was satisfied if the government did not hold a hearing, but provided the accused an opportunity to respond after informing the accused of the evidence against him in the post-trial recommendation. The dissent also pointed out that *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1981), appeared to require a suspension hearing. *Perlman*, 44 M.J. at 618.

28. *Perlman*, 44 M.J. at 617.

29. *Id.* at 618; *see supra* note 27.

30. 27 M.J. 57 (C.M.A. 1988). *Holt* is the seminal case in this area. The CMA held that the sworn testimony given by an accused during the providence inquiry may be received during sentencing and can be provided to the sentencing authority by a properly authenticated transcript or by testimony of a court reporter or other persons who heard what the accused said during the providence inquiry.

31. In 1995, the CAAF affirmed the ACCA determination that it was consistent with the UCMJ to allow the government to introduce a tape of the accused's vivid, explicit, and articulate providence inquiry during sentencing. United States v. Irwin, 42 M.J. 479 (1995). Before the statements are admitted into evidence and used during argument, the government or military judge *should* give the accused notice and an opportunity to object on evidentiary grounds or "whatever." *See* United States v. English, 37 M.J. 1107, (N.M.C.M.R. 1993); United States v. Dukes, 30 M.J. 793 (N.M.C.M.R. 1990); United States v. Glazier, 26 M.J. 368 (C.M.A. 1988). In *Irwin*, the CAAF cautioned that the better rule of practice is for the military judge to put the accused on notice. *Irwin*, 42 M.J. at 482.

32. 44 M.J. 625 (Army Ct. Crim. App. 1996).

33. *Holt*, 27 M.J. at 59.

34. 44 M.J. 308 (1996).

35. This article will not discuss the sentencing issues of the case. Those issues are discussed in the sentencing update article. *See* Major Norman F.J. Allen, *New Developments in Sentencing*, ARMY LAW., Apr. 1997, at 116.

36. The members found Staff Sergeant (SSG) Ramelb guilty of multiple larcenies.

37. *Ramelb*, 44 M.J. at 627.

During the prosecution's case-in-chief, it called as a witness a "spectator" who sat in the courtroom during Ramelb's providence inquiry, to prove that Ramelb had the intent to permanently deprive the government of the use and benefit of the money deposited into the accounts.[39] The witness testified that Ramelb stated, during the providence inquiry, that some of the money was spent for personal reasons and it was his opinion that Ramelb did not use the money for a legitimate reason.[40] The defense counsel failed to object to the spectator's testimony.[41] On appeal, the accused asserted that the use of his providence inquiry violated his Fifth Amendment privilege against self-incrimination. The ACCA had very little trouble stating that the government's use of the providence inquiry violated the privilege against self-incrimination and judicial policy limiting the use, *by the government and the defense*, of judicial admissions during the *Care* inquiry.[42]

The court's narrow, specific holding was that the elements of a lesser included offense that are established by an accused's guilty plea, and not the accused's admissions during the providence inquiry, are fair game for the government to use to establish the common elements of a greater offense to which an accused has entered a not guilty plea.[43]

The key to the ACCA's opinion was not its conclusion that the government violated the Fifth Amendment; the constitutional issue of voluntariness was an easy means to dispose of the issue. The more difficult, but preferable way, to handle the issue was through a "judicial policy" analysis.[44]

Reviewing judicial policy, the ACCA determined that there was an established tradition limiting the use of judicial admissions.[45] *Holt* and its progeny,[46] the court held, were inapplicable because they applied to how the parties could use the providence inquiry during the sentencing phase of the trial. Moreover, the court stated those cases did not reverse the limited use policy that an accused "admits only to what has been charged and pleaded to."[47] Therefore, the government's argument that prior case law supported the use of the accused's *admissions* during providence to prove a related greater offense was misplaced.[48] The court reasoned that once the common elements of the lesser offense and greater offense are established, it would be unfair to permit the government to introduce the accused guilty plea statements to again prove the same elements.[49]

Ramelb stresses that in a mixed plea case in which the accused pleads guilty to a lesser included offense, trial counsel must be prepared to prove the greater offense with evidence independent of the providence inquiry.[50] The trial counsel in *Ramelb* planned ahead and introduced the following evidence: the accused's pretrial statements made to military police, which tended to show that he used the money for his personal use; evidence that Ramelb could have terminated the DFAS deposits and checks at any time based on his skill and knowledge; and evidence that there were adequate quality control procedures in place to test the system, which Ramelb failed to use.[51] A prudent trial counsel will use *Ramelb* to assist in building, rather than losing a case, by collecting evidence and planning to prosecute a full range of issues.

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38. *Id.* By the time of trial, SSG Ramelb made complete restitution of all money that was diverted to the savings account.

39. *Id.*

40. *Id.*

41. *Id.*

42. 40 C.M.R. 247 (1969); *see also* MCM, *supra* note 10, R.C.M. 910(e) (providing the procedure for implementing the *Care* inquiry).

43. *Ramelb*, 44 M.J. at 629. Additionally, this case does not prohibit using those parts of the providence inquiry which constitute aggravating factors directly relating to or resulting from the offense to which the accused has been found guilty during the sentencing phase of trial. *See Ramelb*, 44 M.J. at 630; MCM, *supra* note 10, R.C.M. 1001(b)(4).

44. *Ramelb*, 44 M.J. at 626, 628.

45. *Id.* at 629 (citing United States v. Caszatt, 29 C.M.R. 521 (C.M.A. 1960); United States v. Dorrell, 18 C.M.R. 424 (N.B.R. 1954)).

46. *See* s*upra* note 31.

47. *Ramelb*, 44 M.J. at 629 (citing *Dorrell*, 18 C.M.R. at 425).

48. The government argued that *United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994), permitted the use of an accused's admissions during the providence inquiry to establish facts relevant to both a lesser offense and a greater offense. *Thomas* was a military judge alone trial where the accused pled guilty to consensual sodomy and adultery. He pled not guilty to rape, burglary, and forcible sodomy. The trial counsel, during closing argument on sentence, stated that the accused was present at the victim's home based on the accused's guilty plea. After the defense objected, the military judge indicated that a plea to consensual sodomy "admits one of the elements" and that "if we had court members, they would have been instructed as to the plea to the lesser included offense and I will consider that." On appeal, the accused argued that the military judge considered the content of his statements. The ACCA, in *Ramelb*, indicated that the government's reliance on *Thomas* was misplaced. The ACCA interpreted *Thomas* as a case that was not based on the content of the accused's providence inquiry, but on the use of one of the elements of consensual sodomy to establish the identical element of forcible sodomy, both related offenses.

Defense counsel, on the other hand, must be alert to some of the special considerations of mixed plea cases. While the ACCA proscribed the government's use of the providence inquiry, the conviction was affirmed, partially based on the accused's inculpatory admissions, during *direct examination*, regarding the intent issue.[52] The court also observed that defense counsel failed to object, at any stage of trial, to the government's use of the providence inquiry.[53] The failure to object waived the issue. Defense counsel must meticulously plan and practice an accused's testimony to prevent the government from gaining a windfall from the defense's presentation.[54] In addition, defense counsel must continue to be aware of the qualified sacrosanct protection accorded to the providence inquiry. Except for purposes of R.C.M. 1001(b)(3)[55] or perjury or false statement prosecutions,[56] there should always be an objection when the government attempts to introduce statements from the providence inquiry.

United States v. Figura

In *United States v. Figura*,[57] the CAAF considered the issue of the manner or form that the government could use to introduce the accused's statements from the providence inquiry during the sentencing hearing. The case is important for pretrial agreements, because it intimates that the manner and form of the introduction can be a bargainable term in pretrial agreements.

In *Figura*, the accused was charged with using confiscated United States Armed Forces identification cards to unlawfully cash checks at local installation exchanges.[58] The accused and the government entered into a pretrial agreement and agreed to a stipulation of fact.[59] The stipulation of fact, however, did not contain any information regarding the dates on the various checks, the specific dates when those checks were cashed, and the specific location where the checks were written. The defense and the government agreed to permit the military judge to deliver a summary of the relevant portions of the providence inquiry to the panel members.[60] On appeal, the accused argued

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49. The court's language was as follows:

> Thus, in this case, the government could properly rely upon the appellant's *plea* of guilty to wrongful appropriation to established the common elements between this lesser offense and the greater offense of larceny--that is, that the appellant wrongfully took or retained government funds of a certain value on the dates and places as alleged. Having established these common elements as a matter of law by the accused's plea of guilty, there would be no useful purpose served by allowing the government to introduce the appellant's statements during the guilty plea inquiry to support these same elements. Furthermore, the government must independently prove that element--that is, an intent permanently to deprive--to which the accused has pleaded guilty.

Ramelb, 44 M.J. at 629.

50. *Id*. at 626, 630. In *Ramelb*, the court determined that the government improperly used statements from the providence inquiry, but affirmed the conviction based on harmless error. The result is not support for an unfettered use of the accused's providence inquiry. The independent evidence was substantial and eliminated any prejudicial effect of the accused's providence inquiry statements.

51. *Id.* at 628.

52. *Id*. During the defense case, the accused testified that a more complete answer to the question of whether he used the money for personal use would include that he used the money for "gasoline for trips, and purchasing food at the commissary."

53. The defense counsel had three opportunities to object to the spectator's testimony. *Id.* at 627.

54. Sometimes even the best laid plans do not work, and an accused will testify inconsistently with the defense strategy, as may be the case here. The tone of the opinion, however, suggests that the accused did not make a mistake when he testified about his intent.

55. MCM, *supra* note 10, R.C.M. 1001(b)(3), permits the trial counsel to present aggravating evidence that is directly related to or results from the accused's offenses. Even under R.C.M. 1001(b)(3), defense counsel should strongly consider objecting to the government's use of the providence inquiry because the statement must be directly related to or resulting from the offense.

56. *See generally* MCM, *supra* note 10, Mil. R. Evid 410. The rule prohibits evidence of a plea that is later withdrawn, a plea of nolo contendere; statements made in the course of a judicial inquiry relating to a plea, or statements made during the course of plea negotiations that do not result in a plea or that result in a plea of guilty that is later withdrawn. There are two exceptions to the rule: where a statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or in a trial for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

57. 44 M.J. 308 (1996). The case did not involve the same self-incrimination issue as *Ramelb.* Additionally, the case focuses on sentencing, where the rules pertaining to the use of the providence inquiry are more favorable to the government. *See supra* note 31.

58. *Figura*, 44 M.J. at 309.

59. *Id.*

60. *Id.* at 309-10.

that that the military judge abandoned his impartial role by summarizing the providence inquiry for the members.[61]

The CAAF held that, under *Holt*, this was a permissible use of the providence inquiry. Moreover, the military judge's action was not an abandonment of impartiality. Both the lead opinion and Chief Judge Cox in a concurrence declared that the accused received a windfall by having the military judge give the information to the members.[62] The procedure effectively prohibited the prosecution from embellishing the aggravating nature of the accused's statements.[63] The military judge, the court said, is in the best position to give the panel members a balanced view of the providence inquiry.[64]

Figura reiterates that there is no demonstrably right or wrong way to introduce evidence from a providence inquiry, and any party can introduce the accused's statement for the sentencing authority's use.[65] Creative counsel can see, then, that *Figura* expands the list of effective terms that may be included in a pretrial agreement. The form of introducing the accused's statements should be an important consideration for both sides. The defense and government can agree on how the providence inquiry will be delivered to the sentencing authority. An agreement that the government has complete latitude to introduce the inquiry may make little difference in a judge-alone trial, but might have a greater impact in a members trial. Turning on its head the court's reason supporting military judge summarization of the evidence, the prosecution, through effective direct examination of its "prepositioned" spectator, could establish its interpretation of the true character of an accused's misconduct and present the panel members with a prosecution-oriented view of the offenses of which the panel found guilt.

Contrast this situation with *Figura*, where the government and defense were satisfied with the military judge's delivery of the evidence to the members.[66] The government could tailor the quantum portion of the pretrial agreement, depending on the offenses, to eliminate any disputes over how the providence inquiry would be introduced and secure the right to introduce the evidence in a form it thought was best suited for the moment. This would take the issue out of the hands of the military judge, who has the responsibility to determine how the evidence would be introduced to the members.[67]

Maltreatment, Commercial Paper, and the Psychiatric Ward: Standards for Evaluating the Providence Inquiry

Every year, the courts deal with cases concerning whether the providence inquiry is adequate to support a plea. This year was no different. Three cases highlight the military courts' opinions of what constitutes an adequate providence inquiry. The court also took the opportunity to reaffirm the *Prater*[68] test as the standard of review to determine whether a providence inquiry supports a plea.

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61. *Id.*

62. *Id.* at 310.

63. Judge Crawford wrote that "Indeed, it may well have been to appellant's advantage for the judge to give a brief summary of the providence inquiry rather than to allow introduction of the entire transcript." *Id.*

64. *Id.*

65. *Id.*; United States v. Holt, 27 M.J. 52, 60-61 (1990).

66. *Figura*, 44 M.J. at 310.

67. It is conceivable that you may find one judge who permits the defense and government carte blanche on how to introduce this evidence. On the other hand, there may be some judges, especially in a members trial, who believe that it is grossly prejudicial, when there is a dispute, to allow a party other than the military judge to deliver this evidence to the panel, or permit one procedure over another (admission through authenticated tape recording, authenticated transcript, spectator testimony, or testimony of a court reporter). While there may not be a demonstrably right or wrong way to introduce this evidence, there may be ways, considering the circumstances, that are more preferable to the parties.

68. United States v. Prater, 32 M.J. 433 (C.M.A. 1991); *see also* United States v. Roane, 43 M.J. 93 (1995) (holding no substantial conflict between plea and facts where accused's providence inquiry statements that he intended to pay roommate for long distance phone calls belied his acts, described during providence, that he made long distance phone calls without permission and failed to promptly inform victim of calls).

United States v. Garcia

In *United States v. Garcia*,[69] the accused pled guilty in a judge-alone court-martial to maltreating two subordinates and to multiple specifications of indecent assault on a subordinate. During the providence inquiry, Garcia told the military judge that, at the time of the offenses with the two female subordinates, he believed that each consented to his approaches.[70] He added, however, that "looking back on it," he realized that neither victim consented.[71] Garcia further stated that his mistaken belief was "probably due to the lateness and the alcohol and everything that [he] was feeling at the time."[72] The AFCCA set aside the findings and sentence. It held that, while the military judge determined that Garcia's mistaken belief regarding consent was not reasonable, Garcia never admitted this fact on the record. Its holding, the court said, was consistent with black letter law that the "providence of a guilty plea rests on *what the accused actually admits on the record*."[73]

The CAAF ultimately held the plea provident because the military judge fully set out the elements of the offenses and obtained the accused's assurances that the elements exactly described what he did. Moreover, the court held, the accused did not raise the defense. The offenses that were the subject of the appeal were general intent crimes. A successful mistake of fact defense to a general intent crime would require both a subjective belief of consent and an objective belief that was "reasonable under all the circumstances."[74] Because Garcia never claimed this objective reasonableness, there was no substantial conflict between the plea and the providence inquiry.

The CAAF's general conclusions are important, but the "subplot"[75] has even greater precedential value. Armed with the AFCCA direction that the findings and sentence be set aside, appellate defense counsel argued that whether an affirmative defense was raised was a question of fact. Because only the Courts of Criminal Appeals have fact-finding power under Article 66, UCMJ,[76] the accused argued, the CAAF was bound by the AFCCA factual determination that a mistake of fact defense did lie "unless it is unsupported by the evidence of record or was clearly erroneous."[77]

The CAAF acknowledged that Garcia was correct, at least with respect to half of his argument.[78] The Court was bound by the factual determinations regarding what Garcia actually uttered at trial. Nevertheless, the court was not bound by the AFCCA's determination regarding the legal characterizations or consequences of Garcia's providence inquiry statements. The application of this standard, the court stated, would "forever preclude the court from reviewing a holding by the Courts of Criminal Appeals."[79] The court declared that the law was well settled that the *Prater* test was the standard of review. The CAAF will continue to test findings of fact for clear error, and conclusions of law will be considered de novo to determine whether there is a substantial conflict between the plea and statements made during the providence inquiry.

Faircloth and Greig: Quantum of Evidence Necessary for Adequate Providence Inquiry

United States v. Faircloth[80] and *United States v. Greig*[81] illustrate the quantum of evidence required in a providence inquiry to support a guilty plea.[82] For some time, the courts have reviewed guilty pleas by focusing primarily on the accused's providence inquiry statements.[83] In a case where there is a contradiction between the accused's providence inquiry and witness testimony or a legal defense, should the contradiction be resolved by holding the plea improvident because the evidence is insufficient to support the plea? *Faircloth* and *Grieg* provide greater foundation for the proposition that a plea must be eval-

69. 44 M.J. 496 (1996)

70. *Id.* (citing United States v. Garcia, 43 M.J. 686, 690 (A.F. Ct. Crim. App. 1995)).

71. *Id.* at 497.

72. *Id.*

73. *Id.*

74. *Id.* at 498; MCM, *supra* note 10, R.C.M. 916(j).

75. *Garcia*, 44 M.J. at 497.

76. UCMJ art. 66(c) (1988).

77. *Garcia*, 44 M.J at 497.

78. *Id.*

79. *Id.*

80. 44 M.J. 172 (1996).

81. 45 M.J. 356 (1996)

uated in terms of the providence of the plea and not the sufficiency of the evidence.

In *Faircloth*, the accused pled guilty to larceny of the proceeds of a check from an insurance company. The accused had been in a traffic accident which caused significant damage to his automobile.[84] He took the automobile to the dealership where he originally purchased it for repairs.[85] After filing a claim with his insurance company, he received a check to pay for the repairs.[86] The check was made payable to the accused and the dealership, which was still in the process of repairing the vehicle.[87] Instead of taking the check to the dealership, Faircloth decided to cash the check and pay other bills.[88] He endorsed the check with his name. He then forged the signature of the Ford dealership owner, stamped the check with a homemade stamp that said "Ford Motor Credit," cashed the check, and used the money for other purposes.[89]

During the providence inquiry, Faircloth told the military judge that he was aware of his obligation to give the check to the dealership as payment for repairing his vehicle. Faircloth also admitted that his actions operated to the legal harm of another "because they repaired the vehicle and . . . [the] money was theirs."[90] Further, Faircloth acknowledged that he was not acting as an agent for the dealership and had no authority to endorse the check or take the proceeds.[91]

The Air Force Court of Criminal Appeals, in a split opinion,[92] held the plea to larceny improvident, as a matter of law, because there was an absence of evidence showing that the dealership had a superior possessory interest to the proceeds of the check.[93] The CAAF reversed, holding that, while there were commercial paper considerations in the case, the Air Force Court may have been overly "troubled with the law pertaining to co-payees of negotiable instruments."[94] The CAAF recognized that, under *Prater*,[95] the accused did not set up any matter

82. The CAAF addressed the substantial conflict test in a number of cases in late 1996. *Faircloth* and *Greig* sufficiently illustrate the trend in this area. Here are the cases the court decided regarding factual predicates and pleas that may be important for practice: United States v. Newbold, 45 M.J. 109 (1996) (holding that sufficient factual predicate for plea to kidnapping even though victim was moved no than twelve feet within the room and detained only long enough to complete rape, forcible sodomy, indecent assault, and indecent acts); United States v. Hahn, 44 M.J. 460 (1996) (holding plea to preventing seizure of property provident despite accused's argument on appeal that Naval Investigative Service agents had constructively seized or were about to seize property); United States v. Eberle, 44 M.J. 374 (1996) (holding that accused's action of restraining women in female restroom and masturbating in front of them was sufficient to constitute indecent acts with another); United States v. Smith, 44 M.J. 369 (1996) (holding guilty plea to false official statement provident based on accused's delivery of altered leave and earning statement, military identification card, and false employment verification letter to civilian loan company); United States v. Wilson, 44 M.J. 223 (1996) (holding plea to drug use provident where inquiry indicated that accused was not working for police at time of offenses and accused did not use drugs to protect his life or his cover); United States v. Hughes, 45 M.J. at 137 (1996) (holding plea to larceny based on withholding improvident where accused placed a lock on his wall locker which contained clothing that accused told victim to remove on several occasions); United States v. Shearer, 44 M.J. 330 (1996) (holding plea to leaving the scene of accident provident for accused passenger).

83. United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

84. *Faircloth*, 45 M.J. at 173.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id*. at 5. The defense counsel understood the potential tenuous relationship between the plea and the providence inquiry. The text of the opinion indicates that, after the first iteration of military judge questioning, the defense requested additional inquiry regarding the relationship between the accused, the dealership, and the Ford Motor Credit Company (FMCC). Faircloth replied that the dealership repaired the vehicle and the FMCC financed the vehicle and had a lien on it. He stated that he had to take the check to the dealership, which was the representative of the FMCC. Moreover, he told the military judge that his action of taking the check and cashing it was wrongful "because the currency was given to me in order to pass to McLauglin Ford for fixing my vehicle. It was not mine to keep." *Id*.

92. 43 M.J. 711 (A.F. Ct. Crim. App. 1995). Judge Morgan wrote the majority opinion, which appeared to indicate that the prosecution, defense, or accused had to produce some evidence of FMCC's superior possessory interest in addition to what the accused stated during the providence inquiry. *Id*. at 715-16. Judge Becker's concurrence parted ways with the majority opinion over the reliance on "factual matters outside the *Care* inquiry" and the lead opinion's "lengthy discourse on the business world." *Id.* at 716-17. Senior Judge Pearson concurred in that part of the decision affirming the forgery conviction, but dissented regarding the larceny. *Id.* at 717-18.

93. *Id.* at 715.

94. United States v. Faircloth, 45 M.J. 172,173 (1996).

95. 32 M.J. 433 (C.M.A. 1991).

that was in substantial conflict with his guilty plea. The accused acknowledged each and every element of the offense, and the record indicated that the accused was convinced of his guilt.[96]

The central basis for the court's holding, however, was the settled *United States v. Davenport*[97] rule that no party is required to provide independent evidence to establish the factual predicate for a guilty plea. The plea was supported by the accused's statements delivered during the providence inquiry. It was reasonable, then, for the military judge to conclude that Ford Motor Credit Company (FMCC) had a superior possessory interest in the proceeds of the check based only on Faircloth's statements, which were "considerably detailed, and couched in layman's terms."[98]

Faircloth echoes some old truths for practitioners that can be applied to current practice. Two of the primary reasons that the government negotiates a guilty plea is financial and witness economy. The government is not required to expend funds and obtain witnesses to introduce evidence when an accused's statements during the providence inquiry objectively supports the plea. Second, counsel must request additional inquiry when the facts or the law might render a plea improvident. While the AFCCA viewed the pivotal issue differently than the CAAF, both courts had what appeared to be a record replete with information to resolve the case. The defense counsel sensed that his client's pretrial agreement was in jeopardy and asked the military judge to conduct additional inquiry who then asked specific questions to ensure that the accused's statements supported the plea.[99]

In *Grieg*,[100] the CAAF considered an issue similar to *Faircloth*, but with a slight twist. It reviewed whether the court was bound to consider affirmatively introduced evidence on sentencing, other than the accused's statements during providence, to determine the providence of the plea. The court determined, consistent with prior case law, that only responses of the accused during the providence inquiry have bearing on the providence of a plea.

In *Grieg*, the accused questioned the providence of his guilty plea to communicating a threat, asserting that the military judge failed to establish every element of the offense.[101] The accused's guilty plea was based on statements he made while under treatment at an installation psychiatric ward.[102] To avoid discharge so that he could continue receiving treatment, the accused told a psychiatrist and a psychiatric nurse that he was going to kill his first sergeant and two other captains by unknown means.[103] During the providence inquiry, the accused told the military judge that he wanted the listeners to believe him. In pursuit of that goal, he told the listeners that he was not "joking."[104] He also informed the military judge that when he uttered the statements, he "wanted to stay in the hospital."[105] During the sentencing hearing, the psychiatrist, testifying as an expert in psychology and psychiatry, stated that he "was suspicious at the time [the accused made the statements] and felt it was probably an effort at manipulation in order to maintain hospitalization."[106] The accused sought to have the plea reversed, based in part on the accused contradictory statements and the psychiatrist's sentencing testimony.

The CAAF ultimately held that the accused admitted each and every element of the offenses and there was no substantial conflict between the plea and the providence inquiry. Consistent with *Faircloth*, the court reasoned that determining the providence of a plea based only on what the accused stated during the providence inquiry applies equally to a situation where matters have been introduced into the record by the parties. The court stated that, "as appellant entered a plea of guilty, his own statements, not the statements of witnesses, are the focal point for resolving any alleged inconsistency in his pleas of guilty."[107] The court also dismissed the accused's prayer for relief based on the expert quality of the witness' testimony.[108] Examining

96. *Faircloth*, 45 M.J. at 174. The CAAF also interjected that while the law of negotiable instruments had some bearing , it was of "little assistance in resolving the case . . . since the case concerned the rights of co-payees 'vis-à-vis each other.'"

97. 9 M.J. 364, 367 (C.M.A. 1980).

98. *Faircloth*, 45 M.J. at 174. The court also placed its holding on solid legal ground by reviewing why the plea was consistent with the elements and jurisprudential underpinnings of Article 121. The court said that Article 121 encompasses more than simple common law larceny.

99. *Id.*

100. 44 M.J. 356 (1996).

101. *Id.* at 357.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 358.

previous case law,[109] the court stated that the *Prater* test is to be applied based on a reasonable man standard and not from the "insight of a witness trained in mental disorders."[110]

Grieg opens the door to concluding that once the accused convinces the military judge that the plea is provident, there are very few circumstances that might require military judge intervention to ensure the continued providence of the plea. The door, however, is not wide open. The military judge should always explore potential defenses and contradictions of the accused's statements that might be raised during the sentencing hearing.[111]

Article 32 Investigations

In *United States v. Marrie*,[112] the CAAF held that a *per se* reading of the 100 mile rule was inconsistent with the accused's rights to confrontation under the express language of R.C.M. 405.[113] The rule provides that "witnesses who are 'reasonably available' . . . shall be produced" for direct or cross-examination at an Article 32 investigation. The rule specifically states that "witnesses are reasonably available if they are located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance."[114] In *Marrie*, the CAAF and AFCCA were forced to assume error because the Article 32 investigating officer determined that the 100 mile rule was conclusive on the issue of witness availability without giving any reasons for denying the physical presence of the witnesses.[115] The Article 32 investigating officer failed to include any reasons for denying the physical appearance of the witness, so the court did not have a basis for applying the abuse of discretion test. After *Marrie*, witnesses located more than 100 miles away from the situs of an Article 32 investigation are not presumptively unavailable. While the CAAF clearly redefined the 100 mile rule, it left open how that rule would be applied to a situation where the Article 32 investigating officer made an erroneous "reasonable availability" determination based on the new 100 mile rule, but then took affirmative action to obtain and use the witnesses' testimony by alternative means.[116] The AFCCA indicates how *Marrie* is to be applied in that circumstance. In *United States v. Burfitt*,[117] the AFCCA communicates that an unavailability determination based on an erroneous interpretation of the 100 mile is not always fatal.[118]

In *Burfitt*, the accused was charged with forcible sodomy that occurred during a deployment to Honduras. After going to dinner and bar-hopping in a nearby town with other servicemembers who were stationed at various installations throughout the continental United States, the accused and the group went to the victim's quarters.[119] Appellant indicated that rather than return to his own room some 100 yards away, he would sleep in a hammock on the victim's patio. After everyone

107. *Id.*

108. *Id.*

109. *See* United States v. Phillips, 42 M.J. 127, 130 (1995); United States v. Shropshire, 43 C.M.R. 214, 215-16 (1971).

110. *Grieg*, 44 M.J. at 358.

111. MCM, *supra* note 10, R.C.M. 910(h)(2), provides:

> If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

112. 43 M.J. 35 (1995).

113. MCM, *supra* note 10, R.C.M. 405(g)(1)(A). The text of the rule provides that "witnesses whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available."

114. *Id.*

115. 43 M.J. 35 (1995). The Article 32 investigating officer failed to apply the balancing test of MCM, *supra* note 10, R.C.M. 405(g)(1)(A). *Id.* at 40.

116. In *Marrie*, the Article 32 Investigating Officer (IO) determined that the three male child victims who were located in excess of 100 miles away from the situs of the investigation were not reasonably available. The IO made no attempt to secure their testimony. Invitational travel orders were not issued to the three victims.

117. 43 M.J. 815 (A.F. Ct. Crim. App. 1996).

118. In *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), the court also applied *Marrie*, holding that the Article 32 investigating officer's erroneous application of the 100 mile rule was harmless error considering that civilian witnesses refused to attend the hearing after almost being murdered by the accused, and the Article 32 investigating officer held three separate investigations and obtained testimony through alternative means. The court also found that the Article 32 investigating officer was not biased against the accused because of the erroneous application of the 100 mile rule. *Id.* at 894.

119. *Burfitt*, 43 M.J. at 816.

retired to bed, the victim was awakened by an unknown man sodomizing him. The victim's roommate and another soldier witnessed the unknown man fleeing the room on his hands and feet.[120] The victim and his roommate reported the incident to an officer who had a room in the building. Both soldiers who witnessed the person leaving the scene identified the appellant as the one who committed the offense.

The appellant requested that the officer, the victim, and the two soldiers who identified the accused be physically present for the investigation, which was held at the accused's permanent duty station, Eglin Air Force Base, Florida (Eglin AFB). At the time of the Article 32 investigation, all of the witnesses had returned to their duty stations, which were located more than 100 miles away from Eglin AFB. The Article 32 investigating officer erroneously denied the witness request based on geographical location. At trial, the military judge denied the defense request to reopen the Article 32 investigation.[121]

The AFCCA, in affirming the conviction, held that, while the Article 32 investigating officer erroneously applied the 100 mile rule, the fact that the accused suffered no prejudice did not require relief. An important difference between *Marrie* and *Burfitt*, the court said, was the Article 32 investigating officer's willingness to obtain the witnesses' testimony through alternative means and to permit the defense counsel heightened participation in the taking of evidence.[122] The investigating officer obtained the written statements the witnesses had provided to Army Criminal Investigation Division (CID) agents shortly after the incident, while everyone was still in Honduras. Moreover, the investigating officer obtained all witnesses' sworn testimony by speakerphone. The defense counsel was permitted to cross-examine all witnesses, and the investigating officer summarized the testimony and made it a part of the record. In essence, all that the investigating officer denied the accused was the right to face-to-face confrontation of the witnesses against him.[123]

Burfitt stresses some important things for counsel to consider at the Article 32 stage. First, while the CAAF has rewritten R.C.M. 405(g)(1)(A) to preclude an interpretation that it contains a per se rule of unavailability,[124] counsel, investigating officers, and legal advisors no longer need to worry about all cases being sent back to the Article 32 stage because the investigating officer erroneously applied the 100 mile rule; the court cautioned that *Marrie* must not be overread. If an Article 32 investigating officer takes affirmative action to neutralize the effect of an erroneous application of the 100 mile rule to the extent that any prejudice is reduced or eliminated, the accused will not prevail on a motion to reopen the investigation.

Second, counsel must ensure that the military judge uses the correct standard at trial when considering the accused's motion for a new Article 32. One of the primary factors that saved this case and other recent cases was the fact that the military judge applied the correct standard when denying the accused's motion to reopen the Article 32 investigation.[125]

The court stated that counsel must be alert to situations where the investigating officer determines that the victim is unavailable.[126] The court noted the importance of the victim to any Article 32 investigation and cautioned counsel not to overread its decision as an endorsement of the practice of not requiring the presence of the victim.[127] Such a determination must be "carefully considered, clearly articulated, and amply supported of the record."[128]

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120. *Id.*

121. *Id.* at 817.

122. *Id.*

123. The court also noted that the military judge denied the accused's motion for a new Article 32 investigation based on the proper balancing test. The military judge "weighed the difficulty of securing the witnesses against the importance of their personal appearance to the integrity of the investigation and the corresponding prejudice to the appellant if they did not." *Id.* at 817. The military judge determined that the speakerphone procedure was a reasonable substitute for personal appearance.

124. *Marrie*, 43 M.J. at 40.

125. *Burfitt*, 43 M.J. at 816.

126. *Id.* at 817.

127. *Id.*

128. *Id.*

Court-Martial Personnel

In *United States v. Fulton*,[129] the CAAF took another look at the issue of whether installation primary law enforcement personnel should be excluded from service on court-martial panels.[130] In *Fulton*, the accused pled guilty to attempted larceny and three specifications of larceny.[131] The accused elected to be sentenced by a panel. During group voir dire, one of the members revealed that twenty years earlier he had been the victim of a burglary and some of his stereo equipment had been stolen.[132] On individual voir dire, the member informed the court that he was the Chief of Security Police Operations for the Pacific Air Forces, and had Bachelor's and Master's degrees in criminal justice.[133] The member was responsible for security, law enforcement, and air base operations for the entire command.[134] He also informed the court that his area of responsibility included matters that required "high level decisions" that did not include the accused's misconduct.[135] Although the member was in contact with the accused's commander on some of these "high-level" matters, he never spoke to the commander about the accused's misconduct and had no knowledge of the charges.[136] The military judge denied the defense counsel's challenge for cause against the member, and the AFCCA affirmed the conviction.[137]

The CAAF held that the military judge did not abuse his discretion in denying the challenge for cause; the member was not per se disqualified from court-martial duty based on his status as a security policeman. The member's duties at the local police squadron were minimal, and the accused's misconduct was not the subject of the member's contact with the accused's commander.[138]

In a strong dissent,[139] Judge Sullivan took issue with the majority's dismissal of *United States v. Dale*[140] as controlling which would have required the setting aside of the conviction. In *Dale*, the CAAF reversed the accused's conviction for child sexual abuse because the military judge abused her discretion by failing to grant a challenge for cause against a member who was the deputy chief of security police on the installation where the court-martial occurred.[141] The challenged member had spent his entire military career in the law enforcement field.[142] While he was not "privy to any of the details of the investigation" and excused himself from the meetings with the commander when the case was discussed,[143] he supervised security police investigations and sat in on the "cops and robbers" briefing for the base commander in the absence of the squadron commander.[144] The CAAF held that the convening authority in

129. 44 M.J. 100 (1996).

130. The services look at law enforcement backgrounds and qualification to serve on a panel differently. While there probably is no per se rule, the practice of inclusion has been discouraged. The Army has the strongest rule against inclusion. *See* United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983) (holding that "At the risk of being redundant--we say again--individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be."). The other services appear to look at the situation on a more *ad hoc* basis. *See* United States v. Berry, 34 M.J. 83 (C.M.A. 1992); United States v. Dale, 42 M.J. 384 (1995); United States v. McDavid, 37 M.J. 861 (1993).

131. *Fulton*, 44 M.J. at 100-01.

132. *Id*.

133. *Id*.

134. *Id*. at 101.

135. *Id*.

136. *Id*.

137. The challenge for cause was based on the member's background and training as a law enforcement officer, his present responsibilities, and his status as a past victim of a similar crime. The defense also cautioned that the member would be more inclined to impose a "harsher sentence." The defense counsel preserved the issue through the use of his peremptory challenge and stated that he would have used the challenge against another member had the military judge granted his challenge for cause against the Chief of Security Police. *Id* at 101.

138. *Id*. at 100-01.

139. *Id*.

140. 42 M.J. 384 (1995).

141. *Id*. at 386.

142. *Id*. at 385.

143. The facts indicate the officer knew he would be a panel member in the case and excused himself from the meeting where the investigation or offense was discussed.

144. *Dale*, 42 M.J. at 385.

Dale should not have even appointed the member because it "asked too much of both him and the system."[145]

The pivotal support for the CAAF's ruling was the implied bias provision of R.C.M. 912(f)(1)(N), which provides that a member should not sit if service as a member "raises substantial doubt on the legality, fairness, and impartiality of the proceedings." The *Dale* member was "sincere" in his voir dire responses, seemingly indicating that he would not permit his prior duties or education as a law enforcement officer to interfere with the court's instruction and that he could put aside all matters outside the evidence and instructions presented in the court-martial.[146] The CAAF interpreted R.C.M. 912 (f)(1)(N) as dispositive on the issue because the member was the "embodiment of law enforcement"[147] on the installation. Despite the fact that he did not know about the accused's case and excused himself from the briefing on this case, he was involved in the day-to-day operations of the law enforcement function and attended the "cops and robbers briefings."[148] Judge Sullivan was not able to distinguish between the members in *Fulton* and *Dale.*

The line of cases culminating in *Fulton* indicate that, at best, the CAAF is still sorting out this issue. While the court does not want to sanction a rule that excludes a class of soldiers from panels, law enforcement officers bring to a court-martial ideas and proclivities that may be more inconsistent with the rights that an accused has under the Constitution. While it may be best to review these situations in a *ad hoc* manner, as Judge Sullivan illustrates, the analysis can sometimes lead to a decision that does not "meaningfully distinguish"[149] one case from another. On the other hand, fine distinctions in the facts may lead to opposite conclusions.

United States v. Mayfield

United States v. Mayfield[150] presented the CAAF with a question of apparent first impression concerning the application of Article 16.[151] The court held that a court-martial composed of a military judge alone was not deprived of jurisdiction because the military judge failed to specifically obtain the accused's oral or written request for trial by military judge alone on the record, and the military judge could properly hold a post-trial Article 39(a) session to correct the deficiency. [152]

In *Mayfield*, the accused pled guilty to wrongful use and distribution of marijuana. Prior to trial, the accused submitted "pretrial paper-work"[153] for a trial by military judge alone, was arraigned, and entered pleas of guilty to the charges and specifications. The original military judge presided over two motions sessions with accused, defense counsel, and trial counsel present. At the third session of trial, a new military judge presided, after indicating on the record the original military judge's absence.[154] The military judge announced that the court was assembled, proceeded to the providence inquiry, found the accused guilty, and rendered a sentence.[155] Upon examining the record of trial before authentication, the military judge noticed the absence of a written or oral request for trial by military judge alone.[156] To correct this error, the military judge convened a post-trial Article 39(a) session. After an extensive colloquy with the accused, the judge confirmed on the record that the accused desired a military judge alone trial.[157] The

145. *Id.* at 386 (citing United States v. Dale, 39 M.J. 503, 508 (A.F.C.M.R. 1993) (dissent)).

146. *Id.* at 385-86.

147. *Id.* at 386 (citing United States v. Dale, 39 M.J. 503, 508 (A.F.C.M.R. 1993) (dissent)).

148. *Id.*

149. *Id.*

150. 45 M.J. 176 (1996).

151. UCMJ art. 16(1) (1988). The article provides, generally, that in a military judge alone court-martial, the accused must make an oral or written request for forum on the record before the court is assembled. The accused must be aware of the identity of the military judge and consult with defense counsel before making the forum request. *Id.*

152. *Mayfield,* 45 M.J. at 178.

153. *Id.* The "pretrial paper-work" was never attached to the record of trial and certainly was not made a part of the proceedings prior to the new military judge sitting for the court-martial. The NMCCA opinion indicates that the pretrial paperwork was not a formal request for trial by military judge alone. It may have been a memorandum that was signed by the defense counsel. The NMCCA did not place to much weight on this, stating that Article 16 required that the accused make the request, and this was not evidence in a document that was signed by the defense counsel. *See* United States v. Mayfield, 43 M.J. 766, 770 (N.M.Ct.Crim.App. 1995).

154. *Mayfield,* 45 M.J. at 177.

155. *Id.*

156. *Id.*

157. *Id.*

NMCCA, citing Article 16 and *United States v. Dean*,[158] held that a military judge alone court martial is deprived of jurisdiction if it is created and there is a failure to comply with the requirement that the accused's forum request be written or oral on the record. In compliance with the statute and case law, then, the conviction had to be reversed because the military judge was without jurisdiction to hold a post-trial session to correct a substantive jurisdictional error.

The CAAF reviewed the Military Justice Act of 1968 and determined that, while that Act demanded that a military judge alone request had to be in writing, Article 16 was amended in 1983 to permit the accused to make an oral request on the record.[159] Applying an expansive definition of "oral request on the record," the CAAF said it was "certainly clear"[160] to all the parties that the new military judge would preside over the entire court-martial and determine an appropriate sentence for this accused.[161] At the first Article 39(a) session, the original military judge fully explained to the accused his forum rights. The new military judge mentioned the change in judges on the record, and the defense did not enter an objection at any time to the procedure. At the post-trial session, the accused acknowledged that he was fully advised of all rights, made a forum selection, and confirmed those selections.

The CAAF declared that the military judge was well within his authority under R.C.M. 1102(d) to "direct a post-trial session any time before the record is authenticated to correct an apparent omission."[162] The dialogues between the accused and the original and new military judges was enough to convince the court that the accused had actually made an oral request on the record and no jurisdictional error existed.[163]

The CAAF was able to dispose of this case by phrasing the NMCCA's interpretation of Article 16 as a "technical application of the statutory rules and not a matter of substance leading to jurisdictional error."[164] The CAAF was therefore able to preserve the seminal holding of *Dean* that a military judge's failure to obtain an oral or written request for a military judge alone trial prior to assembly cannot be cured by a post-trial Article 39(a) session. The request may not have been timely, but the request was nevertheless on the record, albeit spread out in different parts.

Mayfield is indicative of the CAAF's continuing movement in court personnel matters to look at issues in terms of their practical effect, rather than through the technical application of the law.[165] Additionally, *Mayfield* is a reminder to practitioners not to overlook the requirement for a written or oral request for trial by military judge alone. In cases that involve replacement of military judges, counsel and the military judge should question the accused anew to ensure the accused's understanding of and desire to continue with his forum selection.

Trial in Absentia: New Views of Presence and Arraignments

New technological advances in automation, communications, and information have been a boon to all sectors of American society, including the military. Training is held by video teleconferencing, legal documents are transmitted by computer, and in the civilian sector, computers are used in the courtroom. What then, in terms of technology, is in store for our courts-martial as we go to the next century as part of FORCE XXI? Considering a case of first impression, the ACCA set the stage for answering this question in *United States v. Reynolds*.[166]

In *Reynolds*, the Army court tangled with the issue of what constitutes presence at a court-martial as it applies to the accused, counsel, and the military judge, and whether an accused can waive the presence requirement.[167] The issue was created by the military judge's use of a speakerphone to conduct an arraignment. The military judge called the initial session of the court-martial to order with the accused and counsel for both parties located in a courtroom at Fort Jackson, South Carolina, and the military judge located in a courtroom at Fort Stewart,

158. 43 C.M.R. 562 (1970).

159. Pub L. No. 98-209, § 3(a), 97 Stat. 1394 (1983). This change was implemented in R.C.M. 903(b)(2), which provides, "A request for trial by military judge alone shall be made in writing and signed by the accused or shall be made orally on the record."

160. *Mayfield,* 45 M.J. at 178.

161. *Id.*

162. UCMJ art. 60(e)(2) (1988).

163. *Mayfield,* 45 M.J. at 178.

164. *Id.*

165. *See generally* United States v. Algood, 41 M.J. 492 (1995) (looking at the practical reality of referring a case to trial using members selected by a previous commander of an installation that was deactivated under the Base Realignment and Closure Program).

166. 44 M.J. 726 (Army Ct. Crim. App. 1996).

167. The ACCA issued a *sua sponte* order to the appellant and the government to submit briefs on the issue of whether the procedure violated the MCM, *supra* note 10. *Reynolds,* 44 M.J. at 727.

GA.[168] Each courtroom contained a speakerphone. The military judge advised the accused that he did not have to continue with the speakerphone procedure and he would not be penalized if he desired to conduct the proceeding with all personnel physically present.[169] The military judge held a face-to-face session with all parties physically present at a court-martial composed of officer members, and the accused was convicted of larceny and housebreaking.[170]

Reviewing the *Manual for Courts-Martial*, the Army court held that the speakerphone procedure violated the law because of the logical definition of presence, the policy reasons why physical presence is required to conduct a court-martial, and the military judge's justification for conducting the arraignment by speakerphone.[171] The court determined that the *Manual for Courts-Martial* nowhere defines "presence" in the applicable provisions.[172] Looking to the plain meaning of the word in *Webster's Dictionary*, the Army court held that presence meant "the fact or condition of being present."[173] According to *Webster's*, "present" means "being in one place and not elsewhere, being within reach, sight, or call or within contemplated limits, being in view or at hand, being before, beside, with, or in the same place as someone or something."[174]

The reasoning for the decision is important and provides solid support for the holding, especially considering the possibility that some might view the case as a condemnation of using new technology in the military courtroom. The key policy reasons underlying the "presence" requirement are simple. The military judge must be sure that the accused is in fact present and personally makes the important elections regarding substantive and important procedural rights.[175] This can only be accomplished by the military judge actually witnessing the demeanor of a physically present accused. The speakerphone procedure deprived the accused of his right to have the military judge make this determination.[176]

The ACCA was also concerned with the public perception of the speakerphone procedure.[177] The court noted that an individual walking into the courtroom to witness a "disembodied voice" as a military judge was not the proper portrait that the military justice system wanted to present to the public.[178]

Besides the policy reasons, the court provided two more concrete justifications for its decision. First, the military judge stated that the reason for the speakerphone procedure was to "save the court some time and the United States some TDY and travel money."[179] Looking to the federal courts and the legislative history of Federal Rules of Criminal Procedure 43(a), the court determined that the only reasons that the federal courts have conducted alternative forms of arraignments (television) are upon a showing of necessity.[180] The stated reason for the procedure satisfied convenience rather than necessity. Finally, the court recognized that if the *Manual* drafters wanted to inject telephonic procedures into the court-martial, it could have accomplished this as it did in R.C.M. 802.[181] It is a normal practice in pretrial procedures for the military judge to conduct the 802 conference by phone. The fact that the drafters did not

168. The distance between the installations is about 150 miles. *Reynolds*, 44 M.J. at 729.

169. *Id*. at 727. The military judge advised the accused of his right to counsel, the different forum selections available, the significance of the arraignment, and discussed the accused's waiver of his Article 32.

170. *Id*. at 726.

171. *Id*. at 728-30.

172. *See* UCMJ arts. 39(a), (b), 26(a), 36 (1988); MCM, *supra* note 10, R.C.M. 803, 804, 805.

173. *Reynolds*, 44 M.J. at 728.

174. *Id*. at 729.

175. *Id*.

176. *Id*. "Observations of subtle changes in demeanor or perceptions of so called 'body language' may indicate to a military judge that an accused really does not understand his rights and needs additional instruction for complete understanding." The court was concerned as to how the military judge could accomplish his duty of supervising the proceeding and ensuring appropriate decorum while not being able to actually see the participants. The court stated that the appellate court would be deprived of its opportunity to "see the court-martial proceeding through the eyes of the military judge" and that the judge's ability to participate in a meaningful way cannot be limited. This would eliminate the appellate court's ability to see the case in full view for possible remedial purpose on appeal. *Id*.

177. *Id*.

178. *Id*.

179. *Id*. at 728.

180. *Id*.

181. MCM, *supra* note 10, R.C.M. 802 provides for a pretrial conference "to consider such matters as will promote a fair and expeditious trial." The Discussion provides that "[a] conference may be conducted by radio or telephone."

include such a procedure for the formal stages of a court-martial was evidence indicating that such procedure was invalid for arraignment.

In *Reynolds*, the Army court issued consistent signals regarding the presence requirement, automation, and waiver. The court limited the holding to the specific facts of the case, but it left open for another day the "ultimate" definition of the term "presence at a time of rapidly evolving technology."[182] Under a different set of circumstances, the court intimates generally, the procedure might have been lawful.[183] In addition, the court stated that the procedure did not deviate so much from the standards of fairness that it would allow the accused to make a waiver of his "presence rights" and be able to claim a benefit on appeal. The record indicated that the accused consented to the procedure with counsel present, and counsel did not make an objection. Practitioners should also take note that the court thought it important enough to raise the issue *sua sponte.* The court appears to prefer that counsel and military judges proceed slowly in this area and, for the time being, forego telephonic, electronic, or video teleconferencing for the formal stages of a court-martial.

Similarly, *United States v. Price*[184] presents an issue concerning arraignment with a twist familiar to some practitioners: the accused's voluntary absence.[185] *Price* is not a departure from precedent but rather, it is based on old settled law.[186] Price was convicted of robbery and aggravated assault. At a pretrial session, the military judge properly advised the accused of his forum and counsel rights, and the accused made his desired elections.[187] The military judge then proceeded to arraignment, where the accused waived a reading of the charges.[188] Instead of calling on the accused to plead, the military judge stated, "I will not ask for the accused's pleas, as I was served with notice of several motions that I would obviously need to resolve before any plea was entered in this case."[189] The accused participated in two motions sessions.[190] The accused was absent when the court-martial reconvened for the merits phase. The court was assembled, and although the military judge failed to enter pleas for the accused, the trial proceeded without defense objection, resulting in the accused's conviction and sentence.[191] The accused raised the defective arraignment issue on appeal for the first time and requested that the conviction be set aside.[192]

The ACCA held that when an arraignment is procedurally defective and an accused voluntarily absents himself from a court-martial after participating in the litigation of motions and being informed of the date that the trial will commence, the court-martial will not be deprived of jurisdiction to try the accused in absentia.

The ACCA noted that the requirement for a lawful arraignment consists of a reading to the accused of the charges and specifications and demanding of the accused that a plea to each charge and specification be made.[193] Determining that the arraignment was defective, the Army court explored case law on the issue of whether the accused could waive entering a plea

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182. *Reynolds*, 44 M.J. at 729. Video teleconferencing appears to violate the court's definition of presence. While that procedure would permit the military judge to see and observe the demeanor of the accused, and supervise the proceedings, it would not permit the accused, counsel, and the military judge to be physically present in the same location (the courtroom). The court interpreted the statutes and R.C.M. provisions to require that all parties be "at one location for the purposes of a court martial." *Id*. Physical presence is necessary so the military judge can truly observe the demeanor of the accused. Video teleconferencing presumably would not satisfy this requirement.

183. Operational necessity (war, operations other than war, etc.) might produce a different result.

184. 43 M.J. 823 (1996).

185. While the cases may be similar in that they concern arraignments, they should not be read together. *Price* focuses on the accused's voluntary absence from and the impact of the accused's action on the subsequent phases of the court martial as it relates to jurisdiction. *Reynolds* is concerned with jurisdiction as well, but is intended to focus on the action of the military judge in supervising the court-martial proceeding, protecting the right of the accused to make informed intelligent choices regarding important substantive and procedural rights, and ensuring that the public has confidence in the fairness of the military justice system.

186. The court cited *United States v. Houghtaling*, 2 C.M.R. 229 (A.B.R. 1951); *aff'd*, 8 C.M.R. 30 (1953); and JOHN A. WINTHROP, MILITARY LAW AND PRECEDENTS ¶ 353 (1896 ed.), as support for its holding.

187. *Price*, 43 M.J. at 824.

188. *Id*.

189. *Id*.

190. In each session, neither the military judge, the accused, nor counsel mentioned arraignment or pleas. *Id.*

191. *Price*, 43 M.J. at 823-24.

192. The defense raised the defective arraignment issue in the clemency petition and requested sentence relief from the convening authority. *Id.* at 825.

193. MCM, *supra* note 10, R.C.M. 904. There is no requirement that the accused actually enter the plea. To complete arraignment, the military judge must, after offering that the charges be read, call upon the accused to enter a plea.

without causing a deprivation of court-martial jurisdiction. The court observed that it was clear that a court-martial's failure to read the charges to the accused was a procedural error that did not operate to deprive the court of jurisdiction.[194] Focusing on the "calling upon the accused to plead"[195] requirement, the court held that prior case law supported the view that asking the accused to plead was not an indispensable element of arraignment as long as the accused was served with a copy of the charges and the parties, with the court's consent, waive the requirement for arraignment.[196] The ACCA had little difficulty concluding that the accused waived the procedural requirement in this case because the record indicated that the accused was informed of the charges against him, participated in three sessions that involved the litigation of complex substantive motions regarding the charges, and was advised of the particular date and time that trial on the merits would commence. [197]

Concurring in the result, Judge Johnston viewed the issue differently than the majority. He pointed out that the "precise" issue was not whether there was a defective arraignment, but whether the *accused* waived the procedural requirement of R.C.M. 904 to enter a plea.[198] In Judge Johnston's opinion, the military judge did not commit prejudicial error. Rather, the accused affirmatively waived the "called upon to plead"[199] requirement by participating in the motions sessions. Judge Johnston determined that the accused's action was the functional equivalent of entering a not guilty plea.[200]

While the concurrence provides an easy answer to the issue, it also raises a red flag for counsel to consider before accepting its logic. Conducting the pretrial phase of a court-martial is the military judge's responsibility. Article 26[201] and *Army Regulation 27-10*[202] requires that the military judge preside over the court-martial, call the court into session for the purpose of arraignment, and receive pleas. Ensuring that the accused is called upon to plead and enters a clear statement of the plea is not a de facto or de jure responsibility of the accused.

Not to be outdone, the majority provided a practical consideration for military judges. The court cautioned military judges not to look at the R.C.M. 804(b) arraignment requirement as "a mere formality to be omitted"[203] during the pretrial phase. Military judges should follow the Military Judges' Benchbook.[204] When an accused desires to waive entering pleas pending the outcome of a motion, the military judge should still call upon the accused to plead. There is no requirement that the accused actually enter a plea.[205]

Voir Dire and Challenges

Old Rules: The Military Judge's Authority to Control Voir Dire

In *United States v. Williams*,[206] *United States v. DeNoyer*,[207] and *United States v. Jefferson*,[208] practitioners might find the cases that stimulate the most debate. Each case operates to prevent counsel from using voir dire to obtain, in the safest way,

194. *Price*, 43 M.J. at 826-27; *see also* United State v. Napier, 43 C.M.R. 262 (C.M.A. 1971); United States v. Lichtsinn, 32 M.J. 898 (A.F.C.M.R. 1991); United States v. Stevens, 25 M.J. 805 (A.C.M.R. 1988). The court pointed out that while these cases were on point as to the arraignment issue, they did not involve trial in absentia. The court also noted two other cases where the issue concerned the first part of the arraignment (reading of the charges) as defective, but did not focus on the second (calling upon the accused to enter a plea). *See* United States v. Wolf, 5 M.J. 923 (N.M.C.M.R. 1978), *pet. denied*, 6 M.J. 305 (C.M.A. 1979); United States v. Cozad, 6 M.J. 958 (N.M.C.M.R. 1979).

195. MCM, *supra* note 10, R.C.M. 904.

196. *Price*, 43 M.J. at 826-27. The ACCA opined that WINTHROP, *see supra* note 186, viewed that either part of the arraignment could by waived by the accused.

197. The motions concerned speedy trial, suppression of an in-court identification, and multiplicity, all of which were denied. *Price*, 43 M.J. at 828 (Johnston, J., concurring in the result).

198. *Id.*

199. *Id.*

200. *Id.*

201. UCMJ art. 26(a) (1988) provides: "The military judge shall preside over each open session of the court-martial to which he has been detailed."

202. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 8-4a(2)(a) and (b) (1 Jan. 1996), provides: "(a) The military judge's judicial duties include, but are not limited to calling the court into session without the presence of members to hold the arraignment. (b) Receiving pleas and resolving matters that the court members are not required to consider . . . ."

203. *Price*, 43 M.J. at 827.

204. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, ch. 2 at 13 (1 Sept. 1996) [hereinafter BENCHBOOK]. The Benchbook procedure asks the military judge to call upon the accused to plead under all circumstances, and then ensure that a plea is entered after all motions are litigated.

205. MCM, *supra* note 10, R.C.M. 904 discussion provides, in part: "Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."

206. 44 M.J. 482 (1996).

information to establish a basis for a challenge for cause. The difficulty in assessing the effect of the cases is that they are based on an old rule that the military judge controls the conduct of voir dire.[209] The opinions, however, leave some room for criticism.

In *Williams*, the accused was charged with indecent assault, using indecent language, and obstruction of justice. During group voir dire, the military judge's questioning of the panel established that three members had prior knowledge of the case.[210] The defense counsel established that one of the members was inclined to draw an adverse inference from the accused's failure to testify, and another member had social contact with the CID agent the government would call as a witness.[211] The military judge denied a defense request for individual voir dire of these members.[212] After an Article 39(a) session wherein the defense presented a written motion for appropriate relief,[213] the military judge explored the areas of defense concern in group voir dire.

The military judge then held another Article 39(a) where the defense's renewed request for individual voir dire of the same members was denied.[214] The defense also requested individual voir dire of the member who had difficulty with the idea that an adverse inference must not be drawn from the fact that the accused would not testify.[215] The military judge denied the request, directing defense counsel to ask any questions it desired in front of the entire panel.[216]

The CAAF held that the military judge did not abuse his discretion in denying the defense requests to conduct individual voir dire. The court reminded practitioners that *United States v. White*[217] gives a military judge wide latitude in determining the scope and conduct of voir dire. In *White*, the Court of Military Appeals held that a military judge did not abuse his discretion by denying challenges for cause against one member who was the superior of a second member, to one court member who had technical expertise in recruiting, and to one member who had lunch on the day of trial with one of the witnesses.[218] The CMA's opinion was based on the fact that military judges have wide discretion to determine the scope of voir dire to establish a sufficient basis for granting or denying a challenge for cause.[219] Additionally, the plain language of R.C.M. 912(d) directs the military judge to exercise discretion in the conduct of voir dire.[220] The case law has never recognized a right of the prosecution or defense to conduct voir dire,[221] and the CAAF

207. 44 M.J. 619 (Army Ct. Crim. App. 1996).

208. 44 M.J. 312 (1996)

209. MCM, *supra* note 10, R.C.M. 912(d).

210. Three members read a newspaper article and one member who read the article also previously read a "blotter report" relating to the case. Another member who read the article remarked that he wished he did not have to participate in the court-martial. The member's reaction to the article, knowing that he might be on the panel, was "I wished that I wouldn't be involved." *Williams*, 44 M.J. at 483.

211. *Id.* at 482. The member had a few beers at the local club with the CID agent.

212. *Id*. at 483-84. It appeared that the defense desired to further explore the member's relationship with the CID agent to determine the extent of knowledge of the members who read the article and blotter report. *Id.*

213. The motion requested that the defense be permitted to conduct individual voir dire and provide its reasons outside of the presence of the members to avoid undermining, belittling, and compromising the defense before the members. *Id*. at 483

214. *Id*. at 484.

215. *Id*.

216. The defense counsel did not "take advantage" of the military judge's offer. The offer placed defense counsel in the precarious position of deciding whether to ask questions that might taint the panel or waive the group voir dire to support his motion. The latter created the situation of proceeding with members who might not be qualified to sit.

217. 36 M.J. 284 (C.M.A. 1993).

218. *Id*. at 287.

219. *Id*.

220. MCM, *supra* note 10, R.C.M. 912(d), provides:

> The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the later event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of the other members when the military judge so directs.

221. *Williams*, 44 M.J. at 485. (citing United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979)).

was careful to state that R.C.M. 912(d) was intended to align the court-martial practice with federal court voir dire procedure.[222]

White, and the Court's plausible interpretation of R.C.M. 912(d), is easily applied to the facts of *Williams.* The military judge mooted one issue when he granted the defense challenge for cause against the member inclined to draw an adverse inference from an accused's failure to testify.[223] The defense counsel mooted the general issue, in the court's opinion, when he refused to comply with the military judge's procedure that all questions be asked during group voir dire.[224] The CAAF's resolution, however, sanctions what might be an unsatisfactory procedure, considering that the primary purpose of voir dire is to establish a basis for causal, and now, peremptory challenges.[225]

While R.C.M. 912(d) does recognize the military judges' authority to control voir dire, it also recognizes the permissive opportunity for counsel to ask questions in a meaningful way to obtain a qualified panel. A counsel's manner of asking questions and focus in a particular area may lead a member to answer questions differently. A member may respond to a question differently when it is asked by a military judge. The member might perceive the military judge as a neutral party. In *United States v. Denoyer*,[226] the Army Court of Criminal Appeals gave a lukewarm endorsement of the manner in which the military judge summarily denied a defense request for individual voir dire to explore the possible impact of rating chain relationships on members.[227] Noting the rating chain relationship, the military judge simply advised the members that rank would not be employed to influence any member or to control another member's judgment.[228] The ACCA also observed that the procedure was a "perfunctory treatment of [a] sensitive issue"[229] and cautioned military judges to follow the Benchbook procedure. [230]

Practitioners should pay special attention to *Williams* and *DeNoyer.* A military judge runs the risk of tainting the panel by limiting counsel's access to individual member questioning.[231] Defense counsel should consider taking advantage of the military judge's offer to conduct group voir dire. This may establish a record to support an argument that other members were tainted during group questioning. Second, trial counsel must proceed carefully. Often, trial counsel are told to join in on challenges for cause when it is clear that a member should not sit for trial. Endorsing the military judge's practice of limiting defense voir dire might prove harmful; the appellate courts might look on such practice as a reason to support reversal, especially if the grounds for limiting voir dire are weak, the case involves very serious offenses, or the sentence is severe.

Bogeymen, Ax Murderers, and Court-Members: *United States v. Jefferson*

United States v. Jefferson[232] is noteworthy because it contains a full panoply of issues relating to voir dire. In J*efferson*, the accused pled guilty to driving while intoxicated, but contested other charges related to leaving the scene of an accident, disorderly conduct, and damaging personal property. At trial, the military judge interrupted the defense counsel's questioning of the members regarding the burden of proof to ensure that the members were not confused by the questions.[233] The defense counsel also protested the military judge's failure to ensure that

222. *Id.* The practice in federal courts is for the district court judge to conduct voir dire. In *United States v. Jefferson*, 44 M.J. 312 (1996), the CAAF noted that three-fourths of the federal district courts conduct voir dire without counsel participation to prevent counsel from using voir dire for purposes other than developing a grounds for challenge. *Id*. at 318; MCM, *supra* note 10, R.C.M. 912(d), discussion advises "[o]rdinarily the military judge should permit counsel to personally question the members." For a discussion why the federal district court practice should be changed to permit greater counsel participation, *see Top Seven Reasons Listed for Attorney Voir Dire*, 11 CRIM. PRAC. MAN (BNA) NO. 3, at 45 (Jan. 29, 1977).

223. *Williams*, 44 M.J. at 485.

224. *Id*.

225. *Batson v. Kentucky*, 476 U.S. 479 (1986), requires that the proponent of a peremptory challenge provide a race/gender-neutral explanation once an objection is made. The proponent must articulate a good reason, based on the proceedings, to overcome the objection. Although not technically required by law, a race/gender-neutral reason can be developed during voir dire.

226. 44 M.J. 619 (Army Ct. Crim. App. 1996).

227. The same military judge tried *Williams* and *Denoyer*.

228. *Denoyer*, 44 M.J. at 620.

229. *Id*.

230. *Id*. at 621. The BENCHBOOK, *supra* note 204, chapter 2, advises the military judge to ask specific question regarding rating chain relationship, but also permits counsel to ask the members additional questions in a group and individual setting.

231. *Williams*, 44 M.J. at 485. The court stated that the military judge had discretion to run this risk, considering the wide latitude the military judge has in the conduct of voir dire.

232. 44 M.J. 312 (1996)

the members knew that no punishment was a viable sentencing option.[234] After the defense inquired whether the members could consider a sentence of no punishment, the military judge attempted to resolve court-member confusion by describing the no punishment option as a "one of those bogeymen that comes up every now and then."[235] The military judge went further, giving the members the example of an ax murderer as someone who should receive punishment without foreclosing at least consideration of the no punishment option.[236] The military judge also denied the defense requests to conduct individual voir dire of a member regarding a rating chain issue and to reopen voir dire to explore bias on the issue of family members who had been victims of crimes.[237] Finally, the military judge denied the defense request that the assistant defense counsel be permitted to conduct voir dire.[238] The military judge denied all the defense causal challenges.

The CAAF held that, while voir dire was "fundamental to a fair trial,"[239] counsel was required to operate within the parameters set by the military judge, who has wide latitude in controlling the procedure. The military judge's action of interrupting counsel during the burden of proof question was permissible because counsel had created confusion by asking the members their conclusions regarding guilt or innocence when they had been informed of the accused's guilty plea to driving while intoxicated.[240] Additionally, while the military judge should not have used the bogeymen language and ax murderer example to illustrate that no punishment was a viable option on sentencing, the court was sympathetic to the situation of court-members who are asked hypothetical questions concerning what sentence they would give prior to a conviction.[241]

The CAAF disposed of the individual voir dire issue with the same alacrity it did in *Williams*, noting that defense counsel could have requested an Article 39(a) session or a side bar conference to inform the court of the reasons why individual voir dire was necessary. The court, however, condemned the military judge's refusal to reopen voir dire to explore the issue of family members who were victims of similar crimes.[242] This issue was one where the court could not simply rely on the military judge's discretion to control voir dire as a basis for the decision, because there were no facts on the record to show whether implied bias existed.[243]

Jefferson is a strong reminder that, when the military judge fails to ensure that voir dire is adequate insofar as victim analysis is concerned, the courts will be more inclined to reverse or set aside a case rather than impute implied bias to ensure that the accused is tried and sentenced by impartial court members.

New Ground: Striking Purkett from the Panel: United States v. Tulloch

In *Purkett v. Elem*,[244] the Supreme Court held that a party is not required to provide an explanation that is persuasive or plausible when responding to a claim that the challenge violates the *Batson v. Kentucky*[245] proscription against the use of a challenge to remove individuals from a jury based on racial or gen-

233. *Id.*

234. *Id*. at 315

235. *Id*. at 316.

236. *Id*. The military judge stated:

> Members, the issue that came up about 'Would you consider no punishment?'--it's one of those bogeymen that comes up every now and then. It's kind of one of these philosophical arguments lawyers get into. But the law requires that you have an open mind and that you have no preconceived idea of punishment. Now, if you bring in a multiple axe murderer and you sit him down and you say, 'Now, this guy is pleading guilty to multiple murders, will you consider no punishment?'--it's kind of an absurd question. Yet, depending on how you phrase it and what the crimes are, the law still requires that you keep an open mind and be able to consider the full range of punishments.

237. *Id*. at 317

238. *Id*. at 316.

239. *Id*. at 321.

240. *Id*. at 320.

241. *Id*. Each member stated they would follow instructions and consider all alternative punishments.

242. *Id*. The court set aside the conviction and ordered a post-trial hearing to inquire into the issue. *Id*. at 322.

243. The court observed that the record did not support a finding of actual bias because the fact that a member has a friend or relative who was a victim of a crime is not a per se disqualification to sit on a panel. A member's answers to voir dire questions, which were prohibited here, would establish a basis for actual or implied bias. The court stated that the law did not favor imputing implied bias. *Id*. at 321 (citing Smith v. Phillips, 455 U.S. 209 (1982); Remmer v. United States, 347 U.S. 227 (1954)).

244. 115 S. Ct. 1769 (1995) (per curiam).

der discrimination. *Purkett* involved a Missouri prosecutor's striking of two black men from a jury because he "did not like the way they looked," "and [because] they looked suspicious," and because one of the jurors had "long, unkempt hair, a mustache, and a beard."[246] Asserting that the only requirement for an explanation is that it must be "clear and reasonably specific" and "be related to the case to be tried," the Court appeared to create an exception to *Batson*, which authorized counsel to make challenges based on "hunches and guesses" similar to pre-*Batson* times.[247] *Purkett* could be construed to permit any advocate with ill-motivations to peremptorily challenge an individual and cover up the motivation with an excuse that did not technically deny equal protection. After *Purkett*, counsel were advised to recognize this limited exception, but not to "play fast and loose with the equal protection rights of an accused or court members."[248] In *United States v. Tulloch*,[249] the ACCA attempted, at least for Army legal practice, to fill the gap in the law of peremptory challenges created by *Purkett*.[250]

In *Tulloch*, the accused pled guilty to possessing and transporting a firearm, and usury. An officer and enlisted panel convicted him of attempted robbery and conspiracy contrary to his pleas. The defense counsel conducted voir dire, focusing on the junior member of the panel who was also a member of the same race as the accused. The defense counsel was able to establish that the junior member, at least from her responses, would be impervious to unlawful coercion in voting on a finding.[251] There were no abnormalities regarding the member's demeanor at any time during group or individual voir dire.

After voir dire, neither trial counsel nor defense counsel made a challenge for cause against the members. When the military judge asked the parties if they desired to make a peremptory challenge, the trial counsel challenged the junior member of the panel, SSG E.[252] Anticipating the *Batson* issue, the trial counsel asserted that SSG E's "demeanor, in general" during the defense counsel's questioning was a valid race-neutral basis for the peremptory.[253] Specifically, the trial counsel stated that: "I was observing him during voir dire, and he seemed to be blinking a lot; he seemed uncomfortable."[254] The defense counsel vigorously responded to the peremptory challenge, noting that he observed no such behavior from the member. The military judge, observing that "trial counsel has been very forthright with the Court in the past,"[255] granted the challenge, indicating that there were several other racial minorities and one female member remaining on the panel.[256]

245. 476 U.S. 479 (1986).

246. *Purkett*, 115 S. Ct. at 1769.

247. *Id.* at 1771.

248. *See* Major John I. Winn, *Recent Developments in Military Pretrial and Trial Procedure*, ARMY LAW., Mar. 1996 at 48-49.

249. 44 M.J. 571 (Army Ct. Crim. App. 1996).

250. One can look at *Tulloch* as a case where the record was not as complete as the court desired. At the court-martial, the military judge failed to make a finding of fact that the court-member's demeanor was consistent with the way trial counsel described it before granting the government's peremptory challenges. The ACCA was left with a record that it could not use to determine whether the trial counsel's reason for the peremptory challenge was based on a racially discriminatory reason. On the other hand, one can look at *Tulloch* as a gap filler. The court was specific in recognizing why the prosecutor in *Purkett* was able to convince the court of the validity of its peremptory. In contrast, the court stated that the trial counsel's action in *Tulloch* was a stark departure from the *Purkett* prosecutor's clear and unambiguously "race-neutral" reason (One should note that *Tulloch* was tried before the Supreme Court issued *Purkett*, so the trial counsel did not have that case to consider). One can also take the middle road course and view *Tulloch* as an incomplete record and gap filler case. The middle road course is probably best.

251. *Tulloch*, 44 M.J. at 573. The following colloquy occurred between the defense counsel and the member:

> DC: Staff Sergeant E, you're the junior member of this panel, obviously, by the rank that you have. If you believe, at the end of the government's case, that they have not--that they have failed to prove their case beyond a reasonable doubt and that, therefore, Private Tulloch was not guilty, and every other panel member disagreed with you and thought him to be guilty, would you, nevertheless, vote not guilty--
> SSG E: Yes.
> DC: --or could you be swayed to turn because of everybody else?
> SSG E: No
> DC: So if you believe he was not guilty, no rank could influence you to change your vote?
> SSG E: [Negative response.]

252. *Tulloch*, 44 M.J. at 575.

253. *Id*.

254. *Id*.

255. *Id*.

256. *Id*. This fact appeared to indicate, at least to the military judge, that the trial counsel did not have an unlawful motive.

The ACCA set aside the findings relating to the contested charge and the sentence, holding that the record was devoid of a finding by the military judge regarding whether the member had in fact exhibited the nervous demeanor which trial counsel alleged.[257] The court also indicated that the military judge should have examined the issue more closely after the defense counsel made a "credible challenge" to the trial counsel's peremptory challenge.[258]

In so holding, the court noted that, in *Purkett*, the Supreme Court required that peremptory challenges in courts-martial be examined under the three-step *Batson* analysis.[259] At the third step of the analysis, the persuasiveness of the moving party's reason is pivotal. The problem with *Tulloch* was that the military judge accepted the trial counsel's reason supporting the challenge without resolving the ambiguity raised by the defense counsel's "credible challenge."

Significantly, the court added, at least for Army practice, another factor to the *Batson* three-step test. When an opposing party does more than object to a peremptory challenge by making a "credible challenge" that fully disputes the explanation offered to support the challenge, the moving party must come forward with additional explanation that does more than "utterly fail[s] to defend it as non-pretext."[260] The ACCA specifically noted that the defense counsel in Tulloch did much more than the defense counsel in *Purkett* by making a vigorous attempt to persuade the military judge to deny the challenge.[261] It was necessary, under these circumstances, for the military judge to resolve the disagreement, on the record, concerning what the member did during individual questioning before ruling on the peremptory challenge.

Tulloch is currently under consideration by the CAAF, so portions of the ACCA opinion might not survive review.[262] It is uncertain, however, whether the CAAF will reverse the two important learning points of the Army court's decision. First, trial counsel must have a clear mind during voir dire to collect information and ask questions for making a decision whether to proceed on a *Batson* issue, and must state a clear reason on the record to support a peremptory challenge that raises a discrimination issue. It is clear from the Army court's opinion that the trial counsel either misstated her reasons or was confused about the basis for the challenge. This case would have been avoided had trial counsel conducted follow-up voir dire to substantiate why the member may have been blinking and she seemed uncomfortable before making the challenge.[263] Second, it is incumbent upon the military judge to remain alert to ambiguities in the reasons for the challenge and not rely on the particular counsel's forthrightness regarding motivation to support a plea.[264] Finally, the Army court's addition of the "credible challenge" factor formally opens the door for courts to more efficiently and justifiably discern which peremptory challenges violate *Batson*. It also tells defense to do more than the defense counsel did in *Purkett* by vigorously contesting a peremptory challenge that may violate *Batson*.

257. *Id.*

258. *Id.* at 575.

259. In a court-martial, the military judge resolves a *Batson* based challenge in the following way: the opposing party must object and establish a prima facie case by entering an objection; the moving party must come forward with an explanation that need not be persuasive or plausible, but must be facially race-neutral; the military judge must then decide whether the accused has proven purposeful racial discrimination.

260. *Id.* at 575.

261. *Id.* n.3.

262. 44 M.J. 277 (1996). The issues in the case are:

> Whether the Army Court of Criminal Appeals erred when it gave no deference to the military judge's assessment of the trial counsel credibility in his determination that the trial counsel's peremptory challenge against a minority court member was not a race-based 'subterfuge' as asserted by the trial defense counsel.
>
> . . . .
>
> Whether the Army Court erred by shifting the ultimate burden of persuasion to the Government regarding whether a discriminatory intent existed in a government peremptory strike of a minority member, and, thereby, violated the principle that the burden in such challenges rests with, and never shifts from, the opponent of the strike.

263. The importance of voir dire cannot be understated. In a recent article, Mr. Johnny Cochran, the lead defense counsel for O.J. Simpson, remarked that voir dire was possibly the most important part of a trial. "If you don't have an impartial trier of fact, you might as well go home." *See* 10 CRIM. PRAC. MAN. (BNA) No. 13, at 343 (Aug. 28, 1996). The CAAF just recently noted the practical and constitutional importance of voir dire in *United States v. Jefferson*, 44 M.J. 312 (1996). The court stated that "Voir dire is a valuable tool . . . for both the defense and prosecution to determine whether potential court members will be impartial. It is also used by counsel as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise peremptory challenges and challenges for cause." The court also stated that voir dire guarantees the defendant's right to an impartial jury and that "few experienced trial advocates would doubt the importance of [it]." *Id.* at 318. Conversely, many trial counsel believe that voir dire is the province of defense counsel. They often waive the opportunity to question members, probably based on the fact that the convening authority already made valid court-martial selections and the court-members completed background questionnaires before the court-martial. Neither the convening authority nor the defense counsel have the mission of convincing the panel members that justice requires a finding that the accused is guilty and deserves substantial punishment to accomplish society's goals of rehabilitation, and specific and general deterrence. Trial counsel must take advantage of voir dire and undertake this mission. If trial counsel had conducted voir dire in this case, there would have, at least, been a record to support the challenge, and the court would likely not have an issue to resolve.

Batson Odds and Ends

In two other 1996 cases, the CAAF and Navy-Marine Corps Court of Criminal Appeals examined two issues related to the application of *Batson*[265] to courts-martial that are worthy of brief mention. In *United States v. Witham*,[266] the NMCCA held that cases which extended *Batson* to gender are equally applicable to Navy and Marine Corps courts-martial.[267] The court noted that those cases extending *Batson* to civil trials,[268] to situations where the challenged member is not a member of the accused's race,[269] and to defense peremptory challenges,[270] appeared to apply to courts-martial through *United States v. Greene*,[271] but the CAAF never formally stated that *Batson* applied to peremptory challenges based on sex.[272] *Witham* involved an accused who was convicted of making a false official statement and filing a false travel claim.[273] After voir dire, the defense counsel sought to remove SSG H, the only female member, from the panel. The military judge denied the defense request after establishing that defense counsel based the challenge on the fact that the member was a female.[274] The appellant argued that the military judge erred because the CAAF never formally stated that gender was an improper consideration for peremptory challenges. In doing so, the court noted that Article 25(d)(2)[275] did not list gender as a consideration in selecting members, and the Supreme Court was unequivocal in excluding gender from the proper factors that can be considered in making a peremptory challenge.[276] The CAAF may have the opportunity to formally review the NMCCA's interpretation of *Batson*, as a petition for grant of review was filed in the case.[277]

In *United States v. Williams*,[278] the CAAF resolved a tangential but similarly important issue concerning whether *Batson* prohibits religion-based peremptory challenges in military practice. In *Williams*, the trial counsel peremptorily challenged the senior black member of the panel.[279] In response to the defense counsel's *Batson* challenge and demand for a race-neutral explanation, the trial counsel stated that "it's because he's a Mason. And the Government believes that the accused in this case is a Mason, and there may be some sort of alliance there."[280] The military judge granted the peremptory challenge. On appeal, the accused argued that the military judge's action violated *Batson* because the government's challenge was based on religion.[281]

The CAAF acknowledged for the first time and consistent with Supreme Court interpretation, that *Batson* is inapplicable

264. After the defense counsel made his "credible challenge" to the trial counsel's reason, the military judge stated, "[Trial counsel] has been very forthright with the court in the past. I assume, [trial counsel] that you're, likewise, being forthright this time; that you have no other reason for substituting--or for excusing this member." *Id*. The Army court also said that the military judge granted the motion based on the presence on the panel of minority members different from the accused's race. The court cautioned that the presence on the panel of members of the accused's race, after peremptory challenges are granted, does not establish a presumption of good faith. *Tulloch*, 44 M.J. at 573

265. 476 U.S. 89 (1986).

266. 44 M.J. 664 (N.M.Ct.Crim.App. 1996), *petition for grant of review filed*, 45 M.J. 49 (1996).

267. J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994) (holding that gender was a suspect classification under *Batson* and that a trial should be free from "state-sponsored" group stereotypes rooted in historical prejudice).

268. Edmondsonville v. Leesburg Concrete Co., 500 U.S. 614 (1991) (holding that *Batson* applies to both parties in a civil trial and the defense counsel's use of two peremptory challenges against two jurors of the same racial minority group as plaintiff violated Batson).

269. Powers v. Ohio, 499 U.S. 400 (1991) (holding that a *Batson* challenge does not require racial affinity between the accused and the challenged juror).

270. Georgia v. McCollum, 505 U.S. 42 (1992) (holding a criminal defendant may not engage in purposeful racial discrimination in the exercise of peremptory challenges).

271. 36 M.J. 274 (C.M.A. 1993); s*ee also* United States v. Santiago-Davila, 26 M.J. 380, 391 (C.M.A. 1988).

272. The issue of *Batson* application to gender was a case of first impression for the NMCCA.

273. The accused was acquitted of kidnapping and rape.

274. *Witham*, 44 M.J. at 665.

275. UCMJ art. 25(d)(2) (1988).

276. *See generally* J.E.B v. Alabama, 511 U.S. 127 (1994).

277. 45 M.J. 49 (1996).

278. 44 M.J. 482 (1996).

279. *Id*. at 484.

280. *Id*.

to religion-based peremptory challenges.[282] Unlike *Tulloch*, the court had a record replete with facts and a judicial finding of fact to evaluate whether the judge abused his discretion and clearly erred in granting the challenge. The record disclosed that there was no voir dire regarding religion,[283] so it was only necessary for the court to apply this part of *Batson* to summarily dismiss appellant's argument based on religion. Moreover, at trial the defense counsel did not oppose the motion based on religious belief, but only alleged that race was a factor.[284] The CAAF reached that conclusion because the dictionary defined Mason or Freemasons as a fraternal organization.[285] As such, the challenge was permissible because *Batson* does not prohibit challenges based on "fraternal affiliation."[286]

Conclusion

The majority of recent cases in pretrial and trial procedure preserve current rules of law. In pleas and pretrial agreements, the intermediate courts cautioned practitioners that they will continue to closely examine novel pretrial agreement terms to ensure compliance with law and public policy, and recognized the qualified sacrosanct nature of the providence inquiry by proscribing its use to convict an accused of a greater offense in mixed plea cases.

Regarding court-martial personnel and *Batson*, the courts also preserved long-standing rules of law while adding a plausible substantive or procedural twist. The courts limited an advocate's access to individual voir dire. Even though the voir dire cases were based on a long line of precedents, tested procedural rules, and federal circuit practice, the formal recognition of judicial authority may, in reality, have a chilling effect on counsel's willingness to conduct voir dire. The unambiguous interpretation of the law that is prevalent in the recent pretrial and trial procedure cases will permit practitioners to ably execute their missions.

281. *Id*. at 485.

282. The CAAF cited *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), and *Casarez v. Texas*, 913 S.W.3d 468, 496 (Tex. Crim. App. 1994).

283. There is no requirement that voir dire support a peremptory challenge. Nevertheless, as the court explained, in a close case it might make the difference in deciding the merits of a *Batson* challenge. *Williams*, 44 M.J. at 485. At least the moving party would have something to support its challenge.

284. The defense counsel did ask the member whether his membership in the Masons would affect his ability to serve on the panel and received a negative response. *Id*. at 483.

285. *Id*. at 485 (citing Webster's Ninth New Collegiate Dictionary 491, 730 (1991)).

286. *Id*.

Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice

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Introduction

In a typical year, the military appellate courts[1] will grapple with issues relating to the substantive criminal law in a substantial portion of their reported opinions.[2] The past year was no different; in 1996, the military appellate courts considered issues involving crimes and defenses in almost one-third of all their reported decisions.[3] This high level of activity by the military courts in the substantive criminal law is generally consistent over time[4] and reflects the fundamental importance of issues involving the judicial determination of what conduct is criminal and thereby subject to punishment.[5]

This article analyzes selected recent decisions by the military appellate courts in this area of the law. Not every recent case is discussed; only those developments that resolve or create uncertainties in the law are considered.[6] To the extent possible, the practical ramifications for the practitioner in the field are identified and discussed. The article reflects the major divisions of the substantive criminal law; I will first consider inchoate offenses,[7] and then examine crimes against persons,[8] property,[9] and military order.[10] The article concludes with a review of new developments in the law of defenses.[11]

Inchoate Offenses

Attempted Conspiracy

In *United States v. Anzalone*,[12] the Court of Appeals for the Armed Forces (CAAF) held that "the UCMJ does not prohibit

1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and Courts of Military Review to the United States Court of Appeals for the Armed Forces and Courts of Criminal Appeals, respectively. For the purpose of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. *See* United States v. Loving, 41 M.J. 213, 229 n.* (C.M.A. 1994), *aff'd*, 116 S. Ct. 1737 (1996).

2. For example, almost 44% of the 694 reported decisions by the military appellate courts from 1993 until 1995 dealt with substantive criminal law issues.

3. At the time of the writing of this article, there were 130 reported decisions of the military appellate courts that were decided in 1996 *and* available on electronic databases; 42 involved issues of substantive criminal law.

4. From 1991-95, just over 30% of the reported decisions of the military appellate courts involved issues of substantive criminal law. The service courts remain slightly more likely than the Court of Appeals for the Armed Forces (CAAF) to address these issues; in 1996, 34% of service court opinions contained substantive criminal law issues, while 30% of CAAF opinions dealt with similar issues. This difference between the tiers of the military appellate courts is steadily diminishing. For example, the service courts in 1993 considered issues relating to substantive criminal law in 67% of their published opinions, while the Court of Military Appeals (COMA) dealt with similar issues in just 34% of their published opinions. By comparison, the service courts in 1996 dealt with these issues in 34% of their published opinions, a level very close to the 30% of all published CAAF opinions that tackled issues relating to crimes and defenses during the same period.

5. The proportion of all reported opinions containing issues of substantive criminal law has been even higher in recent years; in 1995, 47% of all published opinions by the military appellate courts contained substantive criminal law issues, while in 1996, this percentage dropped to 32%.

6. Since 1993, the CAAF has published more opinions each year than all those published by the service courts combined. As such, and in the interest of academic economy, this article will focus upon decisions of the CAAF rather than those of the service courts. However, only 66 opinions by the CAAF decided in 1996 were available in either official reporters or electronic databases at the time this article was written. While 20 of those decisions dealt with substantive criminal law issues, seven were actually concerned with the specific issue of whether the military judge had elicited sufficient factual basis for a guilty plea. Given the limited precedential value of such opinions, *see, e.g.*, United States v. Byrd, 24 M.J. 286, 293 (C.M.A. 1987) (Cox, J., concurring in the result) (expressing "reservations about making law on a guilty-plea record"), this article will focus instead upon issues arising in contested cases reviewed by the CAAF.

7. *See infra* notes 12-43 and accompanying text.

8. *See infra* notes 44-103 and accompanying text.

9. *See infra* notes 104-128 and accompanying text.

10. *See infra* notes 129-185 and accompanying text.

11. *See infra* notes 186-250 and accompanying text.

12. 43 M.J. 322 (1995).

a charge of attempted conspiracy where there is a purported agreement between a service member and an undercover government agent to commit an offense."[13] The court disagreed, however, as to the legal basis for such an offense. Judge Crawford and the late Judge Wiss agreed that a person who purposely engages in conduct that would constitute a conspiracy if the attendant circumstances were as that person believed them to be is guilty of an attempted conspiracy;[14] the fact that an actual conspiracy between Anzalone and the undercover agent was impossible did not therefore preclude a conviction for attempted conspiracy because "in his own mind the accused thought there was an agreement."[15] Judge Gierke, joined by Judge Cox, concurred in the result, but asserted "doubts whether there is such a crime as attempted conspiracy."[16] Judge Sullivan wrote separately concurring in the result, but asserted that "[a] plain reading of the applicable statutes furnishes the answer in this case."[17] He observed that Article 80, UCMJ, prohibits attempts to commit *any* offense punishable under the Code; since conspiracy is an offense punishable under Article 81, UCMJ, attempted conspiracy is therefore an offense prohibited by operation of Article 80, UCMJ.[18] Thus, no single theory concerning the basis for this double inchoate offense enjoyed the support of a majority of the CAAF after *Anzalone*.

The opinion of the court in *United States v. Riddle*[19] added some certainty to this area of the law. In *Riddle*, a majority of the CAAF held that attempted conspiracy is an offense under the UCMJ and adopted the textualist rationale advanced by Judge Sullivan in *Anzalone*.[20] Judge Sullivan, also writing for the majority in *Riddle*, refined the reasoning from his opinion concurring in the result in *Anzalone* and offered three points in support of his conclusion that attempted conspiracy is an offense under military law. He wrote as follows:

> Clearly, the language of [Article 80, UCMJ] is broad and makes no distinction between a conspiracy or other inchoate offense and any other type of military offense as the lawful subject of an attempt offense. In addition, no other statute or case law from this court precludes application of Article 80 to a conspiracy offense as prohibited in Article 81. Finally, conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction or a conspiracy statute embodying the unilateral theory of conspiracy. Accordingly, we reject appellant's argument that he was not found guilty of a crime under the Uniform Code of Military Justice.[21]

Chief Judge Cox and Judge Gierke both dissented on this issue.[22] Chief Judge Cox asserted that attempted conspiracy is a "nonsensical charge" that confuses the law of conspiracy,[23] while Judge Gierke simply restated his position from *Anzalone* that "there is no such crime as attempted conspiracy."[24]

The *Riddle* decision has a number of practical ramifications for the practitioner in the field. By grounding the offense of attempted conspiracy in the text of Article 80, UCMJ, the CAAF expands the potential applicability of the offense to situations other than those where there is a purported agreement between a service member and an undercover government agent to commit an offense.[25] Likewise, the textualist rationale

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13. *Id.* at 323.

14. *See* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 4.c.(3) (1995 ed.) [hereinafter MCM]; *Anzalone*, 43 M.J. at 325, 328.

15. *Anzalone*, 43 M.J. at 325.

16. *Id.* at 326.

17. *Id.* at 327.

18. *Id.*

19. 44 M.J. 282 (1996).

20. *Id*. at 284-85. The CAAF also held that the evidence sufficiently established the accused's intent to conspire with his putative wife to steal military pay entitlements and to make false official statements. The evidence supported accused's convictions of attempting to conspire to commit larceny and attempting to make false official statements, even if the accused was legally married by virtue of a subsequently obtained state judicial decree. The investigator had testified that both the accused and his putative wife admitted during the initial investigation that they were not married, and the wife had admitted that the accused "doctored" her brother's marriage certificate to produce a phony certificate to secure increased pay entitlements, which was evidence of the accused's knowledge that pay entitlements could not be paid without a marriage certificate or license. *Id*. at 285-87.

21. *Id.* at 285 (citations omitted). Judge Sullivan asserts that "[t]here is no general solicitation statute in the military," but then cites the *Manual for Courts-Martial* provision describing the offense arising under Article 134, UCMJ, of soliciting another to commit an offense. *Id.* at 285 n.* (citations omitted).

22. *See id*. at 287-89.

23. *Id.* at 288-89 (Cox, C.J., concurring in part and dissenting in part).

24. *Id.* at 289 (Gierke, J., concurring in part and dissenting in part).

of the majority would also appear to open the door to other double inchoate offenses such as attempted solicitation: "Clearly, the language of [Article 80, UCMJ] is broad and makes no distinction between a conspiracy *or other inchoate offense* and any other type of military offense as the lawful subject of an attempt offense."[26] In sum, the court in *Riddle* expands the universe of conduct by soldiers that may constitute an inchoate offense under the UCMJ.[27]

Trial counsel and military justice supervisors should nevertheless exercise restraint in charging the offense of attempted conspiracy. The legal recognition of the offense by the CAAF does not make it any easier to explain to a trier of fact,[28] and most cases in which a trial counsel would be tempted to charge an attempted conspiracy could be more effectively presented as a solicitation.[29] The primary utility of a charge of attempted conspiracy will therefore be in those cases involving "a purported agreement between a service member and an undercover government agent to commit an offense."[30]

Riddle is unlikely to be the end of the debate concerning double inchoate crimes. The CAAF remains divided concerning the viability of these offenses[31] and it is not commonly known how Judge Efron stands on this issue. As such, defense counsel should continue to challenge these offenses at trial and on appeal until the *current* court rules on this issue. In any event, the defense should continue to attack such charges using conventional means; in cases not involving the doctrine of factual impossibility, the government must still establish beyond a reasonable doubt that the overt act by the accused went beyond mere preparation and was a direct movement toward the commission of the offense.[32] This may be a difficult hurdle for prosecutors to jump in the ethereal world of double inchoate offenses.

Attempted Escape, Conspiracy, and Principals

The juncture of the law of inchoate offenses and that of principals presents an intellectual challenge to counsel similar to that presented by double inchoate offenses; it is sometimes difficult to understand how one who does not perpetrate a criminal offense himself can be liable for an *attempt* to commit an offense by others. It is nevertheless well-settled that one who knowingly and willfully participates in an attempt to commit an offense, and does so in a manner that indicates an intent to make the attempt succeed, is a principal.[33] The issue often encountered in these uncommon cases is whether there was sufficient evidence of knowing and willful participation by the accused that at least encourages the perpetrator to commit the offense.[34] The infrequency of reported decisions in this area makes every new case concerning aider or abettor liability for an attempt by another an important one.

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25. *Cf.* United States v. Anzalone, 43 M.J. 322, 323 (1995) (holding that "the UCMJ does not prohibit a charge of attempted conspiracy where there is a purported agreement between a service member and an undercover government agent to commit an offense").

26. United States v. Riddle, 44 M.J. 282, 285 (1996) (citations omitted); *cf.* MCM, *supra* note 14, pt. IV, para. 105.d. (describing attempts in violation of Article 80, UCMJ, as a lesser-included offense of soliciting another to commit an offense). *But cf.* United States v. Anzalone, 41 M.J. 142, 147 (C.M.A. 1994) (citing with approval authorities that posit there can be no attempt to commit an attempt offense).

27. In his opinion in *Riddle*, Chief Judge Cox asks whether "we will soon be seeing charges of conspiring to attempt to conspire to commit an offense--to be followed by attempting to conspire to attempt to conspire to commit an offense, *ad infinitum*?" *Riddle*, 44 M.J. at 289 (Cox, C.J., concurring in part and dissenting in part).

28. *Cf. id.* (Cox, C.J., concurring in part and dissenting in part) (calling the charge of attempted conspiracy "nonsensical").

29. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 2 SUBSTANTIVE CRIMINAL LAW § 6.1(b), at 6 (1986) [hereinafter LAFAVE & SCOTT], *cited in* United States v. Anzalone, 43 M.J. 322, 326 (1995) (Gierke, J., concurring in the result). One reason counsel might prefer to charge an offense as an attempted conspiracy rather than a solicitation is that the maximum punishment may be higher for the attempted conspiracy than for a solicitation. A soldier found guilty of solicitation arising under Article 134, UCMJ, "shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years." MCM, *supra* note 14, pt. IV, para. 105.e.

30. *See Anzalone*, 43 M.J. at 323; *cf.* United States v. Baker, 43 M.J. 736 (A.F. Ct. Crim. App. 1995) (holding that accused attempted to conspire to manufacture crack cocaine by agreeing with informant to manufacture crack cocaine, and by acting in furtherance of that agreement by purchasing the cocaine, discussing the need for one-third baking soda in the manufacturing process, indicating that he would be back, and leaving a portion of the drug with informant to complete the manufacturing process at a later time).

31. In *Riddle*, Judge Crawford joined the opinion of the court by Judge Sullivan, while Chief Judge Cox and Judge Gierke dissented with the majority's disposition of the attempted conspiracy offense.

32. *See* MCM, *supra* note 14, pt. IV, para. 4.c.(2). The difficulty in describing an attempted conspiracy in situations other than those involving the factually impossible conspiracy was pointed out by Chief Judge Cox in his opinion in *Riddle*: "How does one attempt to conspire? Since the essence of conspiracy is a criminal agreement, is it that one strains to reach an agreement with somebody, but fails?" *Riddle*, 44 M.J. at 288. This sardonic question could actually form the basis for closing argument by defense counsel in an appropriate case.

33. *See* United States v. Jones, 37 M.J. 459, 460-61 (C.M.A. 1993); United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990); MCM, *supra* note 14, pt. IV, para. 1.b.(2)(b).

34. *See Pritchett*, 31 M.J. at 216.

In *United States v. Davis*,[35] the CAAF considered whether the evidence was legally sufficient to establish that the accused conspired with two fellow inmates in the United States Disciplinary Barracks to escape and whether he subsequently aided or abetted their escape attempt.[36] At trial, a prison informant testified that he observed numerous unauthorized meetings between the accused and inmates Waldron and Goff and also noticed, during certain times when the three inmates were missing or unable to be located, that he heard strange noises coming from an off-limits area above the tier where the accused lived.[37] The informant further testified that when he confronted Davis with his suspicions concerning the escape, Davis implicitly acknowledged the plan to escape and showed the informant scratches on his body that may have been caused while working on the escape route.[38] Additional evidence in the record of trial revealed that shoeprints belonging to Davis were found in the tunnel and passageways used by Waldron and Goff for their attempted escape and that access to these tunnels and passageways was gained through a broken screen vent in the ceiling near Davis's cell.[39] Although Davis was eating in the prison mess hall during the escape attempt by Waldron and Goff, the CAAF found the evidence legally sufficient to establish that Davis "purposely associated with Waldron and Goff for the purpose of escaping from the disciplinary barracks . . . [and] voluntarily participated in Inmates Waldron and Goff's escape attempt."[40]

Davis is a useful reminder to counsel concerning at least two aspects of the law of inchoate offenses and the law of principals. As a fundamental matter, the decision reinforces the well-established rule that one need not be present at the scene of an attempted crime to be liable as a principal to the offense.[41] Moreover, the CAAF's opinion also shows us how easy it is to make the law of inchoate offenses and principals more difficult than needed. The reported decision makes no mention of the principle that a "conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it."[42] Likewise, it is important to remember that "[a] principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design."[43] These principles of vicarious liability can, if applied in appropriate cases, greatly simplify the government's burden at trial and on appeal, but might be overlooked by inexperienced counsel relying exclusively upon the opinion in *Davis* for an exposition of the relevant law.

Conventional Offenses: Crimes Against Persons

Homicide: Distinguishing Premeditation and Intent to Kill

The Uniform Code of Military Justice (UCMJ) expressly prohibits seven forms of homicide,[44] including those murders committed by an accused with a premeditated design to kill[45] as well as those committed with an intent to kill or inflict great bodily harm upon a person.[46] These two offenses differ only in the mental state required of each,[47] a distinction that has been called "too vague and obscure for any jury to understand."[48] The CAAF nevertheless held in *United States v. Loving*[49] "that

35. 44 M.J. 13 (1996).

36. *Id.* at 17-18.

37. *Id.* at 18.

38. *Id.* at 17-18.

39. *Id.* at 19.

40. *Id.*

41. *See* MCM, *supra* note 14, pt. IV, para. 1.b.(3)(a).

42. *See id.*, pt. IV, para. 5.c.(5).

43. *See id.*, pt. IV, para. 1.b.(5).

44. *See* UCMJ arts. 118-19 (1988); *cf.* MCM, *supra* note 14, pt. IV, para. 85 (describing negligent homicide as an offense arising under UCMJ art. 134).

45. UCMJ art. 118(1) (1988).

46. UCMJ art. 118(2) (1988).

47. *Compare* MCM, *supra* note 14, pt. IV, para. 43.b.(1) *with id.* para. 43.b.(2).

48. LaFave & Scott, *supra* note 29, § 7.7(a), at 240-41 (citing Benjamin Cardozo, Law And Literature and Other Essays 99-100 (1931)); *cf.* United States v. Loving, 41 M.J. 213, 279 (1994) (considering whether requiring premeditation genuinely narrows the class of persons eligible for the death penalty), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

49. 41 M.J. 213 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster."[50] The court reasoned that the offenses are distinct because premeditated murder requires proof of the element of a premeditated design to kill, an element not required for other forms of murder, and further observed that premeditation and its associated terms were "commonly employed . . . and are readily understandable by court members."[51]

In the aftermath of *Loving*, attention has shifted from litigating the constitutional significance of the distinction between the two offenses to the task of describing this distinction to the trier of fact.[52] The pattern instruction contained in the *Military Judges' Benchbook*[53] provides, in relevant part:

> The term "premeditated design to kill" means the formation of a specific intent to kill and the consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.[54]

In *United States v. Eby,*[55] the defense requested that the military judge give this additional instruction:

> Having a premeditated design to kill requires that one with a cool mind did, in fact, reflect before killing. It has been suggested that, in order to find premeditation, you must find that AT1 Eby asked himself the question, "Shall I kill her?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway." Intent to kill alone is insufficient to sustain a conviction for premeditated murder.[56]

The military judge incorporated the substance of the first and last sentence of the requested instruction, but declined to adopt the remainder.[57] On appeal from his conviction for premeditated murder, Eby asserted that the military judge erred by refusing to give the relevant portion of the requested instruction;[58] the requested language had been cited with approval by the Court of Military Appeals (COMA) in *United States v. Hoskins*[59] and was taken from *Substantive Criminal Law*, a respected treatise by Professors Wayne LaFave and Austin Scott, Jr.[60]

The CAAF nevertheless concluded that the military judge did not abuse his discretion by refusing to give the requested instruction.[61] The unanimous opinion of the court emphasized "that no particular length of time is needed for premeditation, and no specific questions need be asked."[62] To the extent that the requested instruction implies such requirements, it "runs the risk of confusing . . . [or] misleading the jury."[63] As such, the military judge "correctly declined" to give the requested instruction.[64]

Decisions like those in *Loving* and *Eby* send an ambivalent message to the trial practitioner. On the one hand, the military

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50. *Id.* at 279-80. *But see infra* notes 65-67 and accompanying text.

51. *Loving*, 41 M.J. at 280 (citations omitted).

52. *See, e.g.*, United States v. Levell, 43 M.J. 847 (N.M.Ct.Crim.App. 1996) (considering the form of instructions to the trier of fact concerning premeditation).

53. DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) [hereinafter BENCHBOOK].

54. *Id.* para. 3-43-1.d.

55. 44 M.J. 425 (1996).

56. *Id*. at 427; *cf. Levell*, 43 M.J. at 849-50 (considering denial of request for instruction that "the government must prove to you beyond a reasonable doubt that the killing was committed by the accused 'after reflection by a cool mind'").

57. *Eby*, 44 M.J. at 427-28.

58. *See id*. at 426.

59. 36 M.J. 343 (C.M.A. 1993).

60. *Eby*, 44 M.J. at 428.

61. *Id.*

62. *Id.*

63. *See id*.

64. *Id.*

appellate courts are vigorously asserting that "[t]here is critical distinction between a premeditated design to kill and an intent to kill."[65] However that may be, these same courts have repeatedly held that a military judge does not err by refusing to depart from a pattern instruction that could be said to minimize the difference between the two offenses,[66] even when the requested instruction is an accurate statement of the law.[67] This apparent inconsistency could be confusing unless two lessons from *Eby* are kept in mind.

As a threshold matter, the court reinforces the point that parties to courts-martial are *not* entitled to a requested instruction unless it is a correct statement of the law, necessary to address a matter not substantially covered in the standard instruction, and critical in that a failure to give the requested instruction would deprive the accused of a defense or seriously impair its effective presentation.[68] Being correct is not enough; counsel must also be prepared to demonstrate to the military judge that the requested instruction addresses matters not substantially covered in the pattern instruction and how the failure to give the requested instruction will seriously impair the effective presentation of a defense. In any event, military judges always have "substantial discretionary power in deciding on the instructions to give," and their decisions in this regard are reviewed only for an abuse of discretion.[69]

Eby also makes clear that material inappropriate as a requested instruction may, in some circumstances, be properly delivered as argument to the trier of fact.[70] For example, the court in *Eby* held that the military judge did not abuse his discretion by refusing to give the requested instruction, but also observed that the requested instruction "marshals questions that would be an appropriate vehicle for argument to the factfinders."[71] Such a rule, however, does not apply to requested instructions that are declined because they are *inaccurate* statements of the law, but instead applies only to those requested instructions that, while correct, were found by the military judge to be either unnecessary or inconsequential.[72]

Homicide: Premeditation and Heat of Passion

The scenarios that typically give rise to allegations of premeditated murder can occasionally raise the issue of whether the killing was done in the heat of sudden passion.[73] Evidence of this passion can be relevant to the charge in at least two ways: the passion may affect the ability of the accused to premeditate,[74] or it may place the lesser-included offense of voluntary manslaughter in issue.[75] If the military judge determines that either of these matters is in issue,[76] then "[t]he military judge shall give the members appropriate instructions on findings."[77]

The decision by the military judge that a matter is "in issue," as well as the form of any instruction ultimately given, are both subject, in appropriate circumstances, to appellate review.[78] Both these issues are considered in the latest CAAF opinion in *United States v. Curtis*.[79] The accused was charged with a vari-

65. United States v. Curtis, 44 M.J. 106, 147 (1996); United States v. Loving, 41 M.J. 213, 279 (describing the distinction as "meaningful"), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

66. For example, the pattern instruction concerning premeditation in the *Benchbook* does provide that premeditation requires "the formation of a specific intent to kill and the consideration of the act intended to bring about death," but then goes on to reduce the significance of this requirement by providing that "[t]he 'premeditated design to kill' does not have to exist for any measurable or particular length of time. The *only* requirement is that it must precede the killing." BENCHBOOK, *supra* note 53, para. 3-43-1.d. (emphasis added). No further explanation of premeditation or the critical distinction between premeditated and unpremeditated murder is provided.

67. *E.g.*, United States v. Levell, 43 M.J. 847, 851 (N.M.Ct.Crim.App. 1996) (holding military judge did not err in refusing to give "cool mind" instruction even though it "was not an incorrect statement of the law").

68. *See Eby*, 44 M.J. at 428 (observing defense not entitled to requested instruction unless "correct, necessary, and critical") (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 2760 (1994)).

69. 44 M.J. at 428 (citation omitted).

70. *Id.*

71. *Id.*; *But cf. Levell*, 43 M.J. at 852 (asserting without citation to authority that accused "was not free to use" the language from the requested instruction in argument).

72. *See supra* note 68 and accompanying text.

73. *E.g.*, United States v. Curtis, 44 M.J. 106 (1996). The *Benchbook* provides that "[p]assion means a degree of anger, rage, pain, or fear which prevents cool reflection." BENCHBOOK, *supra* note 53, para. 3-43-1.d., at 401 n.5; *cf.* MCM, *supra* note 14, pt. IV, para. 44.c.(1)(a) ("Heat of passion may result from fear or rage.").

74. BENCHBOOK, *supra* note 53, para. 3-43-1.d. n.5.

75. *Id.* n.6.

76. MCM, *supra* note 14, R.C.M. 920(e) discussion.

77. *Id.* at 920(a).

ety of offenses, including two specifications of premeditated murder in violation of Article 118(1), UCMJ.[80] At approximately midnight on 13 April 1987, the accused gained entry to the home of his supervisor, First Lieutenant James Lotz, by telling Lotz that "one of his friends needed help because he had been in an accident."[81] The accused had in his possession a knife with an eight-inch blade that he had stolen from the unit supply room earlier that evening.[82] The opinion of the court tells what happened next:

> When LT Lotz tried to telephone for help, appellant "plunged" the knife into Lotz' chest. Although at this time Lotz was still alive, this wound turned out to be the fatal injury because it punctured the victim's heart. LT Lotz struggled and picked up a chair to defend himself. Appellant then went around the chair and stabbed Lotz a second time. During this struggle, LT Lotz called for his wife, Joan. She appeared on the scene, ran up to her husband, and then turned to appellant and called out his name. She started kicking him, albeit with her bare feet. Then appellant stabbed her eight times, the fatal wound being a heart puncture. Appellant grabbed Joan by the legs as she was dying, pulled her toward him, "ripped off her panties," and fondled her genitalia.[83]

According to the court, "[t]he strategy of the defense both at trial and at sentencing was to present appellant as a young man adopted at age 2 1/2 and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz' racist treatment of him."[84] In light of this defense, the military judge gave a tailored instruction on voluntary manslaughter as to the killing of Lieutenant Lotz; no such instruction was given with regard to the killing of Ms. Lotz.[85] The accused was convicted of the premeditated murder of both victims, sentenced to death, and the convening authority approved the sentence.[86] On appeal, the accused alleged that the military judge erred by failing to instruct the members on voluntary manslaughter with regard to the killing of Ms. Lotz.[87] The defense apparently asserted that the rage that the accused testified that he possessed toward Lieutenant Lotz could be transferred to Ms. Lotz, thereby justifying an instruction on voluntary manslaughter for the killing of *each* victim.[88] The CAAF held that no such instruction was required, reasoning that "[i]n this instance, there was no adequate provocation by Joan Lotz, and a transfer of rage would not be adequate provocation."[89]

The opinion of the court in *Curtis* raises a number of issues of concern to practitioners, especially in the law of instructions. The most important issue in this area concerns the concept of "transferred rage," which is explained in neither the court's opinion in *Curtis*[90] nor the *Manual for Courts-Martial*;[91] no pattern instruction on the topic is found in the *Military Judges' Benchbook*,[92] and no discussion of the theory is found in mili-

78. *E.g.*, United States v. Mance, 26 M.J. 244, 255 (C.M.A.) (describing standards for appellate review of instructions relating to elements of offense), *cert. denied*, 488 U.S. 942 (1988). *But cf.* MCM, *supra* note 14, R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.").

79. 44 M.J. 106 (1996). The appellant actually raised these and 74 additional issues that were considered by the court in this opinion. *See id.* at 113-16.

80. *Id.* at 116.

81. *Id.* at 117.

82. *Id.*

83. *Id.*

84. *Id.* at 120.

85. *See id*. at 151.

86. *Id.* at 116.

87. *Id.* at 151. The accused also challenged the form of the voluntary manslaughter instruction given concerning the killing of Lieutenant Lotz, but the court found waiver and, in any event, no error. *Id.*

88. *See id*.

89. *Id.* The CAAF also held that the evidence was legally sufficient to support the conviction for the premeditated murder of Ms. Lotz. *Id*. at 146-49.

90. *See id*. at 151.

91. *See* MCM, *supra* note 14, pt. IV, para. 44.

92. *See* BENCHBOOK, *supra* note 53, paras. 3-43-1, -2, & 3-44-1. The notion of transferred *intent* is discussed in the instructions cited, but this is a distinct legal concept from transferred rage or passion. *See infra* notes 95-98 and accompanying text.

tary precedent.[93] The CAAF nonetheless asserted that "a transfer of rage would not be adequate provocation" to warrant an instruction on voluntary manslaughter,[94] a conclusion that is potentially confusing to the practitioner and may be a problematic statement of the law in this area.

In their treatise *Substantive Criminal Law*,[95] Professors LaFave and Scott make the following observation concerning provocation by one other than the victim of a homicide:

> It sometimes happens that the source of the provocation is a person other than the individual killed by the defendant while in a heat of passion. This may happen (1) because the defendant is mistaken as to the person responsible for the acts of provocation; (2) because the defendant attempts to kill his provoker but instead kills an innocent bystander; or (3) because the defendant strikes out in a rage at a third party.[96]

Military law provides that the first two examples offered by LaFave and Scott may still be voluntary manslaughter rather than some other form of homicide.[97] The third example describes the concept of transferred rage, and it is less clear what type of homicide has been committed in this circumstance. The majority of jurisdictions that have considered the issue hold that "[i]f one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder."[98]

However, some statutory systems do not so limit provocation; the Model Penal Code, for example, provides that "[c]riminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[99] This form of the offense is broader than that of the majority of jurisdictions in that "the provocation need not have come from the victim."[100] Article 119(a), UCMJ, is very similar to the Model Penal Code provision, and provides that "[a]ny person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter."[101] Like the Model Penal Code, the text of Article 119(a), UCMJ, does not limit the offense to those circumstances in which the accused was provoked by the homicide victim.[102] As such, the assertion that "a transfer of rage would not be adequate provocation" cannot be grounded in the plain text of the statute, and its source should therefore be explained to the practitioner in the field to allow the crafting of appropriate instructions in this regard.[103]

Conventional Offenses: Crimes Against Property

Check Offenses

It is a long-standing characteristic of Anglo-American law that certain gambling debts are unenforceable in the courts.[104] The COMA described the military rule on this matter in *United*

93. Electronic search of the relevant military justice databases revealed that the instant case is the only military decision to explicitly use the phrase "transferred rage."

94. *Curtis*, 44 M.J. at 151.

95. LAFAVE & SCOTT, *supra* note 29.

96. *Id.* § 7.10(g), at 268 (footnotes omitted).

97. *See* BENCHBOOK, *supra* note 53, para. 3-44-1.d. n.4. Interestingly, some civil jurisdictions have limited by statute the availability of voluntary manslaughter to instances when the defendant can show provocation by the homicide victim. LAFAVE & SCOTT, *supra* note 29, § 7.10, at 269 n.103.

98. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 102 (3d ed. 1982) [hereinafter PERKINS & BOYCE]; *see* LAFAVE & SCOTT, *supra* note 29, § 7.10(g).

99. MODEL PENAL CODE § 210.3(1)(b), *cited in* LAFAVE & SCOTT, *supra* note 29, § 7.10(g), at 269 & n.105.

100. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 102(a), at 482 (1986) [hereinafter ROBINSON].

101. UCMJ art. 119(a) (1988).

102. By reference to the statutory text, the victim need only be "a human being," and the provocation need only be "adequate." *See id*. *But cf*. Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994) (observing that similar language in civil voluntary manslaughter statute "should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim"), *cited in* LAFAVE & SCOTT, *supra* note 29, § 7.10 n.103 (Supp. 1996).

103. This is not to suggest that the doctrine of transferred rage should be recognized by the military appellate courts, but simply suggests that it is unclear whether the basis for CAAF's assertion in *Curtis* was legal (i.e., rage can never be transferred to an innocent victim), or factual (i.e., the failure to instruct in this particular factual scenario was not error). The ramifications are significant; if the doctrine of transferred rage is inapplicable as a matter of law, then the *Manual*, if not Article 119, UCMJ, itself, should be amended to reflect that construction. If the specific facts of *Curtis* simply do not raise the issue, then that would seem to indicate that the doctrine is recognized as a matter of military law; explanation of the doctrine in the *Manual* and pattern instructions in the *Benchbook* would therefore be appropriate, as it does not currently exist in either.

104. *See* United States v. Allbery, 44 M.J. 226, 229 (1996).

States v. Wallace:[105] "Whether gaming is legal or illegal, transactions involving the same or designed to facilitate it are against public policy, and the courts will not lend their offices to enforcement of obligations arising therefrom."[106] The Air Force Court of Criminal Appeals recently challenged the vitality of this precedent, however, with its decision in *United States v. Allbery.*[107] The accused was convicted of writing and uttering "worthless checks to the Ramstein Enlisted Club in exchange for rolls of quarters that, then, he used to play slot machines in the club."[108] In its opinion affirming the accused's convictions, the service court stated that they no longer believed legal gambling was against public policy, and consequently "it no longer makes sense to follow *Wallace*."[109]

A divided CAAF reversed the Air Force court; Senior Judge Everett wrote the plurality opinion for the court, and stated as follows:

> We hold that the public-policy basis of a precedent of this Court does not somehow diminish its binding effect on a case that the court below acknowledged was legally and factually indistinguishable from that precedent. Additionally, we are unconvinced that the public policy in question has changed discernibly since *Wallace* was announced, so we decline, ourselves, to overrule that decision.[110]

The CAAF set aside the findings and sentence in the case, and dismissed the charge against Allbery.[111]

The precedential value of the CAAF decision in *Allbery* is diminished, however, because only Chief Judge Cox joined Senior Judge Everett's opinion.[112] Judges Crawford, Gierke, and Sullivan each wrote separate opinions, but all agreed that principles of stare decisis rather than substantive criminal law mandated the result in this case.[113] As such, the opinions in *Allbery* reveal that only one regularly sitting judge of the CAAF unambiguously concurs in the continued vitality of *Wallace* as an accurate statement of the law.[114]

There is a very important point for courts and counsel alike that is made separately by Senior Judge Everett and Judges Crawford and Gierke in their opinions in *Allbery.* The Constitution provides that "[n]o ex post facto Law shall be passed,"[115] and this prohibition against the retrospective change to the legal consequences of an act[116] is applicable to the courts as well as Congress.[117] Even if the courts in this case were in agreement that public policy toward gambling had changed, Allbery would still be entitled to rely upon *Wallace*; to affirm a conviction under those circumstances would amount to an ex post facto law by judicial construction and is thereby prohibited by the Constitution.[118] The practical effect of this observation is that trial counsel at courts-martial are limited in their ability to make "a good faith argument for an extension, modification, or reversal of existing law"[119] in situations where such a change would amount to the retroactive criminalization of an act of the accused.[120]

A further lesson for all practitioners is that whatever vitality *Wallace* still enjoys may be limited to factual scenarios similar to those in the original case.[121] Judge Sullivan wrote in *Allbery* that he reads the decision in *Wallace* narrowly and believes its

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105. 36 C.M.R. 148 (1966).

106. *Id.* at 149.

107. 41 M.J. 501 (A.F. Ct. Crim. App. 1994), *rev'd*, 44 M.J. 226 (1996).

108. *Allbery,* 44 M.J. at 227.

109. *Allbery,* 41 M.J. at 502. This challenge by the Air Force court to the CAAF was strictly a legal one; writing for the court, Judge Young noted that while the facts in *Allbery* were different from those in *Wallace*, "we believe the Court of Military Appeals' edict in *Wallace* is so broad that we are unable to sufficiently distinguish the facts such as to justify a different result and still comply with *Wallace*." *Id.*

110. *Allbery,* 44 M.J. at 227.

111. *Id.* at 230.

112. *Id.*

113. *See id.* at 230-31. Judge Sullivan even went so far as to state that he would prospectively overrule *Wallace*, but reasoned that "[t]he Court of Criminal Appeals was bound to follow our decision until we or a higher court change it or the lower court distinguishes it." *Id.* at 230 (Sullivan, J., concurring in part and dissenting in part). Judge Crawford opined that the CAAF "could take judicial notice that 'gambling is one of the fastest growing industries in the United States today' . . . [and] decide the issue of whether there has been a change in public policy toward gambling or return the case to the court below to more fully analyze the case for a change in public policy." *Id.* at 231 (Crawford, J., concurring in part and dissenting in part). Judge Gierke stated that the substantive criminal law issue was not properly before the court, and declined to join the plurality in "upholding the policy underlying *Wallace*." *Id.* (Gierke, J., concurring in the result).

114. *See id.* at 230.

115. U.S. CONST. art. I, sec. 9.

116. *See* BLACK'S LAW DICTIONARY 520 (5th ed. 1979).

application is properly "limited to cases where a service club knowingly and implicitly encourages a servicemember to gamble and accrue substantial financial losses."[122] Similarly, the Army Court of Criminal Appeals recently observed in *United States v. Green*[123] that check offenses arising from gambling debts "are punishable under the UCMJ if the facts show no *direct* connection between the check cashing service and the gambling activity;"[124] an indirect connection between the check cashing service and the gambling activity would therefore appear to be no bar to prosecution.[125] The Army court also defined "gambling debts" narrowly, stating that "a worthless check is a 'gambling debt' if it is accepted from a soldier by a government check cashing facility for the purpose of supplying that soldier with money to gamble in an on-site gambling enterprise legally operated by the government."[126] Assuming this to be an accurate description of the law, the license granted by *Wallace* and *Allbery* is small indeed.

A final point is of particular concern to military judges and military justice supervisors. There is no mention of any limits on punishing soldiers for check offenses arising from gambling debts in the *Manual for Courts-Martial*,[127] nor is there a pattern instruction on this topic in the *Benchbook*.[128] These unaccountable omissions make this area of the law a productive topic for officer professional development programs within a legal office and necessitate special effort from counsel and judges alike in crafting instructions for the trier of fact in appropriate cases.

Military Offenses

Disobedience and Unauthorized Absence

An order must be a specific mandate to do or not to do a specific act, and an exhortation to merely "obey the law" or to perform one's military duty may not be an enforceable order.[129] Likewise, a personal order to perform previously established duties may also be unenforceable.[130] Orders such as these can ordinarily "have no validity beyond the limit of the ultimate offense committed."[131] A superior may nevertheless support a routine or otherwise preexistent duty by issuing a personal order as "a measured attempt to secure compliance with those pre-existing obligations,"[132] thereby lifting the duty "above the common ruck,"[133] and allowing the disobedience of the personal order to be separately charged and punished from any other offense that may have been committed.[134]

These rules of law are commonly implicated in courts-martial involving charges that allege unauthorized absence and disobedience stemming from the same absence, and such was the

117. *Allbery*, 44 M.J. at 231 (Crawford, J., concurring in part and dissenting in part) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964)).

118. *See id.*

119. Dep't of Army, Pamphlet 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 3.1 (1 May 1992).

120. *See supra* notes 115-118 and accompanying text.

121. For a description of the facts in *Wallace*, see 36 C.M.R. at 148.

122. *Allbery*, 44 M.J. at 230 (Sullivan, J., concurring in part and dissenting in part).

123. 44 M.J. 828 (Army Ct. Crim. App. 1996).

124. *Id.* at 829 (emphasis added).

125. *See id.* at 829-30.

126. *Id.* at 829.

127. *See id.*

128. *See* Benchbook, *supra* note 53, paras. 3-49-1, -2, & 3-68-1.

129. *See* MCM, *supra* note 14, pt. IV, para. 14.c.(2)(d); *cf.* United States v. Bratcher, 39 C.M.R. 125, 128 (C.M.A. 1969) (observing that "an order to obey the law can have no validity beyond the limit of the ultimate offense committed").

130. *See* United States v. Peaches, 25 M.J. 364, 366 (C.M.A. 1987).

131. *Bratcher*, 39 C.M.R. at 128; *cf.* United States v. Buckmiller, 4 C.M.R. 96, 98 (C.M.A. 1952) (requiring "a comparison of the gravamen of the offense set out in the specification with the charge it is laid under and other articles under which it might have been laid"). The Court of Military Appeals described their concern in this circumstance as being "that the giving of an order, and the subsequent disobedience of same, not be permitted thereby to escalate the *punishment* to which an accused otherwise would be subject for the ultimate offense involved." United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975).

132. United States v. Pettersen, 17 M.J. 69, 72 (C.M.A. 1983).

133. United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954).

case in *United States v. Henderson*.[135] The CAAF described the facts as follows:

> [O]n Friday, October 4, 1991, at 7:30 a.m., appellant's platoon sergeant, Staff Sergeant (SSGT) Jones, observed appellant in his barracks. SSGT Jones testified that he ordered appellant to get into a uniform and report to the platoon's regularly scheduled Friday formation at 8:00 a.m. There was other evidence that appellant's commanding officer, Lieutenant Colonel (LCOL) Kelly, had a "standing order" for a formation at 8:15 a.m. on Fridays. Appellant did not report to the formation, but commenced an unauthorized absence that was terminated later that day when he was apprehended by another NCO.[136]

The accused was charged with, inter alia, disobedience of a lawful order in violation of Article 91(2), UCMJ, and unauthorized absence in violation of Article 86, UCMJ.[137] Henderson appealed his convictions for these offenses, asserting that the evidence admitted at trial merely established a failure to report for a routine formation rather than disobedience.[138] The CAAF agreed, and held "that the Government failed to establish that the order by SSG Jones 'represented a measured attempt to secure compliance' with the 'pre-existing' duty to be at formation."[139] The findings of guilty to the disobedience specification were set aside and the specification dismissed.[140]

There is surprisingly much of value to practitioners in the court's brief *per curiam* opinion in *Henderson*. The wording of the holding itself is informative: "the Government *failed to establish* that the order . . . 'represented a measured attempt to secure compliance.'"[141] This would seem to imply that in cases involving disobedience and other offenses based upon the same act of disobedience, the government bears some burden of proof that the order was an effort to support the performance of a routine or preexistent duty with the full authority of the superior issuing the order.[142] The exact nature of this burden is not expressly described in either the instant case or other precedent,[143] but the CAAF in *Henderson* does identify at least two factors that are relevant to the evaluation of the government's effort: the nature of the duty at issue, and the actions of the accused prior to the issuance of the order in question. The court reasoned that under these facts "[t]he order does not go to an extremely important duty, and . . . . there is no indication . . . of open defiance by appellant."[144] A third factor identified in other precedent is the purpose of the order itself; an order that is formulated solely for the purpose of enhancing the punitive consequences of a possible violation is unlawful and may not be enforced.[145] Counsel and military judges involved in the litigation of these issues should be alert to these factors, as well as

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134. *Pettersen*, 17 M.J. at 72; *cf.* United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975) (asserting that so-called "ultimate offense" doctrine allows separate convictions for the relevant offenses and merely limits the maximum punishment to which the accused may be sentenced). *But cf.* MCM, *supra* note 14, pt. IV, para. 14.c.(2)(a)(iii) ("Disobedience of an order . . . which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.").

135. 44 M.J. 232 (1996) (per curiam).

136. *Id.* at 233.

137. *Id.* at 232-33.

138. *Id.* at 232.

139. *Id.* at 233. The court went on to characterize the sergeant's order as nothing more "than a reminder . . . to get dressed quickly or he would miss formation." *Id.* at 233-34.

140. *Id.* at 234.

141. *Id.* at 233.

142. *Cf.* United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954).

143. In *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990), the Air Force Court of Military Review described the conventional understanding of the burdens relating to the litigation of the lawfulness of orders as follows:

> The person accused of violating an order has the burden of showing that the order is not lawful. Determinations of lawfulness of orders are interlocutory questions of law to be resolved by the military judge upon proper motion made at trial. Failure to raise the question of lawfulness of an order by motion during the trial constitutes waiver of the issue.

Id. at 684 (citations omitted). It is unclear how this methodology interacts with the assertion of a government "burden of proof" in these cases.

144. *Henderson*, 44 M.J. at 233-34. The court further reasoned that "[t]he order was given some 45 minutes prior to the formation, and no immediate response was required. Thus, the circumstances were not such that appellant's failure to report amounted to a serious, direct flouting of military authority." *Id.* at 233; *cf.* United States v. Pettersen, 17 M.J. 69, 72 (C.M.A. 1983) (holding continued unauthorized absence after order to return to military control "a direct attack on the integrity of any military system").

any other potentially relevant matters that could be incorporated into the analytical framework used by the courts in these cases.

A second aspect of *Henderson* worth noting is the disposition of the disobedience charge by the court; the CAAF set aside the finding of guilty, and dismissed the specification.[146] This disposition differs somewhat from the court's actions in similar cases. For example, the COMA observed in *United States v. Quarles*[147] that in such circumstances the conviction for the disobedience offense "remains firm and may not be dismissed; only the *sentence* potentially is affected."[148] The court in *Quarles* was dealing with the ultimate offense doctrine in the context of an alleged violation of Article 92, UCMJ,[149] but the rationale for that presidentially-created rule is very similar to that applicable to other disobedience offenses: to prevent the intentional escalation of punishment facing a potential accused through the use of personal orders delivered merely to increase the punitive consequences of conduct already prohibited elsewhere in the UCMJ.[150] As such, one could contend that the appropriate disposition in *Henderson* would have involved a reassessment of the sentence, but left the conviction for disobedience in place.

At the trial level, this would mean that in most cases involving disobedience and unauthorized absence offenses that stem from a single act, the military judge should allow both offenses to go to the trier of fact for findings.[151] If convictions are returned on both offenses, then the military judge should analyze the relevant evidence in light of the factors described above to determine the maximum punishment to which the accused may be sentenced.[152] If the military judge then concludes the government failed to meet its burden to prove that the order represented a measured attempt to secure compliance with a routine or preexistent duty, then the maximum punishment facing the accused should not include the punishment authorized for the disobedience offense in question.[153]

Orders Prohibiting Contact with Individuals

To be lawful, a command must relate to a military duty.[154] The *Manual for Courts-Martial* provides that military duty "includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service."[155] A command with such a valid military purpose may even interfere with the private rights and personal affairs of the soldier receiving the order.[156] As such, orders to have no contact with specified individuals have in some cases been held by the military appellate courts to be lawful orders.[157]

The CAAF recently addressed the lawfulness of such an order in *United States v. Nieves*.[158] Captain Nieves was under investigation concerning allegations that he had fraternized and had sexual relations with women in his battalion.[159] The order

145. *E.g.*, United States v. Traxler, 39 M.J. 476, 479 (C.M.A. 1994).

146. *Henderson*, 44 M.J. at 234.

147. 1 M.J. 231 (C.M.A. 1975).

148. *Id.* at 233 (emphasis in original).

149. *See* MCM, *supra* note 14, pt. IV, para. 16.e.(2).

150. *See Quarles*, 1 M.J. at 232-33. For the limits of this argument, see *Pettersen*, 17 M.J. at 70 n.4.

151. A possible exception to this general rule include circumstances in which the military judge rules that the charging of both disobedience and unauthorized absence offenses stemming from what is substantially a single act or transaction constitutes an unreasonable multiplication of charges. *See* MCM, *supra* note 14, R.C.M. 307(c)(4) discussion. Another possible exception is when the order in question "is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit;" such an order would not be punishable under the Code. *See id.* pt. IV, para. 14.c.(2)(a)(iii); *cf.* Rutledge v. United States, 116 S. Ct. 1241, 1248 (1996) (observing that punishment includes conviction as well as sentence).

152. *See supra* notes 144-145 and accompanying text.

153. *See Henderson*, 44 M.J. at 233.

154. MCM, *supra* note 14, pt. IV, para. 14.c.(2)(a)(iii).

155. *Id.*

156. *Id. But cf.* United States v. Dykes, 6 M.J. 744, 747-48 (N.M.C.M.R. 1978) ("It is beyond cavil that such an order . . . may not arbitrarily or unreasonably interfere with the private rights or personal affairs of . . . military members.").

157. *See, e.g.*, United States v. Hawkins, 30 M.J. 682, 684 (A.F.C.M.R. 1990) (observing in dicta that an order to have no contact with three named individuals unless such contact was arranged by defense counsel was lawful); United States v. Wine, 28 M.J. 688, 690-91 (A.F.C.M.R. 1989) (holding order to disassociate from wife of fellow sergeant was not unlawful as a matter of law).

158. 44 M.J. 96 (1996).

at issue in the case was a verbal one issued by his battalion commander "not to have any discussions with members of . . . [his company], relative to the investigation," or to "discuss it with anybody in the battalion who becomes a member of the investigation."[160] The accused violated the order by subsequently contacting a member of his company and attempting to discuss the ongoing investigation.[161] The accused was convicted at court-martial of disobeying the no-contact order issued by his battalion commander, but alleged on appeal that the order was unlawful, overbroad, and violated his right to prepare a defense.[162]

The CAAF held that the no-contact order was lawful, reasoning that the order did not prohibit all speech by the accused with his company, did not interfere with the accused's right to prepare and present a defense, and was in any event limited to the duration of the administrative investigation.[163] The court also observed that "[i]t logically follows that, if physical restraint to prevent obstruction of justice is permissible, lesser moral restraint in the form of a superior's order would also be permissible."[164] The accused's conviction for willful disobedience of the no-contact order of a superior commissioned officer was affirmed.[165]

The most troubling aspect of the opinion in *Nieves* is the attempt by the court to distinguish the instant order from that found in *United States v. Wysong*.[166] In *Wysong*, the accused was also the subject of an investigation and was ordered by his company commander "not to talk to or speak with any of the men in the company concerned with this investigation except in the line of duty."[167] On appeal from his conviction for disobedience of this order, the COMA concluded that "it is clear beyond peradventure that the order in question was so broad in nature and all-inclusive as to render it illegal."[168] The court also stated that "[a]nother defect in the order is that of vagueness and indefiniteness in failing to specify the particular persons 'concerned' with the investigation. *Such an order might well have extended to the entire company.*"[169] The COMA held the order in *Wysong* to be "illegal and consequently unenforceable."[170]

The CAAF's opinion in *Nieves* asserts that the order in that case differed from that in *Wysong* because it "did not prohibit *all* speech, but only 'discussions with members of Alpha Company, relative to the investigation.'"[171] This implication that the order in *Wysong* prohibited all speech is difficult to reconcile with the reported facts of the case; the order prohibited only unofficial conversations with the men in the company who were "concerned with this investigation."[172] One could even conclude that the order in *Wysong* was *more* narrowly and tightly drawn than that in *Nieves*; the order to Captain Nieves facially applied to his entire company, and extended to anyone in the *battalion* who became "a member of this investigation."[173] As such, a practitioner could conclude that the attempt by the court to distinguish the order in *Nieves* from that in *Wysong* is less than compelling.

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159. *Id.* at 97.

160. *Id.* The battalion commander subsequently issued another order to the accused, similar to the first, but allowing the accused and counsel to request contact with relevant parties through the battalion commander, and further specifying that the "order would remain in effect 'during the period of the investigation.'" *Id*. at 97-98. This subsequent order was not the subject of the court's decision in *Nieves*. *Id*. at 98.

161. *Id.* at 97.

162. *Id.* at 96-98.

163. *Id.* at 99.

164. *Id.* at 98-99 (relying upon United States v. Moore, 32 M.J. 56 (C.M.A. 1991)) (other citations omitted).

165. *Id.* at 99.

166. 26 C.M.R. 29 (C.M.A. 1958).

167. *Id.* at 30.

168. *Id.*

169. *Id.* at 31 (emphasis added). It is interesting to note that the order in *Nieves* may have extended not only to the entire company, but to anyone in the *battalion* who became "concerned with this investigation." *Cf*. *Nieves*, 44 M.J. at 97 (describing no-contact order as extending to "members of Alpha Company, relative to the investigation," and "anybody within the battalion who becomes a member of the investigation").

170. *Id.*

171. *Nieves*, 44 M.J. at 99 (emphasis added).

172. *See Wysong*, 26 C.M.R. at 30.

173. The COMA in *Wysong* stated that "[a]nother defect in the order is that of vagueness and indefiniteness in failing to specify the particular persons 'concerned' with the investigation." *Id*. at 31. Likewise, the same may be said of the order in *Nieves*; who is a "*member* of this investigation"? *See* 44 M.J. at 97.

If one agrees that *Nieves* and *Wysong* are practically indistinguishable, then the rationale of the court in *Nieves* must be grounded elsewhere than in the facts of the two cases; the law must have changed since *Wysong* was decided.[174] This theory is supported by the CAAF's assertion that in the wake of its decision in *United States v. Moore*[175] "it logically follows that, if physical restraint to prevent obstruction of justice is permissible, lesser moral restraint in the form of a superior's order would also be permissible."[176] The same rationale was applied in *United States v. Blye*,[177] where the COMA held that "a military member may be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction."[178] The COMA reasoned as follows:

> It is beyond cavil that a pretrial prisoner in a confinement facility may be lawfully denied the use of alcohol. We do not find it unduly restrictive on the personal liberty of any military member to deny the use of alcohol as a condition of being released from pretrial confinement and placed upon restriction.[179]

The COMA in *Blye* acknowledged that this rationale could be construed as a departure from precedent, and stated that such precedent was overruled to the extent that it conflicted with the court's holding in *Blye*.[180] The CAAF should now formally acknowledge that this rationale may also be inconsistent with *Wysong*, and expressly overrule *Wysong* to the extent that decision can be construed to prohibit an order such as that found in *Nieves*.[181]

One unambiguous lesson derived from *Nieves* concerns the lawfulness of an order that could interfere with the accused's right to prepare a defense.[182] While an order that completely bars contact by an accused with the witnesses against him may be unlawful,[183] other orders that merely require the accused or counsel to request the permission of the command prior to contacting specified individuals have been held lawful.[184] Counsel seeking to establish that an order is unlawful because it interfered with the accused's right to prepare a defense should therefore be able to establish not only that the order potentially restricted the ability to prepare, but also that attempts to obtain access to witnesses were made and thwarted by operation of the order or the issuing command, and that such denial of access actually operated to the prejudice of the accused.[185]

Defenses

Causation

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174. *See, e.g.*, United States v. Hawkins, 30 M.J. 682, 685 (A.F.C.M.R. 1990) ("The cases on this issue after *Wysong* were decided primarily on whether the order restricted the accused's ability to prepare for his defense by not allowing him to participate in interviews of witnesses with his counsel.").

175. 32 M.J. 56 (C.M.A. 1991). In *Moore*, the COMA held that it was permissible to place an accused in pretrial confinement "to prevent an accused servicemember from intimidating witnesses or otherwise obstructing justice." *Id.* at 59, *cited in Nieves*, 44 M.J. at 99.

176. *See Nieves*, 44 M.J. at 98-99.

177. 37 M.J. 92 (C.M.A. 1993).

178. *Id.* at 94.

179. *Id.*

180. Judge Cox reasoned: "Given the distinctions between this case and United States v. Wilson . . . it may not be necessary to overrule *Wilson*. Nevertheless, to the extent that *Wilson* can be construed to prohibit an order under the circumstances found here, that aspect of *Wilson* is expressly overruled." *Id.* at 95 n.5.

181. One could also argue the reverse: the rationale is logically defective that says that if the command could *potentially* put an accused in pretrial confinement for *hypothetical* attempts to obstruct justice or other misconduct, then the command could also use personal orders and commands to prevent that which is already prohibited by the UCMJ, i.e., obstruction of justice. *Cf. supra* notes 130-145 and accompanying text (discussing the enforceability of orders concerning preexistent duties). The reported opinion in *Nieves* gives no indication that the accused had actually engaged in obstruction of justice as in *Mason*, or other misconduct related to the subject of the order as in *Blye*; application of the rationale under these facts is especially problematic. *Cf.* United States v. Alexander, 26 M.J. 796, 797 (A.F.C.M.R. 1988) (holding order prohibiting servicemember from ever writing checks unenforceable).

182. Counsel should remember that, although this issue frequently occurs in conjunction with the assertion by the accused through counsel that the order is unlawful or overbroad, the issue of whether an order interferes with the ability of the accused to prepare a defense is ultimately a different issue from the lawfulness or breadth of the order itself. A precise and definite order can be unlawful because it has the effect of interfering with the ability of the accused to prepare a defense, and an overbroad or otherwise unlawful order may have no effect upon the ability of the accused to prepare a defense and still be unenforceable under the UCMJ. *Nieves* deals with the particular circumstance in which the two issues *overlap*; the order in question was challenged by the defense at trial because its overbreadth allegedly prohibited the accused from contacting witnesses against him. United States v. Nieves, 44 M.J. 96, 98 (1996).

183. *See* United States v. Aycock, 35 C.M.R. 130, 132-34 (C.M.A. 1964).

184. *Nieves*, 44 M.J. at 98-99; *e.g., supra* note 157 and cases cited therein. *But cf.* UCMJ art. 46 (guaranteeing defense counsel equal opportunity with trial counsel to obtain witnesses and other evidence).

185. *See Nieves*, 44 M.J. at 99.

It is a basic premise of the substantive criminal law that "where the definition of the crime requires that certain conduct produce a certain result . . . it must be shown that the conduct caused the result."[186] Conduct is said to cause a result "when . . . it is an antecedent but for which the result in question would not have occurred, and . . . the result is not too remote or accidental in its manner of occurrence to have a just bearing on the actor's liability or on the gravity of his offense."[187] In the words of one noted commentator, "[t]he determination here is not a scientific one at all. Whether a remote result is 'too remote' is a relatively subjective determination."[188] The difficulty inherent in proving that an act caused a certain result is exacerbated in cases where the actions of another intervene in the chain of events between the act of the accused and the result, or contribute to the proximate causation of the result in some way.[189] Military law, however, has done much to simplify the rule concerning intervening causation: "To be the proximate cause of the victim's death . . . conduct 'need not be the sole cause of death, nor must it be the immediate cause--the latest in time and space preceding the death.' It must only play 'a material role in the victim's decease.'"[190]

The minimal showing of causation required by this rule of law has led the military appellate courts to conclude that a military judge did not err in a prosecution for drunken driving, reckless driving, and involuntary manslaughter by failing to give a requested instruction on contributory negligence of the victim when that defense was reasonably raised by the evidence in the case.[191] Likewise, the CAAF recently held that it was not error for a military judge to deny the production of an expert to testify concerning the possibility that the victim's death was caused by the negligence of treating medical personnel in a prosecution for involuntary manslaughter; the court reasoned that such an intervening cause of the victim's death,

> would not have constituted a defense in any event . . . . In this case an intervening cause arising from the negligence of the paramedics or the victim herself would be a defense only if 'the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result.' The proffered defense evidence fell short of this standard.[192]

The CAAF recently considered whether evidence of a negligent intervening cause of death would be relevant in a case in which the government could establish that the act of the accused played a material role in the death. In *United States v. Taylor*,[193] the court considered the following facts:

> On March 8, 1991, while conducting water survival training, appellant was in direct supervision of Private Danilo A. Marty, Jr. During the training, PVT Marty experienced extreme difficulty and exhaustion in attempting to swim across a pool wearing his combat gear. Appellant was in position on a flotation device to lift Marty up and, in fact, did lift him up but then released him. When Marty cried for help, appellant told him that he had "to make it on [his] own." After Marty sank three times, appellant ordered the other recruits to pull Marty's body from the pool. Appellant checked Marty who was unconscious and found no pulse or respiration.[194]

The medical response team that arrived at the scene misused their equipment, failed to follow established procedures, and was unsuccessful in resuscitating PVT Marty.[195] The CAAF went on to note that "autopsy revealed that Marty's lungs were almost completely full of water and that he had suffered cardiac arrhythmia."[196]

In response to a motion in limine by the government, the military judge excluded any evidence of medical negligence by the response team because neither of the witnesses to be called

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186. LAFAVE & SCOTT, *supra* note 29, § 1.2(b), at 10 (1986). This requirement of causation is commonly found in homicide statutes. *E.g.*, MCM, *supra* note 14, pt. IV, para. 43.b.(1)(b) (requiring that "the death resulted from the act or omission of the accused" to establish premeditated murder in violation of UCMJ art. 118(1)). *Cf.* ROBINSON, *supra* note 100, § 88(a) ("Homicide, assault, and property destruction are the most common of the result element offenses.").

187. ROBINSON, *supra* note 100, § 88(c).

188. *Id.* § 88(e).

189. *Cf.* United States v. Reveles, 41 M.J. 388 (1995) (considering significance of intervening dependent actions of medical personnel upon victim harmed by accused).

190. *Id*. at 394 (citations omitted).

191. *See* United States v. Cooke, 18 M.J. 152, 155 (C.M.A. 1984).

192. *Reveles*, 41 M.J. at 394-95 (citations omitted).

193. 44 M.J. 254 (1996).

194. *Id.* at 255.

by the defense on this issue would "testify that the medical team's inaction was the 'sole cause' of PVT Marty's death."[197] On appeal from Taylor's subsequent conviction for involuntary manslaughter, the CAAF considered whether the military judge erred in excluding evidence of negligent medical care given to the victim, and concluded that he had committed prejudicial error; the findings of guilty as to the manslaughter charge and its specification and the sentence were set aside.[198] Judge Crawford, writing the opinion of the court, rejected the argument made by the government at trial and on appeal "that medical malpractice only breaks the chain if it is a substantial or sole cause of death."[199] The court asserted instead that the correct rule of law is that negligent medical treatment may be "a superseding cause, completely eliminating the defendant from the field of proximate causation . . . in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor."[200] This is a question of fact rather than law, and by excluding evidence of the nature of the care provided by the medical team, the military judge "removed from the factfinder the question of whether there was a sufficient intervening cause to excuse appellant from culpability in the victim's death."[201]

There are several lessons to be learned from the decision in *Taylor.* Judge Crawford proffers that in cases of this type, the military judge should ordinarily "admit expert medical testimony to show the victim's condition on being removed from the water and the type of treatment that was given."[202] On a more subtle level, this case indirectly points out the persistent confusion about causation that is present in the substantive criminal law under the UCMJ. For example, the rule of law announced by the court is not found in the pattern instructions for military judges regarding either intervening cause, causation when the acts or omissions of others are in issue, or situations in which there may be multiple contributors to proximate cause; these instructions simply provide, in relevant part, that "[a]n act or omission is a proximate cause of the death even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role in bringing about the death."[203] Similarly, the *Manual for Courts-Martial* contains no discussion of proximate cause, and merely provides that murder requires proof that the death "must have followed from an injury received by the victim which resulted from the act or omission" of the accused.[204] The lesson to be taken from this is that causation is an area of the law in which military judges and counsel may have to rely, to a greater extent than usual, on sources of instructions and law other than the *Benchbook* and the *Manual*.

Double Jeopardy & Multiplicity

195. The opinion of the court described the activity of the response team as follows:

> A response team consisting of one doctor, one nurse, and two corpsmen arrived at the scene. The Government's brief describes what happened next as follows: In essence, the combination of one doctor, one nurse, and two corpsmen pushed the wrong buttons on the defibrillator, preventing it from producing an electric shock; the breathing apparatus was missing a necessary valve; the team was unable to intubate Marty because of weak batteries on the laryngoscope; they were unable to locate a stylet which was necessary for proper functioning of an endotracheal tube; they placed Marty backwards on the gurney, reducing the efficacy of manual chest compressions (CPR) because of the spongy surface. Finally, the gurney was placed in the ambulance backwards, where it was unstable, causing the ambulance physician to withhold additional defibrillation out of fear of electrocuting others . . . . Basic CPR was continually administered virtually during the entire time despite the failure of the advanced medical team to achieve any progress. At the hospital, Marty responded to defibrillation with rhythm, indicating that his heart was still capable of electrical activity, but not mechanical activity.

Taylor, 44 M.J. at 255.

196. *Id.*

197. *Id.* at 255-56.

198. *Id*. at 257-58. The accused was also convicted at court-martial of violation of Article 92, UCMJ. As such, the record of trial was returned to The Judge Advocate General of the Navy, and a rehearing was authorized. *Id*. at 255-58.

199. *Id.* at 257.

200. *Id.* (citations omitted); *cf*. LAFAVE & SCOTT, *supra* note 29, § 3.12(f)(5) (asserting that negligent medical treatment to a victim injured by the act of accused will not be a superseding cause "unless the doctor's treatment is so bad as to constitute gross negligence or intentional malpractice").

201. *See id.*

202. *Id.* Judge Crawford also asserted that the rule advanced by the government, namely that medical malpractice breaks the chain of causation only if it is the substantial or sole cause of death, applies only when the defendant inflicts dangerous wounds designed to destroy life. Putting aside the issue of whether this is an accurate statement of *military* law, one could nevertheless conclude that even this seemingly restrictive rule would operate as a rule of decision rather than a rule of admissibility; it is still likely to be a question of *fact* as to whether the intervening medical malpractice was a "substantial or sole cause of death."

203. BENCHBOOK, *supra* note 53, para. 5-19, at 768-69. The language used by the court in its opinion is only found in the pattern instruction concerning contributory negligence by the victim. *Id*. at 770.

204. *See generally* MCM, *supra* note 14, pt. IV, para. 43-44.

The military law concerning double jeopardy, multiplicity, and lesser-included offenses has been very dynamic of late.[205] A source of the continuing confusion and change in this area of the law is that the CAAF itself remains highly divided as to the proper methodology to be used in resolving problems of multiplicity and lesser-included offenses.[206] One school of thought looks to the statutory elements[207] of the relevant offenses when making the determination as to whether they are the same offense,[208] while the alternative camp is willing to look to the pleadings, and even the proof adduced at trial, when making multiplicity and included offense determinations.[209] This ongoing discord has led some to call for dramatic remedies to the multiplicity problem in the military justice system.[210]

Be that as it may, a clear majority of the CAAF recently subscribed to the use of the elements test for resolving multiplicity issues with its opinion in *United States v. Oatney.*[211] In *Oatney*, the CAAF considered whether communicating a threat is a lesser-included offense to obstructing justice and communicating a threat,[212] and concluded that the military judge did not err in treating the offenses as separate.[213] Judge Sullivan, joined by Judges Crawford and Gierke, looked to the elements of each offense and reasoned that one can obstruct justice without communicating a threat and, as such, "[n]o sine qua non relationship exists as a matter of law between" the two offenses.[214] Chief Judge Cox, joined by Senior Judge Everett, vigorously dissented and stated that "we must look at the *pleadings and the facts of the case* to determine the appropriate punishment for an act of misconduct."[215]

Apart from the fact that a majority of the court has once again endorsed the use of the elements test for resolving multiplicity and included offense issues, the opinion of the court in *Oatney* is also notable for its clarification of three points of uncertainly that had previously troubled practitioners. First, the CAAF confirms that the President's description of the elements of an offense arising under the General Article in part IV of the *Manual for Courts-Martial* is the equivalent of a "statute" for the purpose of multiplicity analysis.[216] Furthermore, the court also reminds practitioners that even under the relaxed construction of the elements test announced in *United States v. Foster*,[217] an offense is included in another only if "the greater offense could not possibly be committed without committing the lesser

205. For a concise description of recent developments in the law of multiplicity in the military justice system, see MAJOR WILLIAM T. BARTO, *Alexander the Great, the Gordion Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 11-12 (1996) [hereinafter BARTO].

206. *See, e.g.*, United States v. Weymouth, 43 M.J. 329 (1995) (containing four separate opinions, none of which were in dissent).

207. For offenses arising under the General Article, this term includes the elements described by the President in part IV of the *Manual*, assuming that the description of the offense contained therein conforms with relevant judicial precedent. *See* United States v. Oatney, 41 M.J. 619, 628 (N.M.Ct.Crim.App. 1994), *aff'd*, 45 M.J. 185 (1996).

208. *E.g.*, United States v. Carroll, 43 M.J. 487, 488-89 (1996) (Gierke, J.); United States v. Teters, 37 M.J. 370, 377 (C.M.A. 1993) (Sullivan, C.J.) ("It is now unquestionably established that this test is to be applied to the elements of the statutes violated and not to the pleadings and proof of these offenses.").

209. *E.g.*, United States v. Weymouth, 43 M.J. 329, 340 (1995) (Cox, J.) (observing that elements in the military include "those . . . required to be alleged in the specification along with the statutory elements"); United States v. Wheeler, 40 M.J. 242, 243-47 (C.M.A. 1994) (Crawford, J.) (using pleadings and proof to resolve multiplicity issues involving General Article offenses).

210. *Cf.* United States v. Lloyd, 43 M.J. 886 (A.F. Ct. Crim. App. 1995) (holding multiplicity issues are forfeited unless raised at trial because multiplicity issues do not rise to the level of plain error), *pet. rev. granted*, 43 M.J. 480 (1996); BARTO, *supra* note 205, at 25-30 (urging increased presidential role in limiting punishments for offenses arising from what is substantially a single transaction).

211. 45 M.J. 185 (1996).

212. *Id.* at 186.

213. *Id.* at 188-89.

214. *Id.*

215. *Id.* at 190 (Cox, C.J., dissenting) (emphasis added). Chief Judge Cox has consistently voiced his concerns that strict adherence to an elements analysis is inappropriate in a military setting. *E.g.*, United States v. Weymouth, 43 M.J. 329, 333-36 (1995) (citing non-statutory nature of some military offenses). Such adherence may lead to prosecutorial overreaching. *See* United States v. Foster, 40 M.J. 140, 144 n.4 (C.M.A. 1994). This concern persists in *Oatney*, and is apparent in his observation that the charging in the instant facts amounted to "[p]iling on." *Oatney*, 45 M.J. at 190 (Cox, C.J., dissenting) (calling for a "15 yard penalty"). However, the issue of whether charging obstruction of justice and communication of a threat, where the latter is the means of accomplishing the former, is an unreasonable multiplication of charges is a separate issue from whether the offenses are the "same offense" for double jeopardy purposes. *See Foster*, 40 M.J. at 144 n.4. Offenses can be separately punishable and still amount to an unreasonable multiplication of charges in a given scenario. *E.g.*, United States v. Bray, No. 9500944 (Army Ct. Crim. App. Mar. 29, 1996) (observing that charging false official statements and false swearing based upon the same statement was unreasonable notwithstanding the fact that the offenses were separate). Conversely, multiplicious offenses may nevertheless be properly charged if necessary to "enable the prosecution to meet the exigencies of proof through trial, review, and appellate action." *See* MCM, *supra* note 14, R.C.M. 907(b)(3)(B). One could therefore reasonably conclude that if the concern is about "piling on," then the focus of judicial concern should not be on multiplicity, but rather upon the reasonableness of the charging decision. *See id.* R.C.M. 307(c)(4) discussion; *cf.* BARTO, *supra* note 205, at 6, 18-23 (calling for military appellate courts to devote more judicial effort to defining the "unreasonable multiplication of charges").

offense."[218] Finally, the CAAF reinforces the evolving rule of law that a military judge does not err by treating offenses that are separate by reference to their elements as being separate for sentencing, as well.[219] As such, the litigation of multiplicity issues at trial may be more straightforward in the wake of *Oatney*.

Army practitioners should take special note of the CAAF's opinion in *Oatney* because it is at least facially inconsistent with the recent decision of the Army Court of Criminal Appeals in *United States v. Benavides*.[220] In *Benavides*, the service court held that "the less serious offense of communicating a threat was 'necessarily included' in the obstruction of justice charge as alleged."[221] The opinion of the court in *Benavides* expressly declined to follow the reasoning of the Navy court in *Oatney*,[222] and instead looked to the pleadings rather than the elements of the offenses in reaching its conclusion.[223] While inconsistent outcomes such as those found in *Benavides* and *Oatney* are to be expected under a multiplicity methodology that relies upon the pleadings in each case for making such determinations, such outcomes are much more problematic under an elements approach to multiplicity and lesser-included offenses; as a result, the precedential value of *Benavides* after *Oatney* is questionable.

Involuntary Intoxication

The proposition that "[v]oluntary intoxication, whether caused by alcohol or drugs, is not a defense"[224] is well-settled in military law. Evidence of voluntary intoxication may nevertheless be "introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense."[225] Nevertheless, the status of involuntary intoxication as a defense in the military justice system was, until recently, less certain.[226] Most civil jurisdictions recognize a defense of involuntary intoxication,[227] and "[w]here

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216. *See Oatney*, 45 M.J. at 188; *cf.* BARTO, *supra* note 205, at 16-17 (observing "these regulatory elements could be considered by the courts and practitioners the equivalent of statutory elements for multiplicity determinations").

217. 40 M.J. 140 (C.M.A. 1994). In *Foster*, the COMA observed that "dismissal or resurrection of charges based upon 'lesser-included' claims can only be resolved by lining up the elements *realistically* and determining whether *each* element of the supposed 'lesser' offense is *rationally* derivative of one or more elements of the other offense-and vice versa." *Id*. at 146; *cf.* United States v. Standifer, 40 M.J. 440, 445-46 (C.M.A. 1994) (using "rationally derived" test to conclude that obstruction of justice is an included offense of subornation of perjury).

218. *Oatney*, 45 M.J. at 188; *cf.* Schmuck v. United States, 489 U.S. 705 (1989) (adopting "impossibility" test for federal prosecutions); United States v. Foster, 40 M.J 140, 142-43 (C.M.A. 1994). Chief Judge Cox criticizes this formula in his dissenting opinion as follows:

> If we carried the analysis used by the lead opinion to its logical conclusion, we would hold that larceny is not included in robbery because it is theoretically possible to commit the offense of larceny without having committed the offense of robbery. Likewise, one should be convicted of both rape and assault, because it is possible to assault someone without raping them. It is true that one can communicate a threat without obstructing justice, but it cannot be done in this case.

Oatney, slip op. at 17 (Cox, C.J., dissenting). This objection may confuse practitioners because its conclusion does not flow from the reasoning of the majority opinion or the applicable rule of law in these cases. First, the standard is *not* simply whether one offense can be proved without proving the other, but rather that *the proof of the greater offense necessarily proves the lesser offense*. *See* UCMJ art. 79; *Schmuck*, 489 U.S. at 719-20; *Foster*, 40 M.J. at 146-47. Applying this test to Chief Judge Cox's hypothetical, larceny is a lesser-included offense of robbery because it is impossible to commit a robbery without also committing a larceny. Likewise, assault is a lesser-included offense of rape because it is impossible to commit a rape without also committing an assault. The fact that one can commit a larceny or an assault without also committing a robbery or rape, respectively, simply means that the offenses are not identical. *See* BARTO, *supra* note 205, at 29 n.180. Moreover, a majority of the CAAF has never expressly and unambiguously endorsed the modification of the elements test to allow consideration of the pleadings and proof in a particular case; the elements test is, by definition, is based upon "theoretical possibilities" in light of the statutory language defining the relevant offenses.

219. *Oatney*, 45 M.J. at 189-90; *see* United States v. Morrison, 41 M.J. 482, 483-84 (1995); MCM, *supra* note 14, R.C.M. 1003(c)(1)(C).

220. 43 M.J. 725 (Army Ct. Crim. App. 1995).

221. *Id.* at 725.

222. *Id.*

223. *Id.* at 724.

224. MCM, *supra* note 14, R.C.M. 916(l)(2).

225. *Id.*

226. *See* United States v. Hensler, 44 M.J. 184, 187 (1996) (observing that the CAAF had not expressly ruled on this issue). *But cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

227. *See* ROBINSON, *supra* note 100, § 176(a), at 338.

the defense is permitted, it most commonly has a formulation parallel to one of the formulations of the insanity defense."[228] Other jurisdictions, while declining to link involuntary intoxication and insanity, may limit the defense to cases of involuntary intoxication resulting from mistake, duress, or medical advice.[229] Until now, however, neither judge nor counsel could be certain of which form the defense took in the military legal system;[230] this situation may now be remedied.

In *United States v. Hensler*,[231] the CAAF considered the questions of the viability and form of the involuntary intoxication defense in military law. The accused, a commissioned officer, was charged with unbecoming conduct and fraternization, both charges stemming from her social and sexual relationships with subordinates.[232] The defense at trial was that the accused "lacked mental responsibility because of 'a confluence of her drugs, her personality traits, her depression, and the introduction of alcohol.'"[233] Evidence placing this defense in issue was introduced by the defense, and "[t]he military judge provided the members the traditional instruction on the insanity defense."[234] On appeal from her convictions for the charged offenses, Hensler alleged that the military judge erred because the instruction concerning lack of mental responsibility "did not include involuntary intoxication as a basis upon which the members may find that the appellant lacked mental responsibility."[235] The service court found the military judge did not err in giving a general instruction on the defense of mental responsibility because "there was no evidence to support an instruction tailored to involuntary intoxication."[236]

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228. *Id.* at 339.

229. *See* LaFave & Scott, *supra* note 29, § 4.10, at 558-60.

230. *Cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

231. 44 M.J. 184 (1996).

232. *Id.* at 185-86.

233. *Id.* at 187. The accused was apparently intoxicated during some of her misconduct and was taking a number of prescription drugs. United States v. Hensler, 40 M.J. 892, 894-95 (N.M.C.M.R. 1994). At least one defense witness testified that the accused "suffered from decreased liver function, the result of a prior bout with hepatitis. This condition affected her body's ability to process alcohol and drug medication with the result that the effects of those substances may have lasted longer than normal." *Id.* at 895. Even more significant was the expert testimony that "the intoxicating effects of the different prescribed drugs and the alcohol 'potentiated' each other, i.e., that the effect of each was magnified by the presence of the others." *Id.* at 899. The defense theory was that the accused was probably unaware, at least initially, of these effects, and as such her intoxicated state during some of her misconduct was involuntary. *Id.*

234. *Id.* at 895. The service court opinion described the instructions as follows:

> Specifically, he instructed them that they could presume the accused to be sane unless they were persuaded by clear and convincing evidence that she suffered from a severe mental disease or defect and that, as a result of her severe mental disease or defect, she was unable to appreciate the nature and quality or wrongfulness of her acts. He added that the appellant had the burden to establish that she was not mentally responsible. The military judge further instructed the members that intoxication resulting from the compulsion of alcoholism or chemical dependence was not a defense, although voluntary intoxication could raise a reasonable doubt that the appellant knew that the men with whom she was fraternizing were enlisted men. The appellant voiced no objection to the instructions given by the military judge, although she did offer her own version of an insanity instruction which he rejected. The proposed instruction directed the members to find the appellant not criminally responsible only if they found that, as a result of the combination of her decreased liver function, chronic psychological problems, and ingestion of prescription medications, she suffered from a delusion that caused her to believe that her behavior was not criminal or that compelled her to commit the offenses.

Id. at 895-96. The CAAF described the instructions somewhat differently as follows:

> The military judge instructed the members: "An issue before you is the accused's sanity at the time of the offenses." He defined mental responsibility. He advised the members "that the term, 'severe mental disease or defect' can be no better defined in the law than by the use of those terms themselves." He used the term "involuntary intoxication" with respect to the issue whether appellant "knew that she was fraternizing with enlisted personnel." He instructed the members that "alcoholism and chemical dependency is recognized by the medical profession as a disease involving a compulsion towards intoxication." He did not specifically link the term "involuntary intoxication" with lack of mental responsibility.

Hensler, 44 M.J. at 187. The use of quotations from the record of trial in appellate opinions concerning the form of instructions cannot but help the judge and counsel seeking to understand the nature and breadth of the court's holding.

235. *Hensler*, 40 M.J. at 896. The service court also considered whether the military judge had erred by failing "to distinguish between voluntary and involuntary intoxication when discussing the effect of the former on her knowledge of the enlisted status of her fraternizing partners." *Id.* at 896-97. The court concluded that the military judge did not err in the instruction. *Id.* at 900.

236. *Id.* at 900.

The CAAF affirmed the decision of the lower court.[237] The court reasoned that "[i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility."[238] The opinion of the court concluded that "[t]he instructions could have been better tailored to the evidence, but we are satisfied, based on this record, that the question of appellant's mental responsibility was fully presented to the members in a correct legal framework."[239]

The decision in *Hensler* has a number of effects on the practitioner. As a threshold matter, the CAAF confirms that involuntary intoxication is indeed a defense under military law.[240] It is, however, a limited defense; involuntary intoxication excuses misconduct only if it causes a lack of mental responsibility, and "is not available if an accused is aware of his or her reduced tolerance for alcohol but chooses to consume alcohol anyway."[241] Moreover, because the defense is "treated like legal insanity,"[242] the accused has the burden of proving by clear and convincing evidence that she was "not mentally responsible at the time of the alleged offense."[243]

There are also a number of issues that remain unanswered in the wake of *Hensler.* The CAAF's opinion appears to equate involuntary intoxication solely with pathological intoxication,[244] the latter being "defined as grossly excessive intoxication given the amount of the intoxicant, to which the actor does not know he is susceptible."[245] Some military decisions, however, have observed that "[i]nvoluntary intoxication exists when intoxication occurs through force, the fraud or trickery of another, or an actual ignorance of the intoxicating character of a substance."[246] Similarly, the Army Court of Military Review has stated that in cases when an accused asserts involuntary intoxication as a defense, "[t]he question then becomes whether his mental disease or defect was culpably incurred."[247] As such, counsel cannot be certain after *Hensler* whether pathological intoxication is the only form of involuntary intoxication recognized under military law, or if a more general inquiry into whether the intoxication was culpably incurred is appropriate in these cases.

Another issue is raised by the CAAF's observation in *Hensler* that the military judge failed to distinguish between involuntary and voluntary intoxication when instructing the members; as such, the potential defense of involuntary intoxication was "gratuitously extended . . . to all six episodes" that were the subject of the charges in this case, even though the CAAF found involuntary intoxication to be in issue only as to one.[248] Such an outcome can be avoided if military judges simply follow the advice offered by the Navy-Marine Corps Court of Military Review in its decision in *Hensler*: "When evidence of involuntary intoxication is introduced, it is essential to distinguish it from voluntary intoxication through proper instructions and, in particular, to avoid reference to the generic term 'intoxication' without defining it as one term or the other."[249] The problem confronting the military judge is that there is currently no pattern instruction available in the *Benchbook* that distinguishes involuntary from voluntary intoxication; indeed, there cannot be a pattern instruction until the CAAF determines whether pathological intoxication is the only form of involuntary intoxication recognized as a defense under military law, or if some broader formulation of the defense is applicable.[250]

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237. *Hensler,* 44 M.J. at 188.

238. *Id.*

239. *Id.*

240. *See id.* at 187-88.

241. *Id.*

242. *Id.* at 188.

243. MCM, *supra* note 14, R.C.M. 916(k)(3).

244. *Hensler,* 44 M.J. at 187.

245. *Hensler,* 40 M.J. at 897.

246. United States v. Travels, No. 31437, slip op. at 2 (A.F. Ct. Crim. App. June 14, 1996) (citing United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982)).

247. United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982).

248. *Hensler,* 44 M.J. at 188. *But cf. Hensler,* 40 M.J. at 899 (stating "there is no evidence that the appellant suffered from 'pathological intoxication'").

249. *Hensler,* 40 M.J. at 900 n.8.

250. *See supra* notes 244-247 and accompanying text.

Conclusion

In 1996, the military appellate courts devoted a substantial portion of their reported opinions to issues relating to the substantive criminal law.[251] These opinions frequently resolved matters of concern to the military justice practitioner, but sometimes left unanswered significant questions that will give rise to issues in future cases. As such, the problems associated with defining crime are likely to continue to be a substantial portion of the business of the military appellate courts for the years to come.

251. *See supra* note 3 and accompanying text.

"An Old Fashioned Crazy Quilt:"[1] New Developments in the Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment

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Introduction

This article discusses appellate courts' pronouncements during the past year in the areas of Sixth Amendment, discovery, mental responsibility, competency to stand trial, and nonjudicial punishment. Nineteen ninety-six can best be described as a year of ebb and flow as the courts further restricted some aspects of an accused's rights to confrontation and compulsory process, while rejecting other attempted inroads. Judge Gierke is quickly becoming the Confrontation Clause expert for the Court of Appeals for the Armed Forces[2] (CAAF), as he authored the majority opinions for nearly all the confrontation cases this term. Those cases illustrate the give and take described above and reflect Judge Gierke's position as a moderate on the court.[3]

Right to Confrontation

One of the major issues involving the Confrontation Clause[4] involves the tension created by the admission of hearsay against an accused. As most criminal law practitioners recognize, the rules prohibiting certain types of hearsay[5] and the Confrontation Clause have significant overlap. In fact, an extreme view of the Confrontation Clause might be that it excludes all hearsay, because the admission of any hearsay would enable a declarant to testify against an accused without facing him.[6] At the opposite end of the spectrum, one could argue that the Confrontation Clause guarantees only that an accused faces those witnesses who actually appear in court and testify against him.[7] The Supreme Court long ago rejected both views as unintended and too extreme.[8] Instead, the Court established a methodology to analyze out-of-court statements for Sixth Amendment protections.

First, if the out-of-court statement is admitted as a firmly-rooted hearsay[9] exception, then no further Confrontation Clause analysis is needed.[10] That is because of the long-standing nature of these exceptions, and because the rationale for their status as hearsay exceptions already supports their reliability.[11] For example, the medical treatment exception[12] is pre-

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1. *See infra* note 5; *see also* Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY'S L.J. 389 (1996) (adopting the textile metaphor for constitutional protections of the accused).

2. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

3. *See* Lawrence J. Morris, *Military Justice Symposium: Foreword*, ARMY LAW., Mar. 1996, at 3 (Judge Gierke was in "the middle of the pack in terms of opinions written and the ability to marshall other judges to his viewpoint").

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

5. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 801(c) (1995 ed.) [hereinafter MCM]. The rule, however, is "riddled with exceptions developed over three centuries." Ohio v. Roberts, 448 U.S. 56, 62 (1980). There are so many exceptions that they amount to "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." *Id.* (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)). Certain statements are "exempted" from the definition of hearsay. MIL. R. EVID. 801(d). Exceptions are found in MIL. R. EVID. 803 & 804.

6. *Roberts*, 448 U.S. at 63 (a literal reading of the Confrontation Clause would exclude any statement made by a declarant not present at trial).

7. White v. Illinois, 502 U.S. 346, 359-60 (1992) (Thomas, J., concurring) (this was the view held by Professor Wigmore and endorsed by Justice Harlan in his concurring opinion in Dutton v. Evans, 400 U.S. 74, 93-100 (1970)).

8. Bourjaily v. United States, 483 U.S. 171, 182 (1987) ("we have attempted to harmonize the goal of the Clause--placing limits on the kind of evidence that may be received against a defendant--with a societal interest in accurate factfinding"); *see also White*, 502 U.S. at 352 (citing Mattox v. United States, 156 U.S. 237 (1895) (such a narrow reading is inconsistent with Supreme Court rulings dating back to the 19th century)); Tom Patton, Comment, *Sixth Amendment's Confrontation Clause--Is a Showing of Unavailability Required?*, 17 S. ILL. U. L.J. 573, 574 (1993) (Supreme Court has steered a middle ground); John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 36-37 (1987) (The Supreme Court has embraced neither view of the right of confrontation).

mised on the assumption that a patient is likely to give accurate information to her doctor if she wants to get well.[13] The basis for the excited utterance exception[14] is the notion that while under the stress of a startling event, people do not have time to fabricate a story.[15] The circumstances under which these statements are made provide indicia of reliability, so cross-examination will not add anything.[16] For that same reason, no further Confrontation Clause analysis is needed.

When a statement does not fall within a firmly-rooted hearsay exception, the Supreme Court has set out a two-prong analysis to ensure compliance with the Confrontation Clause. First, the prosecution must either produce the witness or demonstrate his unavailability.[17] Second, an out-of-court statement will be admitted only if it bears "adequate indicia of reliability." The proponent establishes reliability by showing that the statement has "particularized guarantees of trustworthiness."[18]

Some of the exceptions that the Supreme Court has labeled as firmly-rooted are statements for the purpose of medical treatment,[19] spontaneous declarations,[20] co-conspirators statements[21] and dying declarations.[22] Recently, the CAAF added the hearsay exception for statements against interest[23] to the list of firmly-rooted exceptions.

In *United States v. Jacobs*,[24] the accused was charged with introducing drugs aboard a military aircraft with the intent to distribute them. At his court-martial, the statement a Staff Sergeant (SSG) Lawrence made to law enforcement authorities was admitted against the accused as a statement against interest.[25] Although the statement was largely exculpatory, SSG Lawrence did admit to marijuana use, conspiracy to distribute and attempted distribution of marijuana.

In deciding whether the statement was properly admitted against the accused, the CAAF determined that the statement

9. Firmly rooted hearsay exceptions "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)). When the statement falls within a firmly rooted hearsay exception, then reliability can be inferred. *Id.*

10. *White*, 502 U.S. at 356; *Bourjaily*, 483 U.S. at 183.

11. *Bourjaily*, 483 U.S. at 183.

12. *See* MCM, *supra* note 5, MIL. R. EVID. 803(4).

13. *White*, 502 U.S. at 356; MCM, *supra* note 5, MIL. R. EVID. 803(4) analysis, app. 22, at A22-52.

14. MCM, *supra* note 5, MIL. R. EVID. 803(2).

15. *White*, 502 U.S. at 356; STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 792 (3d ed. 1991).

16. *White*, 502 U.S. at 357 ("adversarial testing" would not contribute to the statement's reliability).

17. *Roberts*, 448 U.S. at 65. *Ohio v. Roberts* involved the use of preliminary hearing testimony against the defendant when a witness failed to appear at trial. The Supreme Court applied the two-prong test set out in the text above and held that the government had established that the witness was unavailable for Sixth Amendment purposes and the testimony had "sufficient indicia of reliability." *Id.* at 68-77.

18. *Id.* at 66.

19. *White*, 502 U.S. at 355 n.8.

20. *Id.*

21. *Bourjaily*, 483 U.S. at 183. Although a statement made by a co-conspirator is technically an exemption from the hearsay rule and not an exception, the Sixth Amendment analysis is the same. United States v. Inadi, 475 U.S. 387, 393 n.5 (1986).

22. *Roberts*, 448 U.S. at 66 n.8 (citing Pointer v. Texas, 380 U.S. 400, 407 (1965)); Mattox v. United States, 156 U.S. 237, 243-44 (1895)).

23. MCM, *supra* note 5, MIL. R. EVID. 804(b)(3).

24. 44 M.J. 301 (1996).

25. *Id.* at 302 (citing MCM, *supra* note 5, MIL. R. EVID. 804(b)(3)). SSG Lawrence was in a Japanese jail at the time of accused's court-martial in the Philippines. According to the story SSG Lawrence gave to Office of Special Investigations (OSI) agents at the time of his apprehension, he first met the accused at a bar in the Philippines, where the accused was stationed and SSG Lawrence was on temporary duty from Japan. After casual conversation, the accused said he would soon be transferring to Japan and expected he would be overweight in his household goods. The accused asked SSG Lawrence to pick up and store several boxes he would mail to Japan. After SSG Lawrence returned to Japan, the accused telephoned him and giving a different name, told him that the boxes were already on their way. SSG Lawrence picked them up at his workplace without knowing the contents, took them home, later opened the boxes and discovered they contained drugs. He then used some of the drugs and resealed the boxes. The accused called SSG Lawrence again and told him to meet a third person, who, unbeknownst to both the accused and SSG Lawrence, was an undercover OSI agent. Eventually SSG Lawrence arranged for transfer of the drugs to the undercover agent and was later apprehended. There were 106 pounds of marijuana in the boxes the accused shipped to Japan. *Id.* at 302-04.

against interest exception is firmly-rooted. Judge Gierke, writing for the court, recognized that as recently as 1994, the Supreme Court expressly declined to decide this very issue.[26] The CAAF then examined its inconsistent rulings in the area.

In *United States v. Dill*,[27] in a two-to-one majority decision authored by Judge Cox, the Court of Military Appeals examined the statement against interest exception and held that it was not "firmly-rooted."[28] Two years later, writing for the court in *United States v. Wind*,[29] Judge Everett called the statement against interest a "well-established exception" and concluded that no further demonstration of reliability was needed.[30]

The *Jacobs* court then looked to the various federal circuits and found that a majority of them treat the exception as "firmly-rooted."[31] The CAAF followed that approach, cautioning, however, that SSG Lawrence's statement should be examined to ensure that all parts of it were truly inculpatory, and remanded the case to the Air Force Court of Criminal Appeals.[32]

The CAAF's conclusion that its most recent precedent treated the exception as "firmly-rooted" may not be precise. In *Wind*, Judge Everett called the exception for statements against interest "well-established" and, comparing it to the former testimony exception, noted that such a characterization obviated the need for any separate reliability analysis. He also noted that the proponent of such a statement must still demonstrate unavailability of the declarant and that the statement indeed falls within the hearsay exception. Unavailability, however, need not be established when the statement falls within a "firmly-rooted" hearsay exception.[33] Judge Everett's use of the term "well-established" was not intended to confer "firmly-rooted" status on the exception, as reflected by his reference to the former testimony exception as "well-established."[34] On more than one occasion, the Supreme Court has announced that, to admit former testimony, one must show unavailability of the declarant.[35]

"Well-established" does not equal "firmly-rooted," and the CAAF's willingness to abandon its earlier caution with respect to statements that are "presumptively suspect"[36] is disturbing. The concern is especially acute when, as happened in this case, the statement is made by a co-accused to a law enforcement agent. The statement may be technically against the declarant's interest, but it is usually an attempt to shift blame, typically to the accused, and curry favor with law enforcement.[37] This fact may be lost on the factfinder if the statement is not subject to the rigors of cross-examination, the "greatest legal engine ever invented for the discovery of the truth."[38] In addition, the pres-

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26. Williamson v. United States, 512 U.S. 594 (1994).

27. 24 M.J. 386 (C.M.A. 1987).

28. *Id.* at 388 ("statements against penal interest are of recent derivation and are not 'firmly rooted' exceptions to the hearsay rule").

29. 28 M.J. 381 (C.M.A. 1989).

30. *Id.* at 385.

31. *Jacobs*, 44 M.J. at 306. The CAAF found that the following jurisdictions treat the statement against interest as "firmly-rooted": United States v. Saccoccia, 58 F.3d 754, 779 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996); Jennings v. Maynard, 946 F.2d 1502, 1506 (10th Cir. 1991); United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991); United States v. York, 933 F.2d 1343, 1363 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988); United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). A few courts do not extend special treatment to the exception. United States v. Flores, 985 F.2d 770, 778-80, *reh'g denied*, 1 F.3d 1239 (5th Cir. 1993); Olson v. Green, 668 F.2d 421, 428 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982).

32. *Jacobs*, 44 M.J. at 306-07.

33. *Inadi*, 475 U.S. at 392; *Bourjaily*, 483 U.S. at 183; *White*, 502 U.S. at 357. *See supra* text accompanying note 10.

34. In addition, one must look at the context in which Judge Everett concluded that the statement against interest is a "well-established" hearsay exception. That sentence immediately follows his rejection of the then-existing distinction between statements against penal interest and those against pecuniary interest. *Wind*, 28 M.J. at 381.

35. Motes v. United States, 178 U.S. 458 (1900); Barber v. Page, 390 U.S. 719 (1968); *Roberts*, 448 U.S. at 74.

36. *Dill*, 24 M.J. at 387 (quoting Lee v. Illinois, 476 U.S. 530, 541 (1986)); *see also* United States v. Greer, 33 M.J. 426 (C.M.A. 1991), where a Filipino national was apprehended and questioned for possession of stolen military property. He was advised of his rights under Filipino law and was told that anything he said could be used *for* and against him. *Id.* at 430. The CMA concluded that, even though he admitted selling stolen property for the accused, the suspect believed his statement would help him avoid a prosecution. Admission of the statement against the accused was improper because the proper focus for admissibility is the declarant's motivation for the statement, not whether it could be used as evidence against him at trial later on. *Id.*

37. In *Williamson v. United States*, 114 S. Ct. 2431 (1994), the Supreme Court recognized this danger. Harris was arrested for driving with nineteen kilograms of cocaine in his trunk. He told a Drug Enforcement Administration (DEA) agent that the cocaine belonged to Williamson and that he was transporting it for him. The agent promised Harris that his cooperation would be reported to the Assistant United States Attorney. Harris refused to testify at Williamson's trial, and his statement to DEA was admitted against the defendant. *Id.* at 2433-34. The Court held that only those portions of Harris's statement that were truly inculpatory could be admitted against Williamson. The Court noted that self-exculpatory statements do not become reliable just because they are made along with inculpatory ones. *Id.* at 2435.

ence of the witness in court ensures that the declarant is under oath and understands the seriousness of the proceedings, and that the factfinder can observe the declarant's demeanor.[39]

One exception that the Supreme Court has clearly stated is not "firmly-rooted" is the residual hearsay exception.[40] It does not have the long tradition of judicial and legislative deference accorded it that other hearsay exceptions have. In fact, the residual hearsay exception was created to afford judges the flexibility to admit probative and reliable evidence that would not otherwise be admitted.[41] For residual hearsay then, the two-prong analysis described above applies.[42]

In *United States v. Ureta*,[43] the CAAF addressed the admissibility of a videotaped interview of a child abuse victim under the residual hearsay exception. The allegations initially came to light when the thirteen year-old daughter of the accused told a friend that her father had been abusing her.[44] As part of the law enforcement investigation, she was examined by a pediatrician and then interviewed by Office of Special Investigations (OSI) agents. This interview was videotaped and the friend and friend's mother accompanied the victim during the interview. On tape, the victim said that her father had been fondling her for about four years and had been having sexual intercourse with her for the previous two years.[45]

Immediately before the Article 32[46] investigation, the victim recanted her statement and refused to cooperate in the prosecution of her father who had been charged with indecent acts, carnal knowledge, and rape. At the father's court-martial, the judge admitted the OSI interview as residual hearsay over defense objection.[47] On appeal, the correctness of that ruling was reviewed. The CAAF first pointed out that, where an out-of-court statement is proffered and the declarant does not testify, only the "circumstances surrounding the making of the statement" may be considered.[48] The CAAF looked to the factors that the Supreme Court has identified as relevant in a child abuse scenario, which include: spontaneity of the statement; consistent repetition; mental state of the declarant; and existence of a motive to fabricate.[49] The CAAF also identified additional factors, including the use of non-leading questions, the interviewer's emphasis on truthfulness and whether the statement is against the declarant's interest.[50]

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38. California v. Green, 399 U.S. 149, 158 n.11 (1970) (citing 5 Wigmore 1367).

39. *Williamson*, 114 S. Ct. at 2434 ("out-of-court statements are subject to particular hazards").

40. Idaho v. Wright, 497 U.S. 805, 817 (1990) (residual hearsay does not share the same tradition of reliability as firmly-rooted hearsay exceptions). There are actually two residual hearsay exceptions. *See* MCM, *supra* note 5, MIL. R. EVID. 803(24) & 804(b)(5). The exceptions are known as "catch-all" provisions and are intended to allow hearsay to be admitted even thought it does not fall within any other exception. SALTZBURG ET AL., *supra* note 15, at 803, 849.

41. SALTZBURG ET AL., *supra* note 15, at 807.

42. *Wright*, 497 U.S. at 814-16.

43. 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

44. *Id.* at 292. The friend reported this to her own mother, and OSI was notified. After a brief interview by OSI, the victim went to an Air Force medical facility. *Id.*

45. *Id.* at 293.

46. UCMJ art. 32 (1988).

47. *Ureta*, 44 M.J. at 295. The victim had continued her refusal to cooperate, citing a privilege under German law, and did not appear at trial. Both sides agreed that she could not be compelled to testify and was unavailable. The judge admitted the interview under Mil. R. Evid. 804(b)(5). He made the following findings of fact regarding the trustworthiness of the tape: no leading questions were used; it was in her own words; it was voluntary, under oath, detailed, factual, and based on first-hand knowledge of the events. He also concluded that the victim was mature and understood the importance of the tape; she had no motive to lie; she lived in the accused's home and was supported by him, and she subjected herself to scorn by family and friends for alleging abuse. Finally, the judge noted the statement was made shortly after the latest incident with the accused and was similar to statements she made to her friend and the pediatrician, statements that were separately admitted under other hearsay exceptions. *Id.*

48. *Id.* at 296 (citing Idaho v. Wright, 497 U.S. 805 (1990)). *Wright* rejected the use of other evidence, such as physical evidence, a confession, or other witnesses' testimony--what it called "*bootstrapping*"--to determine reliability of the statement at issue. On the other hand, where the declarant appears and is at least available for questioning, then the Sixth Amendment is satisfied. United States v. McGrath, 39 M.J. 158 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 420 (1994). In *McGrath*, the thirteen year old victim in a sexual abuse case appeared at trial but refused to testify against her father because she did not want him to go to jail. The defense did not question her. *Id.* at 160-61. *See also* United States v. Casteel, 45 M.J. 379 (1996) (admission of six year-old victim's audiotaped statement to county sheriff did not violate accused's confrontation rights when victim present in court but answered "I don't know" to series of trial counsel's questions), *cert. denied*, 117 S. Ct. 963 (1997).

49. *Ureta*, 44 M.J. at 296. The Supreme Court assembled this list of non-exclusive factors from various state and federal courts. *Wright*, 497 U.S. at 822 (citing State v. Robinson, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988) (mental state of declarant); State v. Sorenson, 421 N.W.2d 77, 85 (1988) (terminology unexpected of child that age); State v. Kuone, 757 P.2d 289, 292-93 (1988) (lack of motive to fabricate)).

50. *Ureta*, 44 M.J. at 296.

The CAAF concluded that the judge did not abuse his discretion. Although statements to law enforcement officials may be more troublesome[51] when it comes to assessing reliability, here the victim's friend and mother were there to comfort her. The investigator's questions were not suggestive or leading. The interview took place only two days after the last act of abuse by the accused. The statement was against the girl's interest because it made her "homeless."[52] Finally, the CAAF addressed an issue that had been unclear after *Idaho v. Wright:* whether a court can rely on other statements made by the same declarant to different people to determine whether there is consistent repetition. Here, the answer was yes, because the statements were made shortly before the videotaped interview.[53] As there was little time for the victim to reflect on what she was doing, the other statements were relevant circumstances surrounding the making of the statement to the OSI agent.

Another case involving a videotape of a child witness admitted as residual hearsay is *United States v. Cabral*.[54] In that case, the accused's wife baby-sat the victim, a four year-old girl. After the girl's mother picked her up one day from the accused's home, the girl said she was hurt.[55] The mother reported the incident, and OSI agents videotaped an interview with the girl. During the first twenty minutes, the agent did not operate the video camera because he was trying to establish rapport with the child.[56] At the accused's court-martial, the child appeared but refused to answer any questions. The judge found her unavailable and admitted the videotape as residual hearsay.[57]

The Air Force court concluded that the judge did not abuse his discretion in admitting the videotape. Agreeing with the judge that the taped interview was reliable, the court focused on the child's description of sexual acts, which was atypical for her age. The court also observed that the agent explained why the whole interview was not taped, that leading questions did not prompt the girl's statements, and that no motive to fabricate existed.[58] The court did caution, however, that future interviews should be videotaped in their entirety, rather than just selective portions.[59]

The appellant also argued that a taint hearing should have been conducted.[60] The Air Force court declined to order such a hearing, concluding that suggestiveness and coerciveness, if any, should be part of the totality of circumstances the judge considers in making his reliability assessment.[61]

Another issue involving the Confrontation Clause is the use of alternative forms of testimony. In *Maryland v. Craig*,[62] the Supreme Court held that the right of confrontation is not absolute and may be limited when there are important public policy concerns at stake. Protection of vulnerable children from further trauma is one of those concerns.[63] In *Craig*, a six year-old girl was afraid of the accused and was allowed to testify from

51. *See, e.g.*, United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (interrogation techniques may often result in a statement that is more the product of the investigator than the declarant). *But see* United States v. Hughes, 28 M.J. 391 (C.M.A. 1989) (statement made to law enforcement agent reliable because made by a well-educated and intelligent adult, during a short interview conducted at declarant's workplace; declarant controlled direction of interview and had no motive to lie).

52. *Ureta*, 44 M.J. at 297. The CAAF relied on United States v. Pollard, 38 M.J. 41, 50 (C.M.A. 1993) for this proposition. In *Pollard*, however, the nine year-old boy, who witnessed his father's abuse of his sister, was told by his mother that if he said anything about his father he could not come home and would be placed in a foster home. *Id.* at 45. In *Ureta*, no such threat was ever made and there was no evidence that the victim thought she would have to leave her home if she made such an allegation. The trial judge also pointed out that the victim subjected herself to ridicule and social stigma among her family and friends by making the allegation against her father. *Ureta*, 44 M.J. at 295.

53. *Ureta*, 44 M.J. at 297.

54. 43 M.J. 808 (A.F. Ct. Crim. App. 1995).

55. *Id.* at 809. The girl's exact words were: "I'm hurt, my hoi." The mother knew that the term hoi referred to vagina. Upon examination of the girl's genitals, the mother discovered redness. When the mother asked why it was red, the girl said that the accused played too rough. She then rubbed her hand up and down on her vagina. *Id.*

56. *Id.* The opinion indicates that the interviewer asked only one leading question during the interview: whether "[Cabral] showed the girl his 'ding dong.'" *Id.*

57. *Id.* at 810. The judge relied on Mil. R. Evid. 804(b)(5).

58. *Id.* at 811.

59. *Id.*

60. *Id.* at 810. The term "taint hearing" in connection with child sexual abuse was first used by the New Jersey Supreme Court in State v. Michaels, 642 A.2d 1372 (1994) (after finding evidence that investigators used suggestive and coercive questioning techniques with a number of young children at a day care center, the court overturned the conviction and directed that, before a new trial could proceed, a "taint hearing" had to be conducted to ensure that any in-court testimony had not been influenced by the improper questioning).

61. *Cabral*, 43 M.J. at 812 (citing United States v. Geiss, 30 M.J. 678 (A.F.C.M.R.), *pet. denied*, 32 M.J. 45 (C.M.A. 1990)); *see also* Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92.

62. 497 U.S. 836 (1990).

another room via closed circuit television. Her testimony was then transmitted into the courtroom, where the accused, judge and jury were located.[64] The Supreme Court upheld the procedure because a case-specific showing had been made to justify use of the special accommodations.[65] Since *Craig* was decided in 1990, most of the cases stemming from it have involved removing the victim from the courtroom. There has been legislative response as well. Federal law now provides explicit authorization for federal courts to utilize two-way closed circuit television in child abuse cases.[66]

United States v. Longstreath[67] is another case involving removal of the victim from the courtroom. Seaman Longstreath was actually court-martialed twice for child sexual abuse. He was first convicted in the Philippines in 1987 for carnal knowledge, sodomy, and indecent acts with his thirteen year-old step-daughter. He was sentenced to ninety days confinement and, upon his release, was transferred to a new duty station.[68] In 1989, additional allegations surfaced, this time involving the original victim and the accused's two biological daughters. At the time the case went to trial, the victims' ages were sixteen, ten and two. A clinical psychologist testified about the need for the ten year-old to testify via one-way closed circuit television.[69] The prosecutor also asked that the sixteen year old be allowed to testify via that method, but the judge initially refused.[70] After the girl experienced problems on the stand, however, the judge ultimately allowed her to testify via closed circuit television.[71]

Addressing the propriety of the use of the closed circuit television, the CAAF first looked at the federal statute.[72] The CAAF declined to decide whether the statute applies to courts-martial.[73] Even if applicable, the court concluded that, because the statute uses precatory language,[74] it does not forestall reliance on the principles in *Maryland v. Craig*. With respect to the younger girl's testimony, the judge was justified in relying on the psychologist's testimony that the girl would be traumatized by the accused. As for the teenager, although there was no expert testimony explaining why an alternative form of testimony was necessary, the judge personally observed the girl's emotional distress and problems communicating with the accused in the same room. The court found that the case specific showing of necessity had been made in both situations.[75]

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63. *Id.* at 852-53. Other concerns include accurate fact-finding, which might require the use of hearsay. *Id.* at 851. The state also has an interest in punishing child abusers and in creating both the perception and reality of fairness in the criminal justice system. Susan H. Evans, Note, *Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism--Maryland v. Craig*, 26 WAKE FOREST L. REV. 471, 493-94 (1991).

64. *Craig*, 497 U.S. at 840-42. The prosecutor and one of the defendant's two defense counsel were in the room with the child, as was a technician. Evans, *supra* note 63, at 474.

65. *Craig*, 497 U.S. at 855. The showing of necessity must establish that: (1) the procedure is necessary to protect the child, (2) the child would be traumatized by the presence of the accused, and (3) the child would suffer more than de minimis emotional distress. *Id.* at 855-56.

66. 18 U.S.C. § 3509 (Supp. IV 1992). The statute requires notice five days in advance of trial and that the judge make a ruling on the necessity for the alternative form of testimony.

67. 45 M.J. 366 (1996).

68. *Id.* at 367-68. The sentence from the first court-martial also included reduction to the grade of E-5 and a reprimand.

69. *Id.* at 368. The psychologist treated the girl for approximately a year and a half. She indicated that the girl was terrified of her father and that the progress they had made during the course of the treatment would be set back if the girl had to face the accused. *Id.*

70. *Id.* at 369. After the first time she testified, the judge noted her distress but was unconvinced that it was due to the presence of the accused. The two year old did not testify at the court-martial. *Id.* at 368, 370.

71. *Id.* at 370-71. The teenager first testified on 10 January 1990. She was largely nonresponsive to questions and broke down twice during the two hours she was on the stand. The next day the government needed a delay so the trial counsel could persuade her to testify. A week later, the girl testified but was again unresponsive to many of the trial counsel's questions. Several recesses were taken but she still refused to answer many questions. The court-martial was continued for another five days, after which the witness simply refused to answer any more questions from the defense. The defense moved to strike her direct testimony. The judge deliberated overnight and then reconsidered his earlier ruling on the closed circuit television. The judge pointed to the girl's comments that it was harder to discuss things in court because the accused was present and she was not comfortable talking about the incidents in front of him. *Id.*

72. *See supra* note 66 and accompanying text. The defense had argued that the statute did apply to courts-martial and that its terms were violated because the statute authorizes the use of two-way closed circuit television and the judge allowed the government to use one-way television. *Longstreath*, 45 M.J. at 372. The lower court held that the statute did apply to courts-martial and provided guidance. United States v. Longstreath, 42 M.J. 806, 815 (N.M.Ct.Crim.App. 1995).

73. *Longstreath*, 45 M.J. at 372; *see also* United States v. Daulton, No. 45 M.J. 212 (1996).

74. That part of the statute that discusses use of two-way closed circuit television uses the term "may," whereas other parts of the statute contain "shall." The *Longstreath* court relied on this distinction as supporting a view that closed circuit television can be one-way or two-way. Using that rationale, however, one could argue that virtually any set-up is authorized by the statute. If Congress intended that other forms of testimony be available, it is surprising it did not include them in the legislation.

75. *Longstreath*, 45 M.J. at 373.

This year, some innovative judges have removed the accused, not the child victim, from the courtroom. Military courts have rejected these latest attempts as further erosion of the right of confrontation. In *United States v. Daulton*,[76] the child's therapist testified that the accused's nine year-old daughter was afraid of testifying in front of him and anybody "who might be on his side."[77] The judge ruled that the accused would watch his daughter's testimony from another room over closed circuit television. The bailiff, who accompanied the accused, acted as a conduit to the two defense counsel, who remained in the courtroom.[78]

In yet another opinion written by Judge Gierke, the CAAF held that, although the military judge properly made a case-specific showing of necessity, the courtroom arrangement was unlike any of those found acceptable in *Craig*, its military progeny or the federal statute. The court was troubled by the accused's inability to observe the reactions of the court members and their inability to observe the accused's demeanor. Another problem was the effect the accused's removal from the courtroom had on the right to counsel. The judge's ruling resulted in the accused communicating to his counsel through an intermediary, the bailiff, who was not part of the defense team and hence not covered by the attorney-client privilege.[79] The CAAF found that the arrangement violated the right of the accused to attend all sessions of court as well as his Sixth Amendment rights of confrontation and effective assistance of counsel.[80] The finding on that specification and the sentence were set aside.[81]

In a vigorous dissent, Judge Crawford contended that the accused was free to consult with his attorneys at any time, that he did in fact consult with them at some point and that any communications through the bailiff would have been privileged because the judge instructed the bailiff to act as an intermediary.[82] She also pointed out that the accused's demeanor is not relevant, because it is the *witness'* presence in front of the fact-finder that the Sixth Amendment guarantees. Finally, she concluded that the judge's instruction to the members not to draw any adverse inference from the accused's absence eliminated any problems. [83]

A service court also overturned a conviction where the accused was removed from the courtroom. In *United States v. Rembert*,[84] a psychologist testified that the thirteen year-old victim of carnal knowledge might be psychologically harmed if forced to testify in front of the accused. The accused watched her testimony via two-way television in the deliberation room. The defense counsel stayed in the courtroom and communicated with his client by cellular telephone. On appeal, the appellant argued a violation of both his Sixth Amendment right of confrontation and his Fifth Amendment right to due process.[85] The government conceded error on due process grounds. Without ruling on the Sixth Amendment, the Army court agreed that the accused's due process rights were violated.[86]

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76. 45 M.J. 212 (1996).

77. *Id.* at 215. The therapist explained that this included the accused's defense counsel. *Id*.

78. *Id.* at 216. The idea for this arrangement originated with the judge, not the trial counsel, who had suggested that the victim leave the courtroom. Defense objected to any alternative form of testimony. Once the judge issued his ruling, both defense counsel elected to stay in the courtroom. *Id.* at 215-16.

79. *See* MCM, *supra* note 5, MIL. R. EVID. 502.

80. *Daulton*, 45 M.J. at 219. Article 39 requires that the accused attend all sessions except for the deliberations of the members. UCMJ art. 39 (1988). R.C.M. 804 also articulates this right of the accused, but explains that it is waived if the accused is disruptive or voluntarily absents himself after arraignment. MCM, *supra* note 5, R.C.M. 804.

81. *Daulton*, 45 M.J. at 220. The error in the case was not harmless. The CAAF cited *Coy v. Iowa*, 487 U.S. 1012 (1988), for the proposition that one would have to speculate as to the likelihood of change in the witness's testimony or the factfinder's opinion. Instead one should look at the remaining evidence; here, no other evidence of the indecent act existed. *Daulton*, 45 M.J. at 219-20.

82. *Daulton*, 45 M.J. at 223-24 (Crawford, J., dissenting). Judge Crawford pointed to a section in the record near the end of cross-examination of the child witness, when the defense counsel briefly left the courtroom. Upon his return, no further questions were asked. Judge Crawford assumed that counsel's departure was to talk to his client. She further noted that, absent any other request for a recess, the accused waived his right to counsel. *Id*.

83. *Id*. at 222-24. Judge Crawford also spent considerable time citing cases where the admissibility of hearsay was upheld. *Id.* at 222-23 (citing United States v. Lyons, 36 M.J. 183 (C.M.A. 1992); United States v. Morgan, 40 M.J. 405 (C.M.A. 1994); United States v. Ureta, 44 M.J. 290 (1996)). Her point seemed to be that if no constitutional error was found despite the total absence of any cross-examination, then no error should exist here where the defense did cross-examine the victim. This conclusion ignores the justification for admission of hearsay with an unavailable declarant; that is, the statement must have "particularized guarantees of trustworthiness." What showing of reliability existed with respect to the in-court testimony of this victim?

In a short dissenting opinion, Judge Sullivan concluded that the accused's confrontation rights were not violated because the accused could observe the victim, albeit indirectly. He also criticized the majority for reading a requirement of two-way television into military law. *Daulton*, 45 M.J. at 220-21 (Sullivan, J., dissenting).

84. 43 M.J. 837 (Army Ct. Crim. App. 1996) (per curiam).

85. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law").

For now it seems prudent for judges to adhere to procedures upheld by the courts or explicitly authorized by statute. These arrangements include: two-way closed circuit television,[87] one-way closed circuit television,[88] and repositioning chairs in the courtroom itself.[89]

The Confrontation Clause may also be implicated when the judge improperly limits cross-examination. Prohibiting the defense from cross-examining a rape victim on her receipt of various government benefits to which she was not entitled violated the accused's right to confront the witness according to the CAAF in *United States v. Bins*.[90] The twenty-five year old American victim had recently arrived in Greece.[91] When she got into a dispute with her Greek attorney, the Staff Judge Advocate offered her on-base housing.[92] He also provided her a meal card, per diem, and mental health counseling during a two-month period before the trial.

At trial, the defense wanted to inquire into these matters as well as her receipt of standard witness fees and the amount of the settlement.[93] The judge held that such matters were not relevant, were unfairly prejudicial and would confuse the members.[94] The CAAF disagreed, holding that, except for the receipt of standard witness fees, the matters were relevant to bias and motive to lie. The judge should have allowed the members to hear this evidence. As the defense theory was that the victim was motivated by money, her credibility was for the members to evaluate. The accused's rights to confront the witnesses against him and to present a defense were violated.[95]

Of course, the right of confrontation guarantees the opportunity for cross-examination, not necessarily that it will be effective.[96] In *United States v. Casteel*,[97] a six year-old victim of sexual abuse had difficulty testifying at the accused's court-martial. Not surprisingly, after she replied "I don't know" to nearly all of trial counsel's questions, the defense declined to cross-examine her and the girl departed.[98] The judge then admitted an audiotaped interview between the girl and a county sheriff, taken a year earlier.

On appeal, the defense argued a violation of the Confrontation Clause because the defense did not have an opportunity to cross-examine the girl after the interview was admitted at trial.[99] Judge Cox, writing for a unanimous court, rejected that

86. *Rembert*, 43 M.J. at 838. Like the CAAF, the Army court pointed to Article 39 and R.C.M. 804 as support for the right of the accused to attend all phases of his trial. *Id.*

87. 18 U.S.C. § 3509(b) (Supp. IV 1992).

88. *See supra* notes 62 to 75 and accompanying text.

89. United States v. Williams, 37 M.J. 289 (C.M.A. 1993); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 498 U.S. 1084 (1991).

90. 43 M.J. 79 (1995).

91. *Id.* at 81. She met the accused in a bar, and they left together. After a second bar, they went to get something to eat, taking a cab at the accused's suggestion. During the ride, the accused stopped the cab and suggested they walk the rest of the way to the restaurant. After a short walk, the accused attacked the woman, threw her down on some rocks, sodomized her, and attempted to rape her several times. *Id.* As is common in many foreign countries, the victim retained a lawyer and began negotiating an out-of-court settlement. It is customary for civilian authorities to drop prosecution of the case if the victim is satisfied with the settlement.

92. *Id.* at 82. The victim became dissatisfied with her attorney's efforts so she negotiated her own settlement with the accused for $2100. The Greek authorities dropped the charges against the accused. Her attorney demanded his share and they scuffled. The Air Force Staff Judge Advocate who was monitoring the case elected to extend her benefits although she had no military entitlement. *Id.*

93. *Id.* The defense argued that this information would impeach the victim's credibility by showing that she was motivated by money. The defense also requested that the accused's Greek attorney be produced. The government opposed the witness production request and filed two motions in limine to preclude testimony on the settlement and receipt of per diem, housing, meals and counseling. *Id.* at 83.

94. *Id.* "I think her testimony is very clear that what she wants and her whole purpose was to see that the case was prosecuted, not to make any money out of it. It is this judge's opinion that this is the motivation, not money." *Id.*

95. *Id.* at 86. The court went on to conclude that the error was harmless because the victim's testimony was corroborated by other evidence and the defense successfully cross-examined her on several other matters. *Id.* at 86-87.

96. United States v. Owens, 484 U.S. 554 (1988) (no violation of defendant's confrontation rights where assault victim remembered that he earlier identified the defendant as his assailant but could not identify him in court); Delaware v. Fensterer, 474 U.S. 15 (1985) (no violation when government expert could not remember the basis for his opinion); United States v. Gans, 32 M.J. 412 (C.M.A. 1991) (admisson of prior statement to military police as recorded recollection did not violate confrontation rights).

97. No. 94-1430 (CAAF Sept. 30, 1996), *cert. denied*, 117 S. Ct. 963 (1997).

98. *Id.* slip op. at 4-5. The girl indicated she knew the difference between truth and falsehood, and knew she need to testify truthfully, but was not responsive to most of trial counsel's direct questions about the abuse of herself and other children. It should also be noted that the girl was testifying from a remote location over closed circuit television. That alternative form of testimony was not was not an issue in the CAAF case. *Id.* at 3.

argument, noting the absence of any defense request to question the girl about the tape or have the judge recall her.[100]

Compulsory Process

Not only does the Sixth Amendment allow an accused to confront witnesses against him, it also guarantees that he will be able to call witnesses in his favor.[101] This right of compulsory process is well settled in American jurisprudence.[102] In the military of course, the trial counsel exercises the right to subpoena witnesses while the command pays their expenses.[103]

The CAAF, facing a slightly different issue this year, addressed whether the defense is entitled to witnesses who will cost the government nothing to produce. Lieutenant Colonel Breeding was an Air Force chaplain charged with assault, communicating a threat, and kidnapping his wife, stepson and daughter.[104] The defense requested twenty-three witnesses to testify about various aspects of his character and his mental state. Ultimately, the judge ordered production of approximately two-thirds of the witnesses.[105]

The majority first analyzed Rule for Courts-Martial (R.C.M.) 703 and its requirement that the defense provide a synopsis of the expected testimony of its requested witnesses, sufficient to show relevance and necessity.[106] The CAAF then turned to Military Rule of Evidence 405 for a discussion of relevance as it pertains to reputation and opinion.[107] The court next conducted a detailed discussion of the foundational elements for reputation and opinion evidence.[108] Finally, the court examined the proffers of evidence for the defense witnesses in the case and concluded that they were insufficient to establish a valid basis for opinion or reputation testimony.[109]

The reader might observe that, given the number of witnesses requested and those actually produced, the judge's ruling could best be supported by arguing that many of the witnesses

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99. *Id.* at 2. The defense contended that in order to cross-examine the girl about the interview, the defense would have had to offer the tape during its case in chief or risk antagonizing the members by recalling the young girl to the stand after it was offered by the prosecution. *Id.* at 8. The defense also argued that uncharged misconduct was improperly admitted and that the tape lacked adequate indicia of reliability. *Id.* at 2. For a brief discussion of the Sixth Amendment considerations when a witness appears at trial, *see supra* note 48.

100. *Casteel*, slip op. at 7-8. Chief Judge Cox observed that the mere fact of recalling the witness to the stand would not have annoyed the members as much as hostile questioning. As for the latter, that is always a risk one takes with rigorous cross-examination. *Id.* Chief Judge Cox added that the defense probably would have gained little by cross-examining the girl because she had already testified she did not remember anything and questioning may have jogged her memory. *Id.*

101. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor").

102. Washington v. Texas, 388 U.S. 14 (1967); United States v. Nixon, 418 U.S. 683 (1974); United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d).

103. *See* MCM, *supra* note 5, R.C.M. 703(c), (e)(2)(D) discussion.

104. United States v. Breeding, 44 M.J. 345 (1996). The granted issue was:

> Whether the judge abused his discretion both by denying certain defense requests for the production of certain witnesses and by persisting in his denial of said witnesses notwithstanding the willingness of the defense to relieve the prosecution of the expenses associated with their appearance at trial, thereby depriving appellant of his Sixth Amendment right to equal opportunity to obtain witnesses under R.C.M. 703.

Id. at 347.

105. *Id.* The judge granted three of six witnesses requested on military character and duty performance, nine of 13 on peacefulness, none on truthfulness, and five out of six on the accused's mental state. *Id.* The accused and his wife had long-standing marital problems and part of his defense at trial was her instability and volatility. *Id.*

would be cumulative because an accused has no right to present cumulative testimony.[110] The majority did briefly address this aspect of the case, although the discussion makes a curious reference to the failure of the defense to renew its request for witnesses on truthfulness after the accused testified.[111] Such a reference is interesting, because it appeared clear from the beginning of the trial that the accused would testify, and the judge never conditioned his witness production ruling on uncertainty over the defense plan in this regard.[112]

In a concurring opinion, Judge Sullivan directed his attention to the granted issue.[113] The defense had argued that the subpoena system in the military is unfair because the trial counsel controls the production of witnesses for both sides. The defense contended that an accused should be able to subpoena his own witnesses, as long as the government does not have to finance them, as in the federal courts.[114] Judge Sullivan rejected that argument and concluded that a military judge does not have

106. MCM, *supra* note 5, R.C.M. 703(b)(1). R.C.M. 703 provides in relevant part:

> (a) *In general*. The prosecution and defense shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.
> (b) *Right to Witnesses*.
> (1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary . . . .
> . . .
> (c) *Determining which witnesses will be produced*.
> . . .
> (2) *Witnesses for the defense*.
> (B) *Contents of request.*
> (i) *Witnesses on merits or interlocutory questions*. A list of witnesses whose testimony the defense consider relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

107. *Breeding*, 44 M.J. at 350 (citing MIL. R. EVID. 405).

108. *Id.* at 350-51. The court described these elements as: the name of the witness, whether the witness belongs to the same community or unit as the accused, how long the witness has known the accused, whether he knows him in a professional or social capacity, the character trait known, and a summary of the testimony about it. *Id*.

109. *Id.* at 351. The proffer on one witness read as follows:

> Major (Chaplain) Gustaf Steinhilber . . . was assigned with Lieutenant Colonel Breeding in Germany and is aware of the marital problems between LtCol Breeding and his wife. He knew LtCol Breeding from August in 1988 until LtCol Breeding left Germany for his assignment to Offutt Air Force Base, and worked closely with him throughout that time. Chaplain Steinhilber has a background [in] marital and family counseling . . . He counseled LtCol Breeding and Elizabeth Breeding concerning their marital problems roughly six times. He will testify concerning LtCol Breeding's good military character and non-violent nature. He will testify as to Mrs. Breeding's aggressiveness, her provocative and demanding attitude toward her husband, and LtCol Breeding's tendency to internalize his frustration with his wife's behavior. He will testify as to Elizabeth Breeding's mood swings, rigidity and tendency to get extremely emotional, all of which [a]ffects her credibility as well as her ability to accurately perceive the events she will be testifying about. He will testify that in his opinion Elizabeth Breeding is prone to exaggeration because she tends to [see] things as black and white, and he therefore has a poor opinion of her character for truthfulness. In the event of a conviction, Chaplain Steinhilber will also be wanted as a witness for sentencing. Chaplain Steinhilber worked with LtCol Breeding for several years and can testify as to LtCol Breeding's good duty performance as well as his personal observations of the mental suffering endured by LtCol Breeding because of the marital difficulties between himself and Mrs. Breeding. He will testify that LtCol Breeding was in a difficult position while assigned to Germany because he was an Air Force Chaplain on a base comprised primarily of Army personnel, and that LtCol Breeding did a good job under those circumstances
> .

Id. at 347. Concerning the proffer, the majority concluded that it did not show that Chaplain Steinhilber knew the accused long enough to form an opinion about him or know his reputation in the community. The fact that he interviewed them six times was not sufficient information without knowing the length or intensity of the interviews. *Id.* at 351. An offer of proof on testimony to be provided by the accused's sister was not sufficient because, although she grew up with him and they attended college together, that was twenty years prior and there was no explanation of contact since then. *Id.*

110. United States v. Harmon, 40 M.J. 107 (C.M.A. 1994) (accused had no right to present testimony of witness when three other witnesses had already provided similar testimony).

111. *Breeding*, 44 M.J. at 352. Clearly, witnesses as to truthfulness would not have been relevant at all unless the accused placed his credibility in issue. MCM, *supra* note 5, MIL. R. EVID. 608.

112. *Breeding*, 44 M.J. at 351. The judge indicated that based on the large number of witnesses involved, he might reconsider his ruling but that the argument would have to be "very persuasive." *Id. See* United States v. Sheridan, 43 M.J. 682 (A.F. Ct. Crim. App. 1995) (counsel need not renew an objection when the judge has ruled finally), *petition denied*, No. 96-0414 (CAAF Apr. 26, 1996).

113. *Breeding*, 44 M.J. at 352-54 (Sullivan, J., concurring).

authority to order a defense subpoena solely on the basis of the defense offer to pay the witness' fees. Further, this lack of authority does not violate Article 46 or constitutional rights, because the standard for both government and defense witnesses is the same--relevant and necessary.[115]

The message is clear: defense counsel need to be more detailed in their synopses of expected testimony. Notwithstanding the dictionary's definition of synopsis as " a brief statement or outline of a subject,"[116] it would appear that the CAAF's view is more exhaustive, and counsel should not hesitate to address all aspects of a witness's expected testimony when litigating the production of that witness.

Consider the defense argument that the military system for obtaining witnesses is unfair.[117] A possible alternative might be separate funding for government and defense witnesses. That raises questions, however, such as: who would oversee the defense funds and how would the funds be allocated among various accused. Occasionally, a staff judge advocate recommends alternate disposition because the command lacks the funds to try a case that will require travel of a large number of witnesses. How would the defense deal with that scenario?

Another alternative would continue command funding of witnesses, but place the power to subpoena with the military judge.[118] That way, a neutral party would rule on all witnesses. Problems are also evident with this approach, however. For example, many judges are not based at the site of the courts-martial, and judicial involvement with witness requests would only make the trial process more cumbersome. To the extent that requested witnesses are not in dispute, involving the judge seems unnecessary and inefficient.

Perhaps the defense bar would do well to remember the old adage: Be careful what you ask for, you might get it. Changing the way we produce witnesses would probably create more problems than it would solve. Any advantage the trial counsel gets under the current rules, such as learning of the defense witnesses in advance, is minimal in light of the defense's disclosure obligation to provide a list of witnesses it plans to call, regardless of the need for subpoenas.[119]

The ability to subpoena videotapes from the media was the subject of a recent decision by the Navy-Marine Corps Court of Criminal Appeals. The accused in *United States v. Rodriguez*[120] was suspected of dealing in firearms. Law enforcement organizations planned to apprehend the accused while traveling and, expecting a big bust, invited NBC News along.[121] The cameramen filmed the traffic stop, arrest and roadside interrogation of the accused. Prior to trial, the defense moved to compel production of the "outtakes" filmed by NBC.[122] NBC turned over only the broadcast material and cited a First Amendment newsgathering privilege for the remainder. The judge refused to abate the proceeding to compel production of the tapes.

In deciding whether Article 46[123] or the accused's Fifth or Sixth Amendment rights were violated, the Navy-Marine court determined that NBC likely would have prevailed on its First Amendment challenge.[124] The court concluded that the government took all reasonable steps to acquire the tapes. Additionally, the judge did not abuse his discretion in declining to abate

114. *Id.* (comparing FED. R. CRIM. P. 17 with R.C.M. 703). FED. R. CRIM. P. 17(a) states that a clerk of court can issue signed subpoenas to the parties, who then fill in the witnesses' names. Only when a defendant is unable to pay the witness' expenses is he required to apply to the court for issuance of a subpoena. Under R.C.M. 703, on the other hand, the defense must go to the trial counsel for all witnesses. If the trial counsel opposes the request, then the defense may move the judge for production of witnesses. The trial counsel, of course, is the master of his own destiny in terms of production of witnesses the government wants, subject to fiscal limitations.

115. *Breeding*, 44 M.J. at 355.

116. AMERICAN HERITAGE DICTIONARY 1305 (1976).

117. *See supra* note 114 and accompanying text.

118. FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 785 (1991) (suggesting this be done ex parte).

119. *See* MCM, *supra* note 5, R.C.M. 701(b)(1)(A).

120. 44 M.J. 766 (N.M.Ct.Crim.App. 1996).

121. *Id.* at 769. The Naval Investigative Service (NIS) and Bureau of Alcohol, Tobacco and Firearms (ATF) began a joint investigation after ATF agents noticed that the accused, who was not registered as a gun dealer, bought many handguns in a short period of time. One weekend, they found out from an informant that the accused would be driving from Virginia, where he worked, to New York City to see his family. Although guns were not mentioned, ATF and NIS agents, riding in unmarked cars, watched the accused pick up three people and drive north. As the convoy drove through Maryland, state troopers stopped the ATF car for speeding. *Id.* When apprised of the mission, state troopers agreed to stop the accused under the pretext of a traffic stop. A trooper stopped the accused for tailgating. After receiving a warning for the traffic offense, the trooper asked if he could search the car and the accused agreed. *Id.* at 770. After the search (conducted by a state trooper and ten ATF agents) began, an ATF agent questioned the accused. No guns were found during the search, which lasted an hour and a half, but the accused was arrested after he made certain admissions. *Id.*

122. *Id.* at 777. Outtakes are tapes that are not shown during the broadcast.

123. UCMJ art. 46 (1988) (trial counsel and defense counsel shall have equal opportunity to obtain witnesses and evidence).

the proceedings, as several witnesses testified about the stop and the government was willing to stipulate to the testimony of another defense witness.

Another case dealing with the subpoena power involved the judge's authority to rule on a challenge to subpoenas issued pursuant to the Right to Financial Privacy Act (RFPA).[125] In *United States v. Curtin*,[126] the trial counsel issued subpoenas for financial records belonging to the accused's wife and father. They received notice, as required by law, and moved to challenge the subpoenas at accused's court-martial. The military judge refused to act on the motion, holding that the proper forum was federal district court because the subpoenas were administrative, issued by the trial counsel and not by the judge.[127]

The CAAF held that the subpoenas were "judicial"[128] within the meaning of both the RFPA and R.C.M. 703. When a trial counsel issues such a subpoena, he performs a function similar to that of a United States district court clerk.[129] The proper place to challenge an RFPA subpoena is in "the court which issued the subpoena." The appellate court concluded that when the trial counsel issues the subpoena, the forum for challenge is a court-martial.[130]

Ineffective Assistance of Counsel

The Sixth Amendment also guarantees that the accused is entitled to effective assistance of counsel.[131] The seminal case of *Strickland v. Washington*[132] established the test for ineffective assistance of counsel: deficient performance by counsel and prejudice to the accused, that is, errors so serious that the accused did not receive a fair trial.[133] *United States v. Harness*[134] deals with the aftermath of a Marine who lied about passing the bar when he applied to the Marine Corps for a commission as a judge advocate.[135] The Marine captain and a civilian lawyer jointly represented the accused at his court-martial. On appeal, the defense did not raise ineffective assistance of counsel; rather, it argued that the accused's Article 38[136] right to be represented by qualified military counsel had been violated because his detailed military counsel fraudulently obtained his certification.

Conceding that the government failed to comply with Article 38, the Navy-Marine court then explored whether that failure materially prejudiced "substantial rights of the accused." The court held that the proper framework for such an analysis was the *Strickland* test and concluded that the joint efforts of both counsel in this case constituted adequate performance.[137]

The question then becomes: is it better to be represented by someone who has not passed the bar or one who sleeps through

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124. *Rodriguez*, 44 M.J. at 778. To overcome the First Amendment barrier, the defense would have to have shown that the tapes were "highly material, necessary or critical to an issue at trial, and not obtainable from other sources." *Id.* at 777.

125. The RFPA prescribes procedures for the government to follow in obtaining financial records. The government must provide notice to the person whose records are being sought. Additionally, the notice must include a description of the means to challenge the subpoena. 12 U.S.C. §§ 3405, 3407 (1988).

126. 44 M.J. 439 (1996) (citing 12 U.S.C. §§ 3401-12 (1988)).

127. *Id.* at 440. The government filed a petition for extraordinary relief asking that the judge be ordered to exercise jurisdiction and consider the challenges to the subpoenas.

128. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS, para. 2-5b (15 Jan. 1982) (IO1, 9 Apr. 1990) (judicial subpoena includes a subpoena issued pursuant to R.C.M. 703 and Article 46).

129. *Curtin*, 44 M.J. at 441. The fact that the trial counsel acts in a ministerial capacity does not make the subpoena an administrative one.

130. *Id.*

131. U.S. CONST. amend. VI ("In all criminal Prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").

132. 466 U.S. 668 (1984).

133. *Id.* at 687. The Court explained that prejudice is shown if there is a reasonable probability that, but for counsel's errors, the result would have been different. *Id.* at 694. In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court further clarified the prejudice prong: it focuses on whether the trial result was unfair or unreliable, not simply on whether the outcome might have been different.

134. 44 M.J. 593 (N.M.Ct.Crim.App. 1996).

135. Captain Jeff Zander graduated from law school but never passed a bar exam. He fraudulently obtained another man's bar certificate from the state of California by misrepresenting that he had changed his name. He then applied to the Marine Corps, falsely asserting that he was a member of the California bar. Captain Zander was court-martialed for false official statement as well as wearing unauthorized medals. Lincoln Caplan, *The Jagged Edge*, ABA JOURNAL, Mar. 1995, at 52. *See* MCM, *supra* note 5, pt. IV, paras. 31, 113.

136. UCMJ art. 38 (1988) (the accused may be represented by detailed military counsel who is detailed under article 27).

137. *Harness*, 44 M.J. at 595. The court declined to adopt a per se rule of ineffectivenss when an unlicensed attorney represents the accused.

court? In *Tippins v. Walker*,[138] a case in a civilian jurisdiction, the defense counsel was "unconscious for numerous extended periods of time during which the defendant's interests were at stakes." He slept every day of trial and the judge reprimanded him twice.[139] Without deciding whether a sleeping counsel creates per se prejudice under the *Strickland* test, the Second Circuit found prejudice.

Ineffective assistance of counsel during the pre-sentencing phase was at issue in *United States v. Boone*.[140] After the accused was found guilty of attempted rape and rape,[141] his civilian defense counsel presented no extenuating or mitigating evidence except for a short unsworn statement, which counsel gave orally on the accused's behalf.[142] The members sentenced the accused to a dishonorable discharge, confinement for sixty years, reduction to E1 and total forfeitures.[143]

After reviewing affidavits from both counsel, the CAAF found that the civilian counsel, either alone or in conjunction with the military counsel, was ineffective. Although the military counsel interviewed three noncommissioned officers who had positive things to say about the accused's duty performance and attitude, and the accused had a good military record up to that point, including service in Germany and during Operation Desert Storm, civilian counsel apparently did not explore this potential evidence. The accused's uncle, an Air Force major who paid the civilian counsel's fees and was willing to testify, also would have been a helpful witness. The court reassessed the sentence and reduced the confinement to forty years.[144]

In an interesting Air Force case, faulty legal advice to the accused concerning contact with witnesses was held ineffective assistance of counsel. In *United States v. Sorbera*,[145] the accused, a thirty-six year old technical sergeant with seventeen years of service, was charged with indecent acts with his eleven year old daughter by a previous marriage.[146] The accused, a deeply religious person, vigorously denied the allegations. His command ordered him not to have any contact with his daughter. Suspicious that the allegations were based on a custody dispute, his civilian defense counsel advised the accused to call his ex-wife and offer her custody of the girl and child support, to advise her of the consequences if the girl continued to lie, and to find out if the mother was using the girl as a pawn.[147]

The accused called his ex-wife, and during the one-hour conversation, urged his ex-wife to prevent the girl from continuing to lie and from returning to Germany to testify.[148] The command preferred an additional charge of obstruction of justice. He was convicted of obstruction of justice and acquitted of indecent acts.[149] The Air Force Court of Criminal Appeals held that pretrial advice may constitute ineffective assistance of counsel where, as here, counsel failed to caution the client of

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138. 58 CRIM L. REP. (BNA) 1548 (2d Cir. Mar. 7, 1996).

139. *Id.* The periods of time during which he slept included the testimony of a critical prosecution witness and the co-defendant.

140. 44 M.J. 742 (Army Ct. Crim. App. 1996).

141. *Id.* at 743. The accused was convicted of raping two women, whom he met at nightclubs. His defense was consensual sex with one woman and he denied ever meeting the other woman. He was convicted of attempted rape of a third woman, whom he met at the same club as one of the other rape victims. The accused claimed that this sex was also consensual. United States v. Boone, 42 M.J. 308, 309-11 (1995).

142. *Boone*, 44 M.J. at 743 n.1. The unsworn statement described the accused's background, noted that this was his first disciplinary incident, and expressed remorse for the events. No witnesses were called despite willingness of the accused's mother and uncle to testify. *Id*. The accused filed a complaint about his counsel's services with the State Bar of Texas. That complaint resulted in a public reprimand of the lawyer for "neglecting a legal matter entrusted to him." United States v. Boone, 39 M.J. 541, 542 (A.C.M.R. 1994).

143. *Boone*, 44 M.J. at 743. The convening authority reduced the length of confinement to fifty years. *Id.* After the Army Court of Military Review initially affirmed the case, 39 M.J. 541 (A.C.M.R. 1994), the CAAF remanded the case for factfinding on effectiveness of counsel during sentencing. *Boone*, 42 M.J. at 314.

144. *Boone*, 44 M.J. at 746-47. The appellant had also argued that his mother was ready and willing to testify about his background and good character. *Id*. at 743. In his affidavit in response to the court's concerns, the civilian defense counsel said that the accused specifically stated that he did not want his mother at the court-martial. The court accepted counsel's explanation. *Id.* at 746.

145. 43 M.J. 818 (A.F. Ct. Crim. App. 1995).

146. *Id.* The girl came to Germany to live with the accused and his second wife. She stayed with them for three and a half years, but began to have problems so she returned to the United States to live with her mother. After living with her mother for seven months, she wrote a note claiming that the accused had molested her. *Id*. at 820.

147. *Id.* The accused told him about the no contact order, but the attorney said it was permissible to call because the accused would talk with the ex-wife and not the daughter. *Id.*

148. *Id.* They also discussed child support, custody, and the ramifications to mother and daughter if the daughter testified against him. The next day the accused told his military counsel about the call, who advised him that it probably was not a good idea to have made the call. Meanwhile, the ex-wife reported the call to the legal office at a nearby military installation. *Id.*

149. *Id.* Apparently the girl's credibility was poor, and the defense called several good character witnesses. *Id.*

the potential drawbacks. The advice was unreasonable under prevailing professional norms and, therefore, constituted deficient performance, especially in light of the fact that the accused was unaware of the legal consequences of his action.[150] His conviction on the obstruction of justice charge established prejudice because the accused had no reason to believe that following the advice would result in an additional charge.[151]

Discovery

This year's developments in the area of discovery illustrate the liberal attitude the military has towards the release of information to the accused.[152] Failure to scrupulously follow discovery obligations continues to haunt trial counsel and creates needless appellate litigation. When prosecuting related cases,it can be a trial counsel's organizational nightmare to ensure that all the evidence is disclosed to the different defense counsel handling the cases. That may have been what led to the discovery problem in *United States v. Romano*.[153] In *Romano*, an investigation began into charges that the accused fraternized with a female servicemember, Airman Mucci. Mucci initially told her first sergeant that she dated the accused, then later told others that she had lied. Eventually charges were preferred against Airman Mucci, the accused, and another servicemember, Sergeant Mitchell.[154] Two witnesses testified at Sergeant Mitchell's Article 32 hearing that Mucci told them that she lied to the first sergeant about the accused.[155]

At trial, Airman Mucci testified that she had dated the accused. After the trial, the defense discovered that the two prior inconsistent statements Mucci made to the witnesses who testified at Sergeant Mitchell's Article 32 hearing had not been disclosed, despite a defense request.[156] The Air Force court held that the statements should have been disclosed under R.C.M. 701(a)(2)(A).[157] In addition, the government should have turned them over as *Brady*[158] material because the statements directly contradicted the airman's testimony and reflected on her credibility. Nevertheless, the nondisclosure was harmless beyond a reasonable doubt because other prior inconsistent statements were brought out at trial.[159]

Although oversights like the above occur, most trial counsel are aware of the duty to turn over exculpatory material to the defense. As a result of *United States v. Simmons*,[160] counsel are also on notice that they must seek out and disclose to the defense favorable examinations, tests, and experiments in the

150. *Id.* at 821. The court acknowledged that the exact language the attorney used was unclear; however, he had advised the accused to make the call with the intent to discourage the girl from testifying. The court concluded that any competent counsel should have seen the danger of this approach and taken steps to ensure that the accused did not exceed permissible grounds. *Id.*

151. *Id.* at 822. The findings and sentence were set aside and the charge dismissed. *Id.*

152. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990) (discovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants); MCM, *supra* note 5, R.C.M. 703 analysis, app. 21, at A21-31-32.

153. 43 M.J. 523 (A.F. Ct. Crim. App. 1995), *petition granted*, 44 M.J. 76 (1996).

154. *Id.* at 525. Sergeant Mitchell was Airman Mucci's immediate supervisor and tried to persuade her to deny any social relationship with the accused. The noncommissioned officer was also in frequent contact with the accused during the investigation. *Id.*

155. *Id.* at 526. A master sergeant (E-7 in the Air Force) who worked for the first sergeant testified that Airman Mucci admitted to him that she had lied to the first sergeant when she said she dated the accused. An Air Force judge advocate who had previously represented Sergeant Mitchell in an unrelated matter, testified that Airman Mucci spoke to him on the phone and told him that the legal office and her defense counsel were trying to get her to lie about her relationship with the accused. *Id.* at 525.

156. *Id.* at 526. Prior to trial the defense requested disclosure of statements by potential witnesses, exculpatory evidence, or "any known evidence tending to diminish credibility of witnesses." *Id.*

157. *Id.* at 527. That part of the rule requires the trial counsel to disclose "books, papers, documents" that are within the "possession, custody, or control of military authorities" and which are "material to the preparation of the defense." MCM, *supra* note 5, R.C.M. 701(a)(2)(A).

158. Brady v. Maryland, 373 U.S. 83 (1963). The seminal Supreme Court discovery case held that the failure to disclose material evidence favorable to the defense violates due process. The military's version of the *Brady* requirement is in R.C.M. 701(a)(6), which provides:

> *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to :
> (A) Negate the guilt of the accused of an offense charged;
> (B) Reduce the degree of guilt of the accused of an offense charged; or
> (C) Reduce the punishment.

159. *Romano*, 43 M.J. at 527-28. The court noted that the statements actually could have hurt the defense case by supporting the prosecution theory that Sergeant Mitchell, Airman Mucci and the accused conspired to obstruct justice. *Id.* at 528.

160. 38 M.J. 376 (C.M.A. 1993). *Simmons* involved the failure to disclose statements made to a CID polygrapher by two sexual assault victims. Statements by one of the victims reflected an ambivalent attitude towards the accused's actions. Neither counsel knew about the statements, but the CAAF held that the language of R.C.M. 701(a)(2)(B) required the trial counsel to "exercise due diligence" in searching for such information. *Id.* at 381.

hands of military investigative authorities. The Navy-Marine court recently extended that duty to information in the hands of other official agencies within the military.

In *United States v. Sebring*,[161] the accused was found guilty of use of marijuana based on a positive urinalysis result. The government evidence included testimony by the executive officer of the Navy drug lab that tested the accused's sample. He testified about the procedures at the lab and their high degree of reliability, which he described as "99.99 percent" accurate.[162] The defense focused on lax collection efforts at the unit, and also presented good character evidence.[163] Unknown to both trial and defense counsel, a quality control report existed that described "data alteration" at the lab over a six-month period, starting one month before the accused's sample was tested.[164]

The court noted the submission of a defense discovery request and held that quality control reports fall within the type of information subject to disclosure under R.C.M. 701(a)(2)(B).[165] The materiality[166] of the information was the next issue the court addressed. The court relied on the "reasonable probability" standard[167] and noted recent Supreme Court holdings describing that test as a determination of whether the non-disclosed evidence could put the case in such a different light as to undermine confidence in the verdict.[168] Although the defense did not specifically attack the lab results, the report of problems at the lab could have been used to impeach the lab's reliability and minimize the value of the test results. The court concluded that the information could have put the whole case in a different light.[169]

In dicta, the Navy-Marine court discussed the parameters of the *Simmons* case. Notwithstanding *Simmons's* limitation of the due diligence requirement to disclose tests, experiments and exams under R.C.M. 701(a)(2)(B) and the absence of any "due diligence" language in other parts of the discovery rule, the service court nevertheless concluded that this duty extends to all *Brady* material. The court relied on *Kyles v. Whitley*[170] for this proposition, pointing out that the prosecutor has a duty to learn about information in the hands of other entities that act on the government's behalf.[171] In this case, the trial counsel had a duty to discover and disclose the information held by a government drug lab that was favorable to the accused. One issue that

161. 44 M.J. 805 (N.M.Ct.Crim.App. 1996).

162. *Id.* at 806. The Navy Drug Screening Laboratory in Norfolk, Virginia tested accused's sample. The executive officer, who testified as an expert, testified about the methods used to test drug samples, the results of tests run on accused's sample, and the significance of those results. *Id.*

163. *Id.* The accused testified that someone tampered with her sample when she left it unattended for fifteen to twenty minutes while she helped another service-member who got sick during the urinalysis. The defense did not attack the testing procedures of the drug lab. The defense also presented testimony that the accused was a good duty performer who would not have used drugs because she was trying to get pregnant and thought she was pregnant at the time. *Id.*

164. *Id.* at 807. The report was the result of an internal investigation. Although the trial counsel did not know the report existed, both the commanding officer and executive officer of the lab did. *Id.* The report was not disclosed despite a defense request for "all quality control program reports and records of incidents of employee errors, negligence and misconduct in processing urine samples." *Id.*

165. *Id.* (citing MCM, *supra* note 5, R.C.M. 706(a)(2)(B)). R.C.M. 706(a)(2)(B) provides, upon request by the defense, for disclosure of:

> results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

See Sebring, 44 M.J. at 808 n.1 (observing that the 1994 and 1995 editions of the *Manual for Courts-Martial* deleted the words "or by the exercise of due diligence may become known").

166. Materiality should be distinguished from relevance. In a discovery context, materiality refers to the effect the information would have had on the trial if it had been disclosed. United States v. Agurs, 427 U.S. 97 (1976). Just because something is relevant does not mean it is material. "It requires 'some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.'" United States v. Branoff, 34 M.J. 612 (A.F.C.M.R. 1992) (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir.), *cert. denied*, 423 U.S. 836 (1975), *set aside on other grounds & remanded*, 38 M.J. 98 (C.M.A. 1993)).

167. A "reasonable probability" is "a reasonable probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). In terms of materiality of nondisclosed evidence, it is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1984).

168. *Sebring*, 44 M.J. at 809 (citing Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995)).

169. *Id.* at 810. Rather than a test of sufficiency of the evidence, the focus is on whether confidence in the verdict is undermined. In this case it was. *See Kyles*, 115 S. Ct. at 1566; Donna M. Wright, Note, *Will Prosecutors Ever Learn? Nondisclosure at Your Peril*, ARMY LAW., Dec. 1995, at 74, 77.

170. 115 S. Ct. 1555 (1995).

171. *Sebring*, 44 M.J. at 810.

remains is what other agencies act on the government's behalf. It requires no torturous thinking to conclude that a military drug lab testing urine samples for the presence of illicit drugs was "acting on the government's behalf." Consider other scenarios: a statement made by an assault victim to medical personnel at a military hospital that he did not see his assailant; a comment by a registered source to a drug and alcohol counselor that he continued to use drugs while working for the government. Do those agencies act on the government's behalf? If so, the next question concerns the limits of due diligence. These are the disclosure issues that the military courts will likely face in the near future.

The Supreme Court this term determined the standard to be applied when the defense requests documents for a claim of selective prosecution. The African-American defendants in *United States v. Armstrong*[172] were charged with various drug and firearms offenses in federal court. They moved for discovery or in the alternative, dismissal of the indictment, on the grounds that they were prosecuted because of their race.[173] The district court granted the motion for discovery and ordered the government to produce a number of documents in connection with the case.[174]

The Supreme Court, in an opinion written by Chief Justice Rehnquist, began its analysis by looking at Federal Rule of Criminal Procedure 16, which provides for the disclosure of documents in the government's possession that are either material to the preparation of the defense or intended for use by the government in its case-in-chief.[175] Regarding the materiality requirement, the Supreme Court ruled that the term "defense" means a defense on the merits, not the litigation of motions.[176]

The Court held that selective prosecution is not a defense to the merits of a charge itself. Selective prosecution claims have a high standard, so discovery for such claims should also have a high standard. That standard is a credible showing of different treatment of similarly situated persons.[177]

Arguably, the case may be of limited precedential value to the military practitioner because of Article 46 and the military's more liberal attitude towards disclosure to the defense.[178] It is likely that the military would not take the narrow view of "material to the preparation of defense"[179] that the Supreme Court did. In addition, even if not discoverable under R.C.M. 701(a)(2)(B), documents relating to a selective prosecution claim might be relevant during the sentencing proceedings and therefore, subject to disclosure under provisions of R.C.M. 701(a)(6).[180] Playing it "safe" is always the best policy for the government in the area of discovery; a conviction has never been overturned because too much information was disclosed to the defense.

The final discovery case to figure prominently this year involved the destruction of evidence. In *United States v. Mantilla*,[181] the accused was convicted of wrongfully possessing,

172. 116 S. Ct. 1480 (1996).

173. *Id.* at 1483. The only support for their motion was an affidavit by a "paralegal specialist," who worked at a federal public defender office. The affidavit stated that there were twenty-four federal drug cases handled by that office in a one-year period, and in every case the defendant was African-American. A study was attached that listed the name of each of these defendants, their race, whether they were prosecuted for cocaine or crack, and the status of each case. *Id.*

174. *Id.* at 1484. The district court ordered the government to (1) provide a list of all cases in the last three years where the government charged both cocaine and firearms offenses, (2) identify the races of those defendants, (3) identify the levels of law enforcement used to investigate those cases, and (4) explain its criteria for prosecuting those defendants for federal cocaine offenses. *Id.* The government moved for reconsideration, which was denied. The government asked the court to dismiss the indictments so it could appeal. A three-judge panel of the Ninth Circuit reversed, holding that the defense must show a colorable basis for believing that others similarly situated have not been prosecuted. The Ninth Circuit en banc affirmed the district court, agreeing that the defense need not make this showing. *Id.*

175. *Id.* at 1485 (citing FED. R. CRIM. P. 16(a)(1)(C)). That section of the rule mirrors R.C.M. 701(a)(2)(A) to a large extent. *See supra* note 157.

176. *Armstrong*, 116 S. Ct. at 1485. The Court reasoned that the plain language of the rule demanded such a reading. The second phrase requires disclosure of evidence that will be used by the government in its case in chief. Therefore, a "symmetrical" reading of the rule would mean that "preparation of the defense" is limited to preparation for the defense on the merits. *Id.* Also, under a different part of rule 16, the defense is not entitled to government work product, that is, reports, memoranda, and other internal documents made by the government in connection with the investigation or prosecution of the case. FED. R. CRIM. P. 16(a)(2). The Court indicated that it would make no sense to allow the defendant access to documents concerning other cases and not his own. *Armstrong*, 116 S. Ct. at 1485.

177. *Armstrong*, 116 S. Ct. at 1489. The defense failed to meet that standard. The only evidence presented was the following: (1) an affidavit by an intake coordinator at a drug clinic which claimed that an equal number of Caucasian and minority dealers and users sought treatment, (2) an affidavit from a criminal defense attorney that in his experience many non-African Americans were prosecuted in state court, and (3) a newspaper article that federal crack criminals were punished more severely than powdered cocaine offenders and every one was African-American. The Supreme Court dismissed these conclusions as based on "anecdotal evidence and hearsay." *Id.*

178. *See supra* note 152; s*ee also* United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986) (when Congress enacted Article 46, discovery rights for state and federal defendants were almost nonexistent, and it intended more generous discovery for the military accused).

179. *See supra* note 165.

180. *See supra* note 158.

181. No. ACM 31778, 1996 WL 520980 (A.F. Ct. Crim. App. Sept. 12, 1996).

distributing, and communicating the contents of materials for an Air Force promotion exam to another noncommissioned officer, who testified against him. During pretrial preparation, defense counsel learned that the witness made flash cards and wrote notes on his study guide. The defense requested these materials, but the witness had already destroyed them.[182]

The Air Force court found no violation of due process. No bad faith was shown, law enforcement personnel never possessed the materials, and the witness was not credible when he said that agents told him it was permissible to throw out the study materials. Finally, the materials had no apparent exculpatory value.[183]

Mental Responsibility/Competency to Stand Trial

The Supreme Court reviewed a state's competency standard this term. Oklahoma's competency standard requires a defendant to prove by clear and convincing evidence that he is not competent to stand trial.[184] The defense in *Cooper v. Oklahoma*[185] raised the issue of the defendant's competency several times before and during the trial.[186] In a unanimous opinion, the Court confronted the issue of what competency standard is constitutionally required. The Court noted that the test for competency is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; that is, whether he has a rational and factual understanding of the proceedings.[187] The Court also acknowledged its precedent that a state could place the burden of proof on a defendant to show his incompetence by preponderance of the evidence.[188] Writing for the Court, Justice Stevens then traced the foundations of the competency standard.[189]

The Court concluded that the clear and convincing standard violates due process, because it allows the state to try a defendant who more likely than not is incompetent. It rejected the state's argument that the state's interest in efficient operation of the criminal justice system outweighs the defendant's right to be tried only while competent.[190]

If the defense counsel who sleeps during trial provides ineffective assistance of counsel,[191] is the defendant who falls asleep not competent to stand trial? The Eleventh Circuit recently answered that question in the negative.[192] The defendant slept through "about 70% of his 5 day murder trial" and could not be awakened when the jury departed for deliberations.[193] The judge inquired several times about his physical

182. *Id.* at *3. The defense contended that these materials not only would have shown that the witness had the motive and opportunity to frame the accused, but also that the witness had more answers than just those given to him by the accused. The witness testified at trial that he did not use the materials the accused gave him but made his own flash cards and study guide from his own notes. He said he discarded them after his exam as he always did, before the defense asked for them. The witness also insisted that he checked with OSI agents and they agreed to the destruction. The agents denied ever telling the witness it was fine to dispose of the materials. *Id.*

183. *Id* at *4*; see* California v. Trombetta, 467 U.S. 479 (1984) (no violation of due process for failure to preserve breath samples of drunk driving suspects where exculpatory value of evidence not apparent before destruction, other comparable evidence available, and evidence would not have played a significant role in case).

184. OKLA. STAT., tit. xxi, § 1175.4(B) (1991).

185. 116 S. Ct. 1373 (1996).

186. *Id.* at 1375-76. First, at a pretrial hearing a state clinical psychologist testified that the defendant was not competent and the judge committed him to a state mental health treatment center. Three months later he was released. At a later competency hearing, two psychologists, both working for the state, gave different opinions of the defendant's competence. The judge found him competent. A week before trial, the defense counsel raised the issue again, complaining that the accused refused to talk to him. The judge adhered to his earlier ruling. Once the trial began, the accused refused to wear a suit, insisting that it was "burning" him. He also talked to himself and a spirit who advised him, and on the stand stated that the lead defense counsel wanted to kill him. During his testimony, the defendant shrank in a corner of the witness stand, and when defense counsel approached him he backed up so far he fell off the witness chair and banged his head on a marble wall. The judge still found him competent but said: "My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now to say he's not competent is something else." Further along in the trial, defense counsel moved for a mistrial based on the defendant's behavior. The record of trial reflects that he did not talk to his attorneys, refused to sit near them, remained in prison overalls throughout the trial, crouched in a fetal position and talked to himself. *Id.* at 1376.

187. *Id.* at 1377 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)).

188. *Id.* (citing Medina v. California, 505 U.S. 437 (1992)).

189. *Cooper,* 116 S. Ct. at 1377-80. The Court pointed out that there is little or no guidance as to what standard was applied at early common law. Later cases suggested a preponderance standard. *Id.* In the United States, until recently, all states used the preponderance standard. Even now, a majority of states and the federal government require either a preponderance standard by the accused or the government. *Id.* at 1379-80. Only three other states use the same standard as Oklahoma. *Id.* at 1380 n.16 (citing CONN. GEN. STAT. § 54-56d(b) (1995); 50 PA. CONS. STAT. § 7403(a) (Supp. 1995); R.I. GEN. LAWS § 40.1-5.3-3(Supp. 1995)).

190. *Cooper,* 116 S. Ct. at 1382-83. The Court rejected two other arguments advanced by the state. The state contended that the standard for competency should be the same as the minimal standard for involuntary civil commitment, held to be clear and convincing evidence in *Addington v. Texas*, 441 U.S. 418 (1979). Justice Stevens explained that competency and involuntary commitment decisions address different issues: the former whether the defendant understands the charges and proceedings against him, and the latter whether the defendant is a threat to himself or others. *Cooper,* 116 S. Ct. at 1383-84. The Court also rejected the state's assertion that competency was a procedural rule, which is within the state's authority to promulgate. The Court concluded that a competency standard implicates a fundamental constitutional right and therefore must satisfy the due process clause. *Id.* at 1383.

191. *See supra* text accompanying notes 138-139.

condition and received assurances from the defendant that he was not using alcohol or drugs.[194] After defendant's murder conviction, a psychologist examined him and learned that he had not been sleeping at night because he was using crack and was worrying about the trial.

The standard for competency is whether the accused understands the nature of the proceedings and can assist in the preparation of his defense.[195] Here, the facts raised no substantial doubt about his competency. Even though he slept, he gave lucid and rational answers when the judge questioned him. There was no reason to think he could not communicate with his lawyer about strategy.[196]

Anyone involved in the administration of military justice can request a sanity board.[197] Of course, the defense counsel is the normal requester. Frequently, the government does not want to conduct a sanity board because it believes it is a defense delay tactic. Occasionally, a preexisting mental evaluation of the accused is available that may qualify as an "adequate substitute."[198]

In *United States v. English*,[199] the question of an adequate substitute arose when the accused referred himself to a naval hospital for depression and suicidal thoughts. A psychiatrist and clinical psychologist evaluated him, concluded he was exaggerating his symptoms and reported this to the command. After the command preferred charges of malingering and attempted malingering, the defense requested a sanity board. After hearing the testimony of the two mental health professionals, the judge found the prior mental evaluations to be "adequate substitutes" for a sanity board.[200]

The Navy-Marine court agreed that the evaluations were adequate substitutes, relying on the testimony of the psychiatrist and psychologist that: (1) their exams complied with R.C.M. 706 requirements, including the questions to be addressed; (2) the accused was competent to stand trial and mentally responsible for his actions; and (3) if ordered to conduct a sanity board, they would not need to interview the accused any further or change their opinions regarding his mental status.[201]

Another issue in the case was whether the statements the accused made to the psychiatrist and psychologist were privileged.[202] Curiously, while arguing that these evaluations were adequate substitutes, the government also maintained that because they were not ordered pursuant to R.C.M. 706, statements by the accused were not privileged. Both the trial judge and the appellate court sided with the government, reasoning that the privilege is designed to accommodate the purpose of R.C.M. 706, not to provide a forum for privileged communications for the accused.[203]

Nonjudicial Punishment

The frequent reliance by trial counsel on records of nonjudicial punishment during the pre-sentencing phase guarantees their continued discussion at the appellate level. The issue of

192. Watts v. Singletary, 59 CRIM. L. REP. (BNA) 1411 (11th Cir. July 18, 1996).

193. *Id.* at 1411. The judge was sufficiently concerned about the effect on the factfinder that he instructed the jury not to consider it in their deliberations.

194. *Id.* On the first day of trial the judge noted that the defendant was sleeping. On the second day he asked whether the defendant was using drugs, prescribed or otherwise, or alcohol. The defendant said no and refused to admit that he had been sleeping. He also denied that he was sick or that he had ever been treated for mental illness. *Id.*

195. Dusky v. United States, 362 U.S. 402, 402 (1960).

196. *Singletary*, 59 CRIM L. REP. at 1411. "A represented defendant generally has limited responsibility in conducting his defense and need not participate in the bulk of trial decisions." *Id.* Additionally, because defense counsel did not raise the issue during trial, the court concluded that the situation must not have been that serious. *Id.*

197. Any commander, investigating officer, trial counsel, defense counsel, military judge or court member may request that a sanity board be ordered. MCM, *supra* note 5, R.C.M. 706(a).

198. United States v. Jancarek, 22 M.J. 600 (A.C.M.R. 1986) (evaluation was adequate substitute where it was done by a physician who had completed psychiatric residency, evaluated the accused knowing he was pending charges, and provided a specific diagnosis and testified extensively about his competency to stand trial).

199. 44 M.J. 612 (N.M.Ct.Crim.App. 1996).

200. *Id.* at 613.

201. *Id.* at 613-14.

202. MIL. R. EVID. 302 creates a privilege for statements made by an accused at a mental examination ordered under provisions of R.C.M. 706. Neither the statement nor any derivative evidence can be used as evidence against the accused. MCM, *supra* note 5, MIL. R. EVID. 302. The defense had argued that the rule should apply retroactively. *English*, 44 M.J. at 614.

203. *English*, 44 M.J. at 614-15. This seems to be an incongruous result: on the one hand the evaluation amounts to a sanity board, but on the other hand, it is denied the normal attributes of a sanity board.

proper credit for prior Article 15[204] punishment arose again this term. The *Manual for Courts-Martial* makes it clear that a military member who receives nonjudicial punishment may be court-martialed for the same offense only if it is serious.[205] Even then, the military member must receive complete credit for any punishment already imposed.[206] According to the military's highest court, the convening authority should give the credit.[207]

Last year, the CAAF held that the judge could calculate the credit.[208] In that case, the military judge explained how he offset each form of punishment against each element of the sentence. *In United States v. Castelvecchi*,[209] however, the judge instructed the members to calculate the credit themselves. His instructions were confusing: he told them to determine a sentence for all the offenses that the accused was guilty of and then determine how much of that sentence was attributable to the offense that was the subject of the Article 15. The judge also gave them the wrong equivalent punishment for converting extra duty and restriction to confinement.[210]

This case serves to remind counsel that the best person to calculate the credit is the convening authority.[211] It can be too complicated for the members and, even if the judge is the sentencing authority, there is a greater risk that he will not articulate his math on the record, leaving it unclear whether the accused received appropriate credit.

In a fairly significant case, the CAAF recently rejected the Navy-Marine court's attack on the continued viability of *Booker* warnings. *United States v. Booker*[212] requires that a servicemember be afforded the opportunity to consult with counsel in deciding whether to accept nonjudicial punishment before that Article 15 is admissible at a court-martial. In *United States v. Kelley*,[213] the Navy-Marine Corps Court of Criminal Appeals last year held that *Booker* was no longer good law in light of recent Supreme Court rulings.

In an opinion authored by Senior Judge Everett, the CAAF upheld *Booker* requirements.[214] Records of nonjudicial punishment and summary courts-martial are still not admissible unless the government can show that the accused was afforded the opportunity to consult with counsel. This requirement guarantees a statutory right, that is, the member's right to turn down the proceedings and demand trial by court-martial, a proceeding at which counsel is afforded.

Conclusion

While the CAAF was willing to expand the list of firmly rooted hearsay exceptions, it was less excited about the prospect of further intrusions on the accused's right of confrontation by creating new alternative forms of testimony. It appears the court is trying to steer a middle ground: protecting the accused's constitutional rights while recognizing that occasionally other policy interests can outweigh those rights. Defense counsel should note that even if the client can sleep during trial,

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204. UCMJ art. 15 (1988).

205. UCMJ art. 15(f) (1988) (disciplinary punishment not a bar to trial by court-martial for a serious crime); MCM, *supra* note 5, pt. V, para. 1e (nonjudicial punishment for a non-minor offense does not bar court-martial; minor offense is one in which the maximum punishment would not include a dishonorable discharge or confinement over one year); MCM, *supra* note 5, R.C.M. 907(b)(2)(D)(iv) (prosecution is barred by prior Article 15 punishment for a minor offense).

206. United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (member must receive "day-for-day, dollar-for-dollar, stripe-for-stripe" credit).

207. *Id.* at 369. The convening authority is best suited to give credit because defense might not want to alert the court to the fact that an Article 15 was administered. *Id.*

208. United States v. Edwards, 42 M.J. 381 (1995); *see also* Donna M. Wright, *Sex, Lies, and Videotape: Child Sexual Abuse Cases Continue to Create Appellate Issues and Other Developments in the Areas of Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment*, ARMY LAW., Mar. 1996, at 81.

209. No. 9501455 (Army Ct. Crim. App. 1996), *petition denied*, 45 M.J. 8 (1996).

210. *Id.* The judge told the panel that the forty-five days of restriction and forty-five days of extra duty imposed on the accused was equivalent to thirty days of confinement. Two days of restriction, however, is equivalent to one day of confinement; for extra duty, the ratio is one and a half to one. *Pierce*, 27 M.J. at 369 n.5. So forty-five days of restriction is equivalent to twenty-two and a half days of confinement. Extra duty for forty-five days is equivalent to thirty days of confinement.

211. *See also* Message, Headquarters, Dep't of Army, DAJA-CL, subject: Sentence Credit (221600Z June 94) (convening authority action must state number of days of sentence credit).

212. 5 M.J. 238 (C.M.A. 1977).

213. 41 M.J. 833 (N.M.Ct.Crim.App. 1995) (en banc), *rev'd*, 45 M.J. 259 (1996). The lower court based its decision on Nichols v. United States, 511 U.S. 738 (1994), where the Supreme Court held that a misdemeanor conviction could be used as a prior conviction to enhance the sentence for a subsequent offense even if the defendant had not been represented by counsel. The Coast Guard Court of Criminal Appeals also criticized *Booker* and urged CAAF to relook the case, however it did not go as far as the Navy court in announcing *Booker's* death. United States v. Lawer, 41 M.J. 751, 754 (C.G.Ct.Crim.App.), *pet. denied*, 43 M.J. 159 (1995).

214. United States v. Kelley, 45 M.J. 260 (1996). It is interesting to note that Senior Judge Everett also authored United States v. Mack, 9 M.J. 300, 320 (C.M.A. 1980), where he explained that the rationale behind *Booker* warnings was to give practical meaning to the servicemember's right to turn down Article 15 or summary court-martial proceedings, rather than being grounded in constitutional concerns.

counsel cannot. Trial counsel must be ever vigilant of their disclosure obligations, not only with regard to information they know about, but also in connection with information they should exercise due diligence to find.

Postcards from the Edge[1]: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence

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Introduction

For followers of the Military and Federal Rules of Evidence, the last year has been, in a word, productive. From recognition of a psychotherapist-patient privilege in federal practice to the use of dysfunctional family "profile" evidence in military child abuse cases, from the defense's use of exculpatory polygraph evidence in courts-martial to the government's use of inculpatory hair analysis to prove drug use, recent military and civilian cases provide significant evidentiary tools for the aggressive trial practitioner. This article addresses these and other developments in evidentiary law, focusing on selected decisions by the military and civilian appellate courts during the last year.

Partially Closing the Open Door-- Limitations on Rebutting Defense Character Testimony

The Military Rules of Evidence (MRE) exclude the circumstantial use of a person's character.[2] Generally speaking, the prosecution cannot, in the first instance, introduce character evidence to show that the accused acted in accordance with a particular character trait; in other words, that he committed the charged offense because he is a certain type of person.[3] The prosecution, however, can introduce character evidence responsively.[4] If the defense introduces[5] evidence of a "pertinent"[6] character trait, the trial counsel may rebut it by cross-examining that witness with respect to specific instances of misconduct or other bad acts engaged in by the accused.[7] In *United States v. Pruitt*,[8] the Air Force Court of Criminal Appeals (AFCCA)[9] partially closed the character door by reaffirming existing limitations on the use of extrinsic evidence offered solely to rebut a good soldier defense.

Airman First Class Martell Pruitt was a postal clerk charged with under-reporting the sale of two money orders for $1000 less than their actual value and falsifying documents to cover it up.[10] Pruitt admitted to falsifying one of the money orders with the aid of his then-girlfriend Sarah, but contended it was meant as a paperwork joke on his supervisor.[11] As evidence of his innocence, Pruitt called several witnesses who testified regard-

1. POSTCARDS FROM THE EDGE (Columbia Pictures 1990) (a witty exposé of life in the Hollywood fast lane starring Meryl Streep and Shirley MacLaine).

2. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 404 (1995 ed.) [hereinafter MCM].

3. GLEN WEISSENBERGER, FEDERAL EVIDENCE--1996 COURTROOM MANUAL 48 (1996); s*ee also* United States v. Reed, 44 M.J. 825 (A.F. Ct. Crim. App. 1996) (trial counsel cannot *initiate* evidence of the accused's character by simply cross-examining the accused regarding a pertinent character trait not already placed in issue by the defense).

4. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 320 (6th ed. 1994). "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 492 (1948).

5. Mil. R. Evid. 405(a) recognizes three devices to prove the accused's character: reputation within a pertinent community, opinion of a witness familiar with the character, and specific instances of conduct if character is an element of the charge or defense.

6. Whether a trait is pertinent depends on the relationship between the charged offense and the accused's defense. *See, e.g.*, United States v. Gagan, 43 M.J. 200 (1995) (accused's heterosexuality is a pertinent character trait when offered to disprove homosexual sodomy and indecent assault offenses).

7. *See* United States v. Brewer, 43 M.J. 43 (1996) (trial counsel can test the soundness of opinion testimony through inquiry into relevant specific instances of conduct even though they may not be within the time period upon which the witness bases his or her opinion).

8. 43 M.J. 864 (A.F. Ct. Crim. App.), *review granted*, 45 M.J. 42 (1996).

9. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals (codified at 10 U.S.C. § 866 n. (1995) and 10 U.S.C. § 941 n. (1995)), respectively. The new names are the: Army Court of Criminal Appeals, Navy-Marine Court of Criminal Appeals, Air Force Court of Criminal Appeals, Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. In this article, the name of the court that was in place when the decision was published will be used.

10. *Pruitt*, 43 M.J. at 866.

11. *Id.* at 867.

ing their high opinion of his military character. On cross-examination, the trial counsel asked the witnesses whether they were aware that Pruitt had taped a sexual act with Sarah without her consent and had threatened to send the tape to her mother, that Pruitt had assaulted Sarah on occasion, and that he had also been caught driving while intoxicated (DWI).[12]

While the witnesses conceded that these acts would tend to show poor military character, they testified they did not know whether Pruitt had actually committed them.[13] Not satisfied with these responses, the trial counsel called Sarah to authenticate the tape and corroborate the assault, and introduced a copy of an Article 15 Pruitt received for the DWI. The AFCCA found error, though harmless under the circumstances.[14]

When challenging a good soldier defense, the trial counsel can either call her own reputation and opinion character witness in rebuttal or *inquire* on cross-examination as to the defense witness's familiarity with specific instances of the accused's conduct.[15] She may not, however, introduce independent proof that the acts or events actually occurred,[16] unless the extrinsic proof is offered for a purpose other than to rebut character testimony.[17] Here, while the trial counsel properly asked whether the witnesses were aware of the prior acts, the military judge erred by permitting her to call Sarah to corroborate both the assault and videotaping and by permitting her to introduce extrinsic proof of the DWI.

The Air Force court cautioned practitioners that, when cross-examining a defense character witness with pertinent specific acts, the trial counsel must have a good faith belief that the report or fact she is asking about is true.[18] While the military judge can assume counsel has sufficient proof in hand, the better practice is to voir dire her to determine the good faith basis for the allegations before allowing cross-examination to proceed.[19]

In addition, even if trial counsel are allowed to ask questions regarding pertinent acts of misconduct, defense counsel should realize that the focus of cross-examination is on the *accused's* conduct and not on the disciplinary action taken by the command against him.[20] Here, the trial counsel should have focused on the conduct underlying the arrest for the assault on Sarah and not on the arrest itself;[21] the focus should have been on the act of driving while intoxicated and not on the imposition of Article 15 punishment. As the court illustrated, other disciplinary actions in the accused's personnel files, such as bars to reenlistment, letters of reprimand and counseling statements, can be similarly characterized. If used to challenge the opinion of a good military character witness, trial counsel must focus on the underlying facts and circumstances that brought about the discipline and not on the actual record of any subsequent punishment.[22]

Pruitt provides an excellent overview of the methods used to prove and rebut character evidence in courts-martial and is highly recommended as essential reading for all counsel.

Do We Have the Right Man? Child Victims, Recall, and Military Rule of Evidence 412[23]

12. *Id.*

13. *Id.*

14. *Id.* at 870.

15. "In all cases in which evidence of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 2, MIL. R. EVID. 405(a).

16. For example, a character witness who offers an opinion as to the accused's character for peacefulness may be asked whether they knew the accused had assaulted his first sergeant three months before the charged offense. If the witness did not know, the implication is that he or she is not sufficiently qualified to attest to the accused's peacefulness. Similarly, if he or she did know, and still had a favorable opinion, then the witness himself is suspect. However, the trial counsel is still bound by the witness' response and could not call the first sergeant to prove the assault actually happened.

17. For example, Mil. R. Evid. 608(c) permits a witness to be impeached with evidence of bias, prejudice or motive to misrepresent. As this evidence may be introduced through the examination of witnesses, or "by evidence otherwise adduced," extrinsic evidence is plainly allowed. SALZBURG, *supra* note 4, at 647.

18. *Pruitt*, 43 M.J. at 868.

19. *Id; see also* EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE 230 (2d ed. 1993).

20. *See* United States v. Robertson, 39 M.J. 211 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

21. *Pruitt*, 43 M.J. at 868.

22. *Id.*

23. As a consequence of Mil. R. Evid. 1102, Mil. R. Evid. 412 was amended by the Violent Crime Control and Law Enforcement Act of 1994, effective 29 May 1995. The new rule broadens the trial protections afforded victims in cases involving sexual misconduct. For an overview of the differences between the new and old versions of Mil. R. Evid. 412, see Stephen Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Assault and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 82-89.

Evidence of a sexual assault victim's past sexual behavior or sexual predisposition is legally irrelevant to the determination of whether a sexual assault occurred,[24] subject to three limited exceptions.[25] In *United States v. Buenaventura*,[26] the CAAF examined the scope of two of these exceptions in a case involving evidence of sexual abuse by a child victim's grandfather and expert testimony regarding a phenomenon known as "memory transference."[27]

A general court-martial convicted Specialist Ricardo Buenaventura of, among other offenses, rape, indecent acts and indecent liberties committed upon his eight-year-old niece, AD.[28] The allegations forming the basis for the charges came to light when AD told a school counselor that she had been sexually abused by her uncle in her home and that she had also been abused by her grandfather when he was living in the house during the same time. These accusations were later repeated to a therapist and a clinical psychologist. At trial, the defense informed the court it intended to call AD's father, who would testify he suspected AD's grandfather of abuse.[29] The defense also had evidence that the grandfather would tell AD "you stink;" and then abuse her while she bathed. When speaking with the school counselor, AD described the accused's abuse similarly--he would come into the bathroom, tell her to take a shower with him, and then abuse her while she bathed.

The defense theory was that AD had been abused by her grandfather and was simply substituting Buenaventura in her recall of the events, someone much more acceptable emotionally and psychologically.[30] The military judge refused to permit cross-examination about sexual abuse by the grandfather, because it was not favorable to the defense.[31]

In reversing the Army Court of Criminal Appeals (ACCA), the CAAF declared that the issue was not whether Buenaventura had committed any of the offenses, but whether he had committed all the offenses of which he was charged.[32] Here, the grandfather's abuse arguably was the source of AD's trauma. It was also evidence that she was mistaken about the identity of her abuser, which went directly to the credibility of AD's claims, and called into question whether her memory was clear and accurate on critical details about the allegations regarding Buenaventura's assaults as contrasted with incidents of abuse by the grandfather.[33] The court also concluded that the evidence was relevant as it showed that someone else was the source of injury,[34] explained how AD acquired knowledge beyond her years, and corroborated Buenaventura's version of the events.[35]

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24. Rule 412 reads in pertinent part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any . . . criminal proceeding involving alleged sexual misconduct . . .
> (1) Evidence offered to prove that any alleged victim engaged in sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

MCM, *supra* note 2, MIL. R. EVID. 412.

25. Mil. R. Evid. 412(b) provides exceptions to the general exclusionary rule. First, evidence of specific instances of the alleged victim's sexual behavior is permitted when the accused is trying to prove that someone else was the source of semen, injury, or other physical evidence. Second, evidence of specific instances of sexual behavior between the alleged victim and the accused is allowed to prove consent on the part of the victim. Third, evidence may be constitutionally required to be admitted. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(a-c).

26. 45 M.J. 72 (1996).

27. Normalization, or memory transference, involves transferring emotions that an individual has toward a significant person in his life onto a trusted figure, such as a child-victim substituting the abuser with a parent or teacher in his recall of the assault. SIGMUND FREUD, AN OUTLINE OF PSYCHO-ANALYSIS 65-70 (1949).

28. His approved sentence included a dishonorable discharge, confinement for twelve years and forfeiture of all pay and allowances. *Buenaventura*, 45 M.J. at 72-73.

29. He had found AD naked in bed with her grandfather. He saw his children watching pornographic movies in their grandfather's room. He would wake up in the morning and find AD in her grandfather's room. Once when asked why she was not wearing underwear, AD said "Grandpa took them off me last night." Despite the existence of this seemingly overwhelming evidence of sexual abuse, the father apparently did nothing. *Id.* at 74. Several days after the court-martial, a man sold him the Brooklyn Bridge.

30. *Id.* at 73-74.

31. *Id.* at 79. The military judge accepted the argument that abuse by the grandfather made it no less likely that Buenaventura had also molested the victim.

32. *Id.*

33. *Id.* at 79-80.

34. In dissent, Judge Crawford argued the majority's theory that post-traumatic stress disorder is an "injury" as used in Mil. R. Evid. 412(b)(2)(A) is contrary to congressional intent; "injury" is a physical injury, not an emotional one. *Id.* at 80.

35. *Id.* at 79.

Buenaventura was not the only CAAF decision this last year involving evidence of memory transference. The court reviewed two other cases with a similar issue, reaching, however, different conclusions as to the admissibility of the evidence.

In *United States v. Gober*,[36] the accused was charged with rape, sodomy and indecent acts with his eight and thirteen-year-old stepdaughters between 1987 and 1990. The defense theorized that the girl's biological father sexually abused his daughters prior to 1985, when Gober married the mother of the victims.[37] At the time of the second marriage, there was evidence of significant family trauma, including an acrimonious divorce and several instances of the natural father kidnapping the girls and hiding them for months at a time.[38] The only defense evidence of sexual abuse, however, came from one expert[39] who would testify that, based on family history interviews, the victims possibly suffered from sexual abuse and attributed it to Gober by memory transference;[40] this testimony was eventually excluded by the military judge. The CAAF affirmed the conviction concluding the proffered evidence was too remote in time, occurring two years before Gober even entered the picture, and the expert's proposed testimony was not based on actual interviews and psychological testing of the victims.[41]

In *United States v. Pagel*,[42] the accused was charged with attempted carnal knowledge, sodomy and indecent acts with his daughter. To show she must have confused him with someone else, the accused wanted to introduce evidence of a one-time assault in a Montana trailer park by a molester named "Jerry." "Jerry" allegedly fondled, kissed and attempted to get on top of the victim several years before Pagel's two-year period of abuse in the family home.[43] The military judge excluded the evidence, and the CAAF affirmed. Even assuming the allegations were true, the court concluded that the prior single incident of abuse was too remote in time and location and not supported by expert testimony.[44]

Can the three cases be reconciled? Unlike the evidence in *Gober* and *Pagel*, the victim's description of her uncle's and grandfather's sexual assaults in *Buenaventura* was strikingly similar. The instances of abuse were preceded by pornographic movies, took place in the family home, were associated with bathing, and occurred during a period in which both men were living in the house. The defense counsel in *Buenaventura* also had expert testimony based on personal interviews and testing that the victim could have transferred the identity of the perpetrator in her recall of the abuse.[45]

In many child sexual abuse cases, the accused, a trusted authority figure in the victim's life, concedes the abuse occurred but argues that someone else did it. If faced with a similar scenario and there is evidence of a similar abuser committing similar acts close in time and location, coupled with expert testimony based on interviews of the parties, the accused may be able to successfully argue the child is substituting him for the true abuser in his or her recall of the traumatic events.

I Didn't Do It, But If I Did . . . . Unequivocal Defense Concessions May Bar Government's Use of Uncharged Misconduct

The Government's use of "bad acts" evidence, offered solely to show the accused is a bad person, is contrary to the character ban in MRE 404(a).[46] The government typically gets around this evidentiary obstacle by arguing a non-character theory of relevance under MRE 404(b).[47] In balancing the probative value of the evidence against the danger of unfair prejudice to the accused,[48] the military judge considers any number of fac-

36. 43 M.J. 52 (1995).

37. *Id.* at 53-54.

38. *Id.* at 53.

39. For almost 100 years, expert witnesses have been accurately described by the courts as "the mere paid advocates or partisans of those who employ and pay them, as much as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'expert.'" Chaulk By Murphy v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (quoting Keegan v. Minneapolis & St. Louis R.R., 78 N.W. 965, 966 (Minn. 1899)).

40. *Gober*, 43 M.J. at 55.

41. *Id.* at 58-59.

42. 45 M.J. 64 (1996).

43. *Id.* at 68.

44. *Id.* at 70.

45. *Buenaventura*, 45 M.J. at 80.

46. "Evidence of a person's character or trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." MCM, *supra* note 2, MIL. R. EVID. 404(a).

tors.[49] From a defense perspective, one of the most important is whether there are alternative means of accomplishing the same evidentiary goal. The accused's unequivocal offer to concede an element of the offense may help in this regard.

In *Crowder v. United States*,[50] the United States Court of Appeals for the District of Columbia Circuit held that, when a defendant unequivocally concedes an element of the charged offense, the government may not introduce uncharged misconduct evidence under Rule 404(b) if intended to prove that same element.[51]

Three police officers in a marked car observed Rochelle Ardall Crowder exchange a small object for cash with another man. They motioned to Crowder, who ran away. One of the pursuing policemen saw Crowder throw down a brown paper bag as he scaled a fence; the bag contained ninety-three zip lock bags of crack and thirty-eight packets of heroin. In a search incident to arrest, a pager and $988 in cash were seized. Crowder denied ever possessing the bag, and his first trial ended in a hung jury.[52] At the second trial, the Assistant United States Attorney (AUSA) informed the court and the defense he intended to offer evidence that Crowder had sold drugs previously to an undercover officer. This evidence was offered to show knowledge of drug dealing and to prove the "intent to distribute" element of the offense.[53] Crowder offered to concede every element of the crime, except whether he possessed the drugs on the day of the arrest.[54] The judge refused to bind the government's hands and admitted the evidence over defense objection.

In the second case, an undercover police officer wanting to buy crack walked up to a man standing on a D.C. street corner. The cop handed over $20, and the man walked over to another man sitting in a nearby car, an alleged drug dealer named Horace Davis.[55] The cash was exchanged for a small packet, and the man walked back towards the undercover officer. The man placed the packet on a window ledge and motioned for the undercover officer to retrieve it. The officer complied and subsequently radioed descriptions for both men. Davis was arrested coming out of a nearby grocery store minutes later.[56] At trial, Davis intended to raise a mistaken identity defense and subpoenaed the store owner as an alibi witness. The AUSA provided notice he intended to introduce evidence that Davis had sold cocaine three times before the charged offense, evidence offered to show knowledge of drug dealing and to prove the intent to distribute element of the charged offense.[57] Davis offered to concede that the person who possessed the drugs knew they were drugs and intended to sell them. He claimed, however, that it was not he. The judge admitted the evidence over defense objection.

On appeal, the D.C. Circuit held that a defendant's unequivocal offer to concede an element of the offense, combined with an explicit jury instruction that the government no longer needs to prove the element, makes evidence of uncharged misconduct under Rule 404(b) inadmissible if offered to prove that same element.[58] In the court's mind, this offer to concede, combined with the jury instruction,[59] gives the government everything the evidence could show with respect to the element and does so without risk that the jury will consider the uncharged misconduct for an impermissible propensity purpose. "In the absence

47. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted 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." MCM, *supra* note 2, MIL. R. EVID. 404(b).

48. Where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or undue consumption of time, the evidence may be excluded even though it is relevant. MCM, *supra* note 2, MIL. R. EVID. 403.

49. These factors may include: the degree of similarity between the charged offense and the uncharged act, the importance of the fact to be considered, the importance of hearing from the accused, and the ability of the panel to adhere to a limiting instruction. *See* GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 176-78 (3d ed. 1991).

50. 87 F.3d 1405 (D.C. Cir. 1996) (en banc), *vacated and remanded*, 65 U.S.L.W. 3505 (U.S. Jan. 21, 1997). The case was a consolidated review of two separate appeals in which both defendants were convicted of various drug distribution offenses.

51. *Id.* at 1407.

52. Crowder claimed that when he refused to talk to the police about an unrelated murder, they beat him and falsely accused him of possessing the drugs. To refute the government's claim he was selling drugs, defense witnesses testified the object Crowder passed was actually a cigarette. The large amount of cash was for some home repairs and the beeper was to communicate with the mother of Crowder's daughter, since he had no phone. *Id.* at 1408.

53. Rule 404(b) now requires the government to provide the defense with reasonable notice in advance of trial if it intends to introduce extrinsic offense evidence.

54. *Crowder*, 87 F.3d at 1409.

55. *Id.* at 1407-08.

56. *Id.* at 1408.

57. *Id.*

58. *Id.* at 1410.

of any other non-propensity purpose for the bad acts evidence, the evidence is therefore inadmissible because its only purpose could (sic) be to prove the character of a person in order to show action in conformity therewith, precisely what Rule 404(b)'s first sentence prohibits."[60]

In a strongly worded dissent, the minority argued that the prosecution's burden to prove every element of the offense is not relieved by the accused's tactical decision not to contest an essential element of the offense.[61] Criminal defendants should not be able to block the government's evidence and dictate trial strategy by conceding, admitting, refuting, not contesting or stipulating to what the evidence will tend to prove.[62] It is the government's evidence that must show that *this* defendant knew the substance was drugs and that *this* defendant intended to distribute the drugs--not that *someone* may have intended to distribute.[63] A defendant's offer to concede should simply be one factor the judge takes into consideration when balancing the probative value of the evidence against the danger of unfair prejudice to the accused.[64]

Does *Crowder* have any application to military practice? Consider the case of *United States v. Orsburn*.[65] Staff Sergeant Steven Orsburn was charged with, *inter alia*, indecent acts with his eight-year-old daughter. The trial counsel wanted to introduce pornographic books found in Orsburn's bedroom as evidence of his intent to gratify his lust or sexual desires, an element of the charged offense.[66] Orsburn objected to the admissibility of the books, arguing that the offenses never happened but if they did, by their very nature, whoever did them must have done so with the intent to gratify his lust or sexual desires. To Orsburn, then, the only reason the trial counsel was offering the books was to show his character as a sexual pervert, predator or molester, which violates the general character ban found in MRE 404.[67] The military judge admitted the books over defense objection. In writing for the majority in affirming the conviction, then Chief Judge Sullivan held that the military judge did not abuse his discretion in balancing the probative value of the evidence against the danger of unfair prejudice to the accused. Importantly, Sullivan noted that Orsburn "had refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent."[68] If he had, under the rationale set forth by the majority in *Crowder*, would the evidence have been suppressed and a different result reached?[69]

Of course, the current albatrosses around the necks of the accused are the new Military Rules of Evidence, 413 and 414,[70] putatively permitting trial counsel to introduce evidence of

59. The court included a sample instruction which would follow the judge's instructions on the elements of the offense: "By Davis's agreement, the Government need not prove either knowledge or intent. Your job is thus limited to the possession element of the crime. Therefore, in order to meet its burden of proof, the Government must prove beyond a reasonable doubt only one element of the crime, that Horace Davis was in possession of the cocaine base charged in the indictment." *Id.* at 1411. "You must find Horace Davis guilty if you find the government has proven beyond a reasonable doubt that Horace Davis possessed the drugs." *Id.* at 1417.

60. *Id.* at 1410.

61. *Id.* at 1421.

62. CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE 198-99 (1978).

63. *Crowder*, 87 F.3d at 1427-28.

64. Of course, if the balancing test favors the accused, the military judge may have the inherent authority to compel the prosecution to accept a defense tendered concession or abate the proceedings. *See, e.g.*, United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979), *vacated*, 448 U.S. 902, *on remand*, 626 F.2d 444 (5th Cir. 1980), *cert. denied*, 450 U.S. 956 (1981).

65. 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991).

66. The three paperback books were entitled *Degraded, Delighted Daughter*; *Chained Youth: Girls in Bondage*; and *The Whore Makers*. *Id*. at 183.

67. *Id.* at 187.

68. *Id.* at 188.

69. In *Old Chief v. United States*, 117 S. Ct. 644 (1997), the Supreme Court recently looked at the issue of defense concessions in the context of a case in which the defendant is charged with possession of a firearm by a felon and offers to concede the predicate felony.

After a fight in which shots were fired, Johnny Lynn Old Chief, a felon in possession of a firearm, was charged with, *inter alia*, violating 18 U.S.C. § 922. Old Chief offered to stipulate to the existence of the prior felony conviction, arguing that the nature of the prior offense, aggravated assault, would result in the jury concluding that he was, by propensity, the probable perpetrator of the charged offense. *Id*. at 646. The government refused to stipulate and insisted on its right to present its own evidence of the prior conviction. The district court agreed and the Ninth Circuit affirmed. The Supreme Court granted certiorari and reversed. *Id*. at 647. The Court held that the district court abuses its discretion under Fed. R. Evid. 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment and record over objection, when the name and nature of the prior offense raises the risk the jury will improperly consider the evidence and when the purpose of the evidence is solely to prove the element of prior conviction. *Id*. at 647-56. Although the Court made clear that its holding was limited to cases involving proof of felon status, a situation rarely seen in military practice, considering the broad language used in the opinion in incorporating Rule 403, the case may have some precedential value for the military defense counsel in arguing concessions to uncharged misconduct evidence.

70. *See* Henley, *supra* note 23.

other offenses of sexual assault or child molestation on the issue of the accused's propensity or disposition to commit these types of offenses. If this is so,[71] it is difficult to see how the accused could ever concede the purpose for which the evidence is being offered, as the concession would necessarily require an admission that the accused is predisposed to commit child molestation or sexual assault. Regardless, *Crowder* and *Orsburn* provide some precedent for defense counsel to cite in helping stem the expanding government tide in sexual assault and child molestation cases.

Tell Me Your Secrets. A Psychotherapist-Patient Privilege in Military Practice?

In *Jaffee v. Redmond*,[72] the United States Supreme Court held that confidential communications between patients and their psychotherapists made during the course of diagnosis or treatment are now protected from compelled disclosure in federal litigation.[73] The decision brings federal practice into line with those states that already recognize some form of psychotherapist-patient privilege.[74] It is unclear, however, whether this significant decision will result in immediate recognition of a similar privilege in military practice, absent a legislative or executive mandate amending the rules of evidence.[75]

Mary Lu Redmond, a police officer on patrol duty in an Illinois apartment complex, shot and killed Ricky Allen to prevent him from stabbing a man he was chasing.[76] Allen's estate thereafter filed a federal wrongful death suit alleging Redmond violated Allen's constitutional rights by using excessive force during the encounter.[77] During pretrial discovery, the estate's administrator sought access to notes of some fifty counseling sessions between Redmond and Karen Beyer, a clinical social worker licensed by the state and hired by the city.[78] Redmond and Beyer resisted the discovery request, asserting the conversations and notes were privileged communications protected from compelled disclosure. The district court rejected this claim and ordered production of the notes.[79] Neither Redmond nor Beyer complied with the order and the trial judge ultimately instructed the jury that the refusal to hand over the notes had no legal justification and they could presume the content of the notes would have been unfavorable to Redmond.[80] The jury returned a verdict for the estate, awarding $545,000 in damages.[81] The United States Court of Appeals for the Seventh Circuit reversed, finding the trial court erred in ordering production of the confidential communications between Redmond and Beyer.[82] The United States Supreme Court affirmed.[83]

Justice John Paul Stevens, writing for the majority,[84] first noted that Federal Rule of Evidence (FRE) 501 grants federal courts the discretion to define new evidentiary privileges by interpreting "common law principles . . . in the light of reason and experience."[85] Justice Stevens declared that reason and experience justified a privilege protecting confidential communications between psychotherapists and patients because it would promote sufficiently important interests outweighing the need for any probative evidence from that source.[86] Stevens

71. To date, the one published case addressing the scope of the new rules focused on the trial judge's discretion to employ a balancing test under Rule 403. Frank v. County of Hudson, 924 F. Supp. 620 (D. N.J. 1996) (evidence proffered under the new rules must still be legally relevant under Rule 403). In *United States v. Guardia*, 1997 WL 63768 (D. N.M. Jan. 15, 1997) a pending New Mexico district court case in which the defendant is charged with sexual assault, the judge granted the defense's motion *in limine* opposing the government's use of two prior sexual assaults offered under Rule 413. The judge ruled that Rule 403 applied, notwithstanding the elimination of the presumption against use of prior bad acts. The government has appealed the ruling, seeking expedited disposition.

72. 116 S. Ct. 1923 (1996).

73. *Id.* at 1927-32.

74. *See* Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 AM. J. TRIAL ADVOC. 721, 723-25 (1995) (asserting forty-nine states and the District of Columbia recognize some form of psychologic or psychiatric-patient privilege).

75. *See infra* notes 91-104 and accompanying text.

76. Jaffee v. Redmond, 51 F.3d 1346, 1349-50 (7th Cir. 1995).

77. *Id.* at 1348.

78. The counseling sessions were intended to help Redmond cope with the pain and anguish caused by the shooting. *Id*. at 1358.

79. The trial judge believed that the psychotherapist-patient privilege recognized in other circuits did not extend to licensed clinical social workers. *Id*. at 1350.

80. *Id.* at 1351.

81. *Id.* at 1352.

82. *Id.* at 1358.

83. Jaffee v. Redmond, 116 S. Ct. 1923, 1932 (1996).

84. Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Kennedy, Souter, Thomas, Ginsberg, and Breyer joined. Justice Scalia filed a dissenting opinion, which Chief Justice Rehnquist joined in part. *Id*. at 1925.

indicated that the mental health of our nation's citizenry, no less than its physical health, is a public good of transcendental importance[87] and that the possibility of exposing intimate discussions of this nature could "impede development of the confidential relationship necessary for successful treatment."[88]

Justice Stevens also had no difficulty in expanding this psychotherapist-patient privilege to include communications made to licensed social workers in the course of psychotherapy. He concluded that the rationale for recognizing a psychologic or psychiatric privilege applies equally to communications made to licensed social workers engaged in mental health counseling.[89] Justice Stevens noted that social workers today "provide a significant amount of mental health treatment and service the large segment of our population that cannot afford a psychiatrist or psychotherapist."[90]

The Supreme Court's recognition of a new privilege protecting confidential communications made not only to psychiatrists and psychotherapists but also to licensed social workers engaged in psychotherapy is grounded in a logical interpretation of FRE 501. This does not necessarily mean that such communications are now automatically protected from compelled disclosure in courts-martial.[91] The law of the particular forum in which the case is litigated determines the applicability of privileges.[92] As such, the nature and scope of evidentiary privileges in military practice[93] are set forth, not in FRE 501,but in the military rules.

Although MRE 101(b)[94] and MRE 501(a)(4)[95] seem to provide authority to adopt testimonial and evidentiary privileges recognized in federal district courts, a substantial impediment

85. *Id*. at 1927. Federal Rule of Evidence 501 provides in part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

86. The Court noted that the likely evidentiary benefit in denial of a privilege would be modest. If rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances giving rise to the need for treatment would probably result in prosecution. Without a privilege, much of the desirable evidence that the proponent seeks would likely be in existence anyway as such admissions would probably not be made in the first place. *Jaffee*, 116 S. Ct. at 1929.

87. Justice Scalia, in a scathing dissent, chided the majority for, in part, extending a privilege to psychotherapists without first providing adequate justification. He states the following:

> When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends, and bartenders--none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing your psychotherapist or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet, there is no mother-child privilege.

Id. at 1934.

88. *Id.* at 1928.

89. *Id.* at 1931.

90. The Court agreed with the Seventh Circuit that "[d]rawing a distinction between counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose," especially when the latter provide a significant part of the mental health counseling for the poor and those of modest means. *Id*. at 1932.

91. In the military, a quasi-psychotherapist-patient privilege already exists under the limited circumstances where a psychiatrist or psychotherapist is detailed to assist the defense team. United States v. Tharpe, 38 M.J. 8, 15 n.5 (C.M.A. 1993). Communications made to a psychiatrist or psychotherapist who is part of the defense team are protected by the attorney-client privilege under Mil. R. Evid. 502. A second limited privilege may apply to communications made by an accused as part of a sanity inquiry under Mil. R. Evid. 302. United States v. Toledo, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 U.S. 889 (1988).

92. United States v. Johnson, 47 C.M.R. 406 (C.M.A. 1973). "It should be noted that the law of the forum determines the application of [any] privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege, for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial." MCM, *supra* note 2, MIL. R. EVID. 501(d), Drafter's Analysis, app. 22, A22-36 to A22-37 (1995 ed.)

93. For an excellent historical overview of the law of privileges under military practice, see Captain Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5 (1981).

94. Military Rule of Evidence 101(b) declares the following:

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

MCM, *supra* note 2, MIL. R. EVID. 101, Scope.

exists in MRE 501(d), which states that information not otherwise privileged[96] does not become privileged on the basis that is was acquired by a medical officer or civilian physician.[97] Can *Jaffee* and MRE 501(d) be reconciled? Possibly.

Trial and defense counsel in a position of having to advocate for the recognition of a privilege[98] can argue the phrase "medical officer or civilian physician" as used in MRE 501(d) is limited in scope to military and civilian *medical doctors*. Psychologists, psychiatric social workers, behavioral science specialists, and other non-physicians engaged in mental health counseling should be excluded.[99]

Of course, the contrary argument is that, while *Jaffee* may have recognized a difference,[100] military courts have not, as yet, distinguished between the therapeutic practices of a physician who treats a person's physical ailments and a psychotherapist who treats his largely unmanifested mental health needs.[101] *Jaffee* has limited precedential value for the military practitioner because it was based on an interpretation of FRE 501, which does not include the specific disqualifying language set forth in MRE 501(d).

The questions raised by *Jaffee* are not limited to whether there should be an evidentiary privilege in military practice for communications made by servicemembers, family members, victims, and others to individuals providing therapeutic services, and the notes taken therein. Arguably, such a privilege is justified, because it would protect the privacy of confidential communications and serve the public good by helping to ensure the mental well-being of our soldiers and their families.[102] A more pressing concern, however, is whether something more is required in military practice to recognize a psychotherapist-patient privilege than simply interpreting the rules of evidence to now permit one, a result seemingly in direct contravention to MRE 501(d) and existing case law. While such a privilege is now recognized in federal practice, it was accomplished because of the Supreme Court's direction to construe federal rules in a way permitting the development of a common law of federal privileges.[103] The military rules have no such mandate,

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95. Military Rule of Evidence 501 provides, in pertinent part, as follows:

> (a) A person may not claim a privilege with respect to any matter except as required by or provided for in:
> . . . .
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

MCM, *supra* note 2, MIL. R. EVID. 501.

96. For example, Mil. R. Evid. 502 (Lawyer-Client Privilege) or Mil. R. Evid. 504 (Husband-Wife Privilege) may protect communications between parties even though one may be a physician.

97. Mil. R. Evid. 501(d) provides: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 2, MIL. R. EVID. 501(d). *See generally* United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993), *rev. denied*, 40 M.J. 287 (C.M.A. 1994) (The military does not recognize the physician-patient privilege, and the court refused to create one concluding it was outside its authority; Congress entrusted the President with the power to adopt rules of evidence, including privileges).

98. For example, a trial counsel would likely want to protect a sexual assault victim's confidential communications revealed to a rape counselor during the course of therapy. Alternatively, a defense counsel may want to limit the government's access to admissions made by a client during psychological interviews and subsequent treatment.

99. This interpretation could lead to anomalous results where the psychotherapist is also a physician. For example, consider the situation where a soldier makes identical admissions to both a licensed clinical social worker and a psychiatrist. The statement made to the social worker would be privileged because a social worker is not a doctor. However, the same statements made to the psychiatrist would not be privileged because a psychiatrist, although engaged in mental health counseling, is by training and branch of assignment, a medical officer and physician. A possible resolution of this potential semantic conflict would be to interpret "medical officer and civilian physician" as excluding any individual employed in the mental health professions, including psychiatrists, focusing instead on the nature of the relationship rather than the identity of the counselor. *See* Bruce J. Winnick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence* View, 50 U. MIAMI L. REV. 249, 264 (1996).

100. As Justice Stevens acknowledged, treatment by a physician for physical ailments often may proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends on an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996).

101. *See* United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994) (no physician-patient or psychotherapist-patient privilege in federal law, including military law).

102. "Confidentiality is the *sine qua non* for successful treatment." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

103. Winnick, *supra* note 99, at 251.

and *Jaffee* should not be construed to permit military courts to "craft it [a psychotherapist privilege] in common-law fashion"[104] as a consequence of judicial (mis)interpretation of MRE 501(d).[105]

That being said, military evidentiary practice should remain consistent with those rules "generally recognized in the trial of criminal cases in the United States district courts," and there is little logical or practical reason not to amend the military rules. The military justice system is now virtually the only jurisdiction not recognizing some form of psychotherapist-patient privilege. Even a compromise creation, such as recognizing a privilege for dependents and other civilians but not for communications between psychotherapists and servicemembers, would be better than staying the course.[106]

Bless Me Father For I Have Sinned. It Has Been . . . . The Clergy Privilege in Military Practice

Though probably not recognized at common law,[107] one of the more widely adopted evidentiary privileges is that protecting communications between members of the clergy and penitents.[108] In *United States v. Napoleon*,[109] the AFCCA examined this privilege in the context of a case alleging ineffective assistance of counsel. The decision is of some practical import for the trial practitioner, as the court took the opportunity to address the scope of this long-recognized, yet infrequently raised, privilege.

Master Sergeant Doris Napoleon was placed in pretrial confinement pending her general court-martial for the stabbing death of Arlyta Renee Harris, a rival for the romantic affections of the night manager at the Vandenberg Air Force Base NCO Club.[110] During her stay in confinement, Napoleon had several visits from a friend, Technical Sergeant Walters, who also happened to be a lay minister at one of the base chapels. During one of these visits, Napoleon made some damning admissions to Walters, which were later introduced at trial by the government, without objection, as direct evidence of premeditation.[111] On appeal, Napoleon alleged ineffective assistance of counsel for not objecting to the introduction of her conversation with Walters on the basis that they were protected by the clergy privilege.[112]

The privilege regarding communications with the clergy "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[113] Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his or her capacity as a spiritual advisor;[114] and (3) the communication must be intended to be confidential.[115] In this

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104. *Jaffee*, 116 S. Ct. at 1940.

105. Testimonial privileges "are not lightly created nor expansively construed for they are in derogation of the search for the truth." Jaffee v. Redmond, 51 F.3d 1346, 1357 (7th Cir. 1995) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

106. This is one option being discussed by the Joint Service Committee on Military Justice. Telephone interview with Lieutenant Colonel Frederic L. Borch III, Special Assistant to The Judge Advocate General, U.S. Army (Dec. 17, 1996).

107. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 184 (3d ed. 1984).

108. *See* Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 427 (1994) (asserting all fifty states and the District of Columbia have enacted statutes recognizing the privilege).

109. 44 M.J. 537 (A.F. Ct. Crim. App. 1996).

110. Napoleon followed the victim back to the boyfriend's room where she managed to get her into her car. She drove the victim to a remote part of the club parking lot where she stabbed her in the chest with such force as to produce a six-inch wound with a blade of only five inches long. With the first of four or five blows, the knife penetrated the victim's heart, diaphragm and liver. *Id*. at 545.

111. In talking about the stabbing, Walters testified that Napoleon "realized what had happened and everything that had been done. And she definitely told me at that time that she wasn't angry or enraged or anything when the incident occurred. It kind of just went from there." *Id*. at 542.

112. Mil. R. Evid. 503, Communications to Clergy, provides as follows:

> (a) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

MCM, *supra* note 2, MIL. R. EVID. 503.

113. Trammel v. United States, 445 U.S. 40, 51 (1980).

114. "Clergyman" is defined as a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman. MCM, *supra* note 2, MIL. R. EVID. 503(b)(1).

115. *See, e.g.*, United States v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985).

case, the court found that Napoleon failed on two grounds. First, there was no evidence that the conversation with Walters was made as a formal act or religion or as a matter of conscience. Instead, it was apparent from the record that Napoleon was seeking "emotional comfort and perhaps sympathy in speaking . . . about her feelings of not being angry or enraged."[116] Her purpose was thus outside the scope of the privilege. In addition, the court noted that whatever credentials and responsibilities Walters had as a lay minister, he was not operating in the capacity as a spiritual advisor during his visits with Napoleon.[117] Rather, the evidence demonstrated that Walters' visits were borne out of friendship, not piety.

With servicemembers increasingly finding religion when confronted with the possibility of lengthy periods of confinement, defense counsel may find themselves raising the clergy privilege in order to protect inculpatory admissions made by their clients. In *Napoleon*, the Air Force court does a credible job detailing the inherent difficulties in satisfying the privilege's foundational elements.

Hysteria and Skepticism Aside--Are Taint Hearings in Child Sexual Abuse Cases A Good Idea?

Margaret Kelly Michaels, a twenty-two year old aspiring actress, was hired by the Wee Care Nursery School, Maplewood, New Jersey, in September 1984 as a full-time teacher's aide; she worked until her departure on 25 April 1985.[118] On 30 April, one of the Wee Care children revealed to his mother that each day at nap time, Michaels disrobed him and took his temperature rectally.[119] After a two-year investigation by the Essex County Prosecutor's Office, Kelly Michaels was charged with 246 counts of bizarre sexual abuse[120] against thirty-eight children, ages three to five.[121]

The state's case against Michaels consisted almost entirely of the children's testimony, which referred almost exclusively to pretrial statements taken during the course of the state's investigation. Despite the fact there was little physical evidence to support the contention that the children had been molested,[122] Kelly Michaels was convicted of 115 counts and sentenced to forty-seven years in prison.[123]

The focus on appeal was the manner in which the state conducted its investigatory interviews of the children; specifically, whether the interview techniques employed by the investigators undermined the reliability of the children's pretrial statements and subsequent in-court testimony. In *State v. Michaels*,[124] the New Jersey Supreme Court, confronted with investigatory interviews "fraught with the elements of untoward suggestiveness and unreliable evidentiary results,"[125] concluded the interrogations were conducted in a highly improper manner and set aside the convictions.[126]

To ensure Kelly Michaels' right to a fair trial, the court held that a hearing was required to determine whether the children's ability to recall the alleged abuse was affected by the improper interrogation. The hearing would determine whether any in-court testimony would be admissible at any subsequent retrial.[127]

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116. *Napoleon*, 44 M.J. at 544.

117. *Id.*

118. She left in order to take a job closer to home. Robert Rosenthal, *State of New Jersey v. Kelly Michaels: An Overview*, 1 PSYCH., PUB. POL. & LAW 246 (1995).

119. Lana H. Schwartzman, Note, 25 SETON HALL L. REV. 453 (1994).

120. Michaels was alleged to have licked peanut butter off the children's genitals; played the piano while nude; made the children drink her urine and eat her feces; and raped and assaulted them with knives, forks, spoons and Lego blocks. Although Michaels was accused of performing these acts during school hours over a seven-month period, no adult or student ever reported seeing her act inappropriately and no parent noticed any signs of strange behavior or genital soreness. Jean Montoya, *Something Not So Funny Happened On The Way To Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 929 (1993).

121. Lisa Manshel, *The Child Witness and the Presumption of Authenticity After State v. Michaels*, 26 SETON HALL L. Rev. 685, 686 (1996).

122. In fact, Michaels herself passed a polygraph examination a week after the investigation began. Rosenthal, *supra* note 118, at 249.

123. LISA MANSHEL, NAP TIME. THE TRUE STORY OF SEXUAL ABUSE AT A SUBURBAN DAY-CARE CENTER 447-48 (1994).

124. 642 A.2d 1372 (N.J. 1994).

125. *Id*. at 1382.

126. Most of the thirty-eight children interviewed were asked leading questions strongly suggesting that perverse sexual acts had occurred. Seventeen were asked questions involving references to urination, defecation, consumption of human waste and oral sexual contacts. Most of the children in the two years leading up to the trial were subjected to repeated interrogations, most at the urging of their parents. The children were threatened, cajoled and bribed. Positive reinforcement was used when the children made inculpatory statements, negative reinforcement when children denied the abuse. Five of the children were told that Kelly was in jail and she had done bad things to other children; the children were encouraged to keep Kelly in jail. They were told that the investigators needed their help and they could be "little detectives." The children were introduced to the police officer who arrested Kelly and were shown the handcuffs used during the arrest. Mock police badges were given to the children who cooperated. *Michaels*, 642 A.2d at 1380; *see also* Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of State of New Jersey v. Michaels Presented by Committee of Concerned Scientists*, 1 PSYCH., PUB. POL. & LAW 272 (1995).

Likening the inculpatory statements of sexual abuse victims to confessions and identifications, the court insisted that such evidence requires special measures to ensure reliability.[128] Therefore, an accused triggers the requirement for a taint hearing with a threshold showing of "some evidence" that the child was exposed to suggestive or coercive interviewing.[129] The burden then shifts to the government to prove by clear and convincing evidence that the child's statements retain sufficient indicia of reliability to outweigh the suggestive pretrial influences. If the government cannot persuade the court, the judge must exclude the child's pretrial statements and any in-court testimony based on those unreliable statements.[130]

The Army and Air Force courts recently addressed *Michaels'* potential application to military practice in deciding: (1) whether there is a *requirement* for a pretrial taint hearing to determine if coercive or suggestive interview techniques distorted a child's recollection of events thereby undermining the reliability of their in-court testimony; and (2) whether an accused is ever *entitled* to a pretrial hearing, even when there is evidence of suggestive interview techniques.

In *United States v. Kibler*,[131] the accused was charged with various molestation offenses on three child victims. The charges came to light when one victim commented to her mother as she was brushing her hair that she was glad this was the last day of school. When asked why, she asserted it was because the accused had sex with her.[132] Two more girls, one Kibler's daughter and another girl he baby-sat, eventually also made complaints. All three were interviewed by social services caseworkers, CID agents, doctors and the trial counsel.[133]

There was no motion to suppress or objection at trial challenging the reliability of the victim's in-court testimony. On appeal, citing *Michaels*, the accused asserted he was entitled to a pretrial hearing on the issue of the reliability of the children's in-court testimony. The Army court held that the accused waived consideration of this issue. Even assuming waiver should not be applied, the court found that "the pretrial interrogations and investigations had no effect on the reliability of any of the victim's in-court testimony."[134] The ACCA distinguished *Michaels,* finding that the government's case was not primarily made up of the children's statements, nor did the case hinge on evidence derived from the children's statements. In fact, there was significant physical, medical and behavioral evidence to corroborate the children's allegations.[135] Under the circumstances of this case, the court concluded no taint hearing was required.[136]

The same result, though using a different rationale, was reached by the Air Force court in *United States v. Cabral*.[137] Master Sergeant Matthew Cabral was charged with molesting the four-year-old daughter of a friend. The child was unavailable at trial, so the trial counsel moved to admit the videotaped interview Office of Special Investigations (OSI) conducted with the victim.[138] The defense challenged use of the tape, suggesting that the rehearsed answers and use of inappropriate leading questions made the tape inadmissible.[139] The AFCCA affirmed, finding that evidence of the coercive nature of the interview or suggestiveness, if any, went to the weight to be given the evidence and not its admissibility.[140] Cabral was not entitled to a hearing, even if there was evidence of suggestibil-

127. *Michaels*, 642 A.2d at 1382. Margaret Kelly Michaels was released after spending five years in prison; the state eventually declined to retry her.

128. *Id*. at 1375.

129. *Id*. at 1383.

130. The door apparently remains open, however, for the admission of selected portions of the proposed testimony. The court stated that "if it is determined by the trial court that a child's statements or testimony, or a portion thereof, do retain sufficient reliability for admission at trial, then it is for the jury to determine the probative worth and to assign the weight to be given to such statements or testimony as part of their assessment of credibility." *Id*. at 1384.

131. 43 M.J. 725 (Army Ct. Crim. App. 1995).

132. The victim said it was "so she would not have to run past Kibler's house anymore." "What do you mean?" the mother replied. "It's a secret," the child said. When pressed, the girl finally told her mother it was so she wouldn't have to have sex anymore. *Id.* at 728.

133. *Id.*

134. *Id*. at 727.

135. *Id.*

136. *Id.*

137. 43 M.J. 808 (A.F. Ct. Crim. App. 1996) (review granted by CAAF).

138. The military judge admitted the tape under Mil. R. Evid. 804(b)(5), the residual hearsay exception. MCM, *supra* note 2, MIL. R. EVID. 804(b)(5). *See* Donna M. Wright, *An Old Fashioned Crazy Quilt: New Developments in the Sixth Amendment, Discovery, Mental Responsibility and Nonjudicial Punishment*, ARMY LAW., Apr. 1997, at 72.

139. *Cabral*, 43 M.J. at 810.

ity; a hearing as a predicate for the admission of child testimony is a legislative, not a judicial fix.[141]

While most people would agree that child sexual abuse is a social problem of shameful dimensions,[142] some commentators believe a climate of skepticism and doubt prevails when dealing with the credibility of a child-victim.[143] This skepticism is partly due to the vulnerability of children to inappropriate interview techniques and the notion that the suggestive and coercive nature of the interview techniques undertaken by hysterical parents and overly aggressive police distort the child's memory and recollection of actual events. To ensure a defendant is convicted of offenses he or she actually committed, New Jersey has adopted certain procedures to ensure the reliability of a child sexual abuse victim's pretrial statements and in-court declarations.

While the Army and Air Force courts have held that pretrial taint hearings are not required, results reached albeit by different rationales, *Michaels* may still have some vitality in the military, or at least for the Army practitioner. The accused may be entitled to a pretrial taint hearing when the government's case depends almost exclusively on information elicited from the investigatory interviews of the child-victim and there is little, if any, corroborating physical or behavioral evidence, if the defense can make an initial showing of "some evidence" of suggestiveness or coercion.[144] At this hearing, the Government would be required to prove by clear and convincing evidence the statements retain sufficient indicia of reliability that outweigh the suggestive pretrial influences.[145]

The recent increase in child sexual abuse cases in military practice brings with it an increased opportunity to question the reliability of a child's in-court and out-of-court allegations. While pretrial taint hearings are certainly a novel idea, they appear to be a reasonable accommodation for a difficult problem.[146]

Backing in Through the Front Door--Substantive Consideration of Prior Inconsistent Statements

Although the credibility of any witness can be attacked, even by the party calling the witness,[147] it is improper to call a witness for the primary purpose of placing otherwise inadmissible evidence before the court under the guise of impeachment.[148] While prior inconsistent statements can, in limited circumstances, be used as substantive evidence of guilt,[149] the typical scenario facing trial practitioners involves using inconsistent statements to attack the witness' in-court testimony.[150] The concern is that an unscrupulous judge advocate may call a witness simply to impeach him with an inconsistent statement, hoping that the panel will consider it as substantive evidence, rather than for its legitimate purpose of impeaching the credibility of the witness' in-court testimony.[151] The subtle distinctions between use of a prior inconsistent statement as impeachment or as substantive evidence are understandably

140. *Id.* at 812.

141. *Id.* at 810; s*ee also* United States v. Geiss, 30 M.J. 678 (A.F.C.M.R.), *pet. denied*, 32 M.J. 45 (C.M.A. 1990).

142. *See generally* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES (2d ed. 1992) (outlining prevalence and effects of child abuse); *see also* Robert J. Marks, *Should We Believe The Children? The Need For a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. LEGIS. 207 (1995).

143. These range from claims that "the vast majority of children who profess sexual abuse are fabricators," RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE (1987), to "observers who have likened the climate created by [child abuse] laws to that of Salem during the witch hunts, to that of Nazi Germany in 1939, or to that of the McCarthy era in the 1950s." R. Emans, *Abuse in the Name of Protecting Children*, 68 PHI DELTA KAPPA 740 (1987) (cited in John E.B. Myers, *New Era of Skepticism Regarding Children's Credibility,* 1 PSYCH., PUB. POL. & LAW 385, 392 (1995)).

144. A listing of improper influences was comprised by the court and may include the following: (1) whether the inquiry lacked investigatory independence; (2) whether the interviewer pursued a line of questioning indicating a preconceived notion of the child's experiences; (3) whether the interviewer used leading questions; (4) whether the interviewer repeatedly asked the same question after the child already answered; (5) whether the interviewer explicitly vilified or criticized the accused; (6) whether the investigator failed to account for the effect of outside influences on the child's descriptions, such as prior conversations between the victim and his parents or the victim and other child-victims; (7) whether the child did not view the interviewer as a trusted authority figure; and (8) whether the interviewer lacked conviction regarding the presumption of innocence. *Michaels*, 642 A.2d at 1377; *see also* John E. B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment,* 18 PAC. L.J. 801, 889 (1987); John E.B. Myers, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony,* 27 PAC. L.J. 1 (1996).

145. As the court recognized, "the issue we must determine is whether the interview techniques used by the State in this case were so coercive and suggestive that they had the capacity to distort substantially the children's recollections of actual events and thus compromise [their] reliability and testimony based on their recollections." *Michaels*, 642 A.2d at 1377. The author emphasizes that questions concerning the reliability of a child's in-court testimony are distinct from: (a) the child's competency and capacity to testify; and (b) the weight to be given any admitted testimony by the fact-finder.

146. For a contrary view, *see* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 64 BAYLOR L. REV. 873 (1994).

147. The credibility of a witness may be attacked by any party, including the party calling the witness. MCM, *supra* note 2, MIL. R. EVID. 607.

148. The introduction of an in-court report of an out-of-court statement offered to prove the truth of the statement depends on an analysis of the definition of hearsay and the exceptions to the hearsay rule. *See* IMWINKELRIED, *supra* note 19, at 261. Extrinsic proof of a prior inconsistent statement to impeach a witness's in-court testimony may also be considered by the court as substantive evidence only if it qualifies as either an exemption to the hearsay rule, or if it is otherwise admissible as a hearsay exception under Mil. R. Evid. 803 or 804.

lost on most panel members.[152] As a result, despite the permissive language of MRE 607, when a party knows the witness has recanted a prior inculpatory statement *and would do so in front of the members*, that party cannot call the witness simply to impeach the credibility of the in-court testimony with the prior out-of-court inconsistent statement.[153] In *United States v. Ureta,*[154] the CAAF reviewed the application of this exclusionary rule in the increasingly common scenario of a recanting witness in a sexual abuse prosecution.

K, the 13-year-old daughter of Master Sergeant Jose Ureta, told a close friend that her father "had been messing with her since the age of nine."[155] One week later, Ureta's wife Christina, K's natural mother, made a sworn statement to OSI in which she claimed the accused had admitted to sexually abusing their daughter and placing his fingers in her vagina, but had denied having intercourse.[156] At the Article 32 investigation, Mrs. Ureta testified consistently with her sworn statement, but added that her husband had admitted having sexual intercourse.

At Ureta's general court-martial for rape, carnal knowledge and committing indecent acts, the trial counsel intended to call Christina who was, concededly, something of a "wild card" witness.[157] Christina did testify, but denied that Ureta had ever made any inculpatory admissions.[158]

The trial counsel attempted to impeach Christina's denials by questioning her about the sworn statement to OSI and subsequent Article 32 testimony, which she admitted making, but consistently responded they were lies to get back at her husband for his extra-marital affair the year before. The trial counsel then offered the Article 32 transcript into evidence, which was received by the military judge over defense objection. On appeal, the defense challenged the trial counsel's action in calling Christina simply to impeach her with prior inconsistent statements as well as the admission of the Article 32 transcript, eventually taken back by the members into deliberations.[159]

If the military judge and counsel knew that Christina would recant her statement to OSI in front of the members, it would have been error to call her solely to impeach her with her prior inconsistent statement.[160] Here, however, the CAAF noted that the trial counsel honestly did not know what, if anything, Christina would say.[161] Because the trial counsel had every reason to

149. Mil. R. Evid. 801 provides, in part:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)(A).

150. Mil. R. Evid. 613 governs use of prior inconsistent statements when offered as impeachment evidence. It states that "in examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. MCM, *supra* note 2, MIL. R. EVID. 613(a).

151. For example, a trial counsel calls a witness who has made a previous statement implicating the accused in a robbery; that previous statement would likely be excluded as hearsay if offered for the truth. The trial counsel knows the witness has repudiated the statement and, if called, would testify in favor of the accused. Nonetheless, the trial counsel calls the witness for the ostensible purpose of impeaching him with the prior inconsistent statement. Since the "maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer," the trial counsel must have some other purpose in calling the witness. United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985). The only purpose trial counsel has in calling this type of witness must be to bring before the court hearsay evidence that the panel members could not otherwise consider. SALTZBURG, MARTIN AND CAPRA, *supra* note 4, at 800.

152. SALTZBURG, MARTIN AND CAPRA, *supra* note 4, at 801.

153. United States v. Pollard, 38 M.J. 41 (C.M.A. 1993) (unless of course the testimony is admissible in its own right as substantive evidence under Mil. R. Evid. 801(d)(1)A)); s*ee also* United States v. Taylor, 44 M.J. 475, 479-80 (1996).

154. 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

155. *Id.* at 292.

156. *Id*. at 294.

157. The trial counsel informed the military judge that he did not know whether Christina would even testify, much less what she would actually say. *Id*. at 295.

158. *Id.*

159. *Id*. at 298-99.

160. *See Pollard*, 38 M.J. at 50-51.

161. *Ureta,* 44 M.J. at 298.

believe Christina would testify in accordance with her pretrial statements, the military judge did not err in allowing him to call Christina and then impeach her denials with her prior inconsistent statement to OSI and with her testimony during the Article 32 investigation.[162] This, however, was not the end of the court's analysis.

When a witness denies making the prior inconsistent statement, counsel may call another witness to testify about the statement or introduce a document of the prior statement; in otherwords, the denial may be proven by a third party.[163] Under what circumstance should extrinsic proof of the statement not be allowed? The CAAF has held that "extrinsic evidence of a prior inconsistent statement should not be admitted *for impeachment* when: (1) the declarant is available and testifies; (2) the declarant admits making the prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony."[164] Ureta argued that because his wife testified and admitted the inconsistencies, extrinsic proof of the prior inconsistent statement (the Article 32 transcript) was error. The court disagreed, noting that the limitations on use of impeachment only apply if the statements are not otherwise admissible as substantive evidence.[165]

Out-of-court statements offered for the truth of the matter asserted generally are inadmissible hearsay.[166] However, a statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, the statement is inconsistent with the declarant's testimony, and the statement was given under oath subject to the penalty of perjury at a trial or other hearing.[167] In reading the two rules together, CAAF held that "the transcript could not be admitted for impeachment under MRE 613(b) but was admissible as substantive evidence in its own right under MRE 801(d)(1)(A)."[168] In *Ureta*, the prior inconsistent statements were admissible as substantive evidence because they were made at the Article 32 investigation. However, trial and defense counsel should carefully scrutinize an opponent's motives in calling witnesses for the limited purpose of impeaching them with prior inconsistent statements. If there is evidence the witness has or will recant the pretrial statement in front of members and the statements are not otherwise independently admissible, a challenge to the witness' testimony should be sustained.

Hair Today, Gone To Jail Tomorrow--Proving Wrongful Drug Use Through Inculpatory Hair Analysis

In 1995, the CAAF addressed the admissibility of hair samples in *United States v. Nimmer*,[169] setting aside a sailor's conviction for wrongful use of cocaine and remanding for a hearing to consider the reliability of exculpatory hair analysis.[170] In 1996, in a case of first impression in federal criminal practice,[171] the AFCCA affirmed the government's use of chemical hair analysis to prove an accused's wrongful use of drugs.

In *United States v. Bush*,[172] the accused was ordered to provide a urine sample as part of a random drug inspection. The sample provided was colorless, odorless, and did not foam when shaken. Although a field test indicated the accused's

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162. *Id.*

163. When offered for impeachment, the prior inconsistent statement is not being offered for the truth of the matter and the proponent of such evidence need not concern himself with the general ban on use of hearsay evidence. United States v. Taylor, 44 M.J. 475, 479 (1996).

164. *Ureta*, 44 M.J. at 298 (quoting United States v. Button, 34 M.J. 129 (C.M.A. 1992) (citations omitted)).

165. *Id.* at 299.

166. The military rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MCM, *supra* note 2, Mil. R. Evid. 801(c).

167. MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)A).

168. While the prior inconsistent statement made at the Article 32 investigation could itself be considered as substantive proof of guilt, the military judge erred in allowing the members to bring the actual transcript back into deliberations. *Ureta*, 44 M.J. 299; s*ee also* United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

169. 43 M.J. 252 (1996).

170. Nimmer submitted a urine sample on 27 January 1992, as part of the routine incident to reporting to his new command; the sample tested positive three days later. On 8 February, Nimmer had several strands of hair taken from his head and tested at his own expense at a civilian drug laboratory. At his court-martial for wrongful use of cocaine, the military judge excluded expert testimony that there was no detectable amount of the cocaine metabolite in the hair samples, with the inference being that Nimmer did not use cocaine and the submitted sample was not his or had been adultered. The case was remanded so the military judge could look at the validity of the scientific methodology leading to the expert's conclusion that the absence of the drug metabolite in the hair sample necessarily meant Nimmer did not consume cocaine. For a cursory, though marginally adequate, analysis of the case, see Stephen Henley, *Developments in Evidence Law*, ARMY LAW., Mar. 1996, at 102.

171. Although at least one federal district court has found hair analysis sufficiently reliable to use inculpatory test results in probation revocation proceedings. United States v. Medina, 749 F. Supp. 59 (E.D.N.Y. 1990).

172. 44 M.J. 646 (A.F. Ct. Crim. App. 1996).

specimen was not urine, it was not confirmed by the drug laboratory until approximately one month later.[173] By the time the command learned of the discrepancy, the window of detection had passed making it unlikely that the accused's urine would test positive for cocaine. The command then looked into the possibility of testing the accused's hair for the presence of drugs.

Pursuant to a valid search authorization,[174] about one hundred hairs were subsequently seized from Bush's head, tested, and reported positive for the presence of cocaine and its metabolite, benzoylecgonine.[175] At trial, the military judge admitted the test results and expert testimony regarding hair analysis. Bush was convicted of dereliction of duty for failing to provide a urine specimen and for use of cocaine.[176]

On appeal, Bush argued that hair analysis is unreliable and does not satisfy the test for admissibility of scientific evidence under MRE 702.[177] The AFCCA held that the military judge did not abuse his discretion in permitting qualitative and quantitative analysis of the hair sample to go before the members and affirmed the conviction.[178] The court noted there was no dispute at trial about the foundational principle of hair analysis.[179] There was also no dispute that mass spectrometry, the specific test employed by the laboratory, can reliably and validly detect the presence of cocaine.[180] The only dispute seemed to center around whether the presence of the drug could be explained by other than knowing ingestion, such as passive exposure,[181] which the court held went to the weight to be given the evidence and not its admissibility.

As the court concluded, "with proper controls, chain of custody, scientific methodology and instruments of sufficient sensitivity, cocaine found in hair is strongly indicative that cocaine was at some point ingested by the subject and may be properly considered as evidence of wrongful use."[182] When faced with circumstances similar to those in *Bush*, counsel may consider using hair analysis to prove or corroborate the use of drugs. Test results can also quantify the amount of drug use, which can then be used to bolster or refute an accused's innocent ingestion/passive inhalation defense as well as support or attack claims that "this was my one and only time, sir. You've got to believe me."[183]

Discerning Fact From Fiction. Use of Polygraphs In Courts-Martial

Under the 1969 *Manual for Courts-Martial*, polygraph tests[184] were explicitly declared to be inadmissible.[185] This bar was omitted from the Military Rules of Evidence when promulgated in 1980, leaving admissibility of such evidence subject to the same rules governing the civilian federal courts,[186] which

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173. The government introduced evidence at trial that the accused was capable, as a result of his medical training, of reverse self-catheterization. In otherwords, he was capable of replacing the urine in his bladder with a saline solution. *Id*. at 647. Ouch.

174. Submission of a substituted specimen justifies a subsequent order to submit a valid specimen, and that subsequent order stands on the same legal footing as the original. United States v. Streetman, 43 M.J. 752 (A.F. Ct. Crim. App. 1995).

175. *Bush*, 44 M.J. at 648.

176. *Id.*

177. Military Rule of Evidence 702 provides as follows:

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

MCM, *supra* note 2, MIL. R. EVID. 702.

178. *Bush*, 44 M.J. at 652.

179. *See* Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10-11. The author writes as follows:

> As blood circulates through the hair, it nourishes the hair follicle. If drug metabolites are in the blood, they will be entrapped in the core of the hair in amounts roughly proportional to those ingested. Those traces remain in the hair as it grows out of the head at the rate of approximately one-half inch per month. Because the hair itself contains the drug, the ingester cannot wash them away. The drug metabolites do not diminish with time and will exist until the actual hair is destroyed.

Rob's article provides a superb examination of the advantages and shortcomings of hair testing in relation to urinalysis, its application to courts-martial practice, and is must reading for military counsel.

180. As the court astutely noted, the question of whether the *presence* of the cocaine metabolite in a hair analysis tends to prove that the subject used drugs (*Bush*) is logically and scientifically discrete from whether the *absence* of the cocaine metabolite in a hair sample tends to prove that the subject did not use drugs (*Nimmer*). *Bush*, 44 M.J. at 650.

181. *Id.* at 651.

182. *Id; see also* Karl Warner, *Hair Analysis-Overcoming Urinalysis Shortcomings*, ARMY LAW., Feb. 1990, at 69-70.

essentially require that expert testimony be based on generally accepted scientific principles.[187] In *United States v. Gipson*,[188] the Court of Military Appeals found that *Frye v. United States* had been superseded by the Military Rules and was not an independent standard for admissibility.[189] Rather, the focus on the admissibility of novel scientific evidence in general, and polygraphs in particular, is whether the evidence will "assist the trier of fact to understand the evidence or to determine a fact in issue."[190] After *Gipson*, the trend seemed to point to potential acceptance of polygraph evidence.[191] The impact of *Gipson* was short lived, however, and with the promulgation in 1991 of MRE 707,[192] the military courts "went from being one of the most liberal federal jurisdictions on polygraph evidence to becoming a jurisdiction in which the admission of such evidence was banned totally."[193]

While intended to remove all judicial discretion in weighing the legal and logical relevance of polygraph evidence, MRE 707 has, in recent years, been one of the more frequently disputed provisions of the military rules.[194] Adoption of a per se rule that excludes potentially exculpatory polygraph testimony "was bound to result in any number of constitutional due process[195] and compulsory process[196] claims."[197] In *United States v. Scheffer*,[198] the CAAF finally concluded that wholesale exclusion of polygraph evidence under a per se rule is unwarranted.[199]

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183. Current scientific methods can test for the presence of marijuana, cocaine, opiates, methamphetamines, barbiturates, and PCP. Baumgartner, Hill, & Blahd, *Hair Analysis for Drugs of Abuse*, 34 J. FORENSIC SCI. 1433 (1989). Hair sampling is less invasive than urine testing and is easily collected under close supervision without the embarrassment of providing a urine sample. There is a wider window of detection. Hair analysis can show pattern and magnitude of use. However, no Department of Defense Forensic Toxicology Drug Testing Laboratory is currently performing hair analysis. If counsel want to use hair analysis, they will likely have to send the sample to a civilian laboratory to perform the test, which is relatively expensive at about $60 per test. Telephone interview with Dr. James Jones, Deputy Commander, Ft. Meade Forensic Toxicology Drug Testing Laboratory (Nov. 4, 1996). One such laboratory is Psychemedics Corporation, 1280 Massachusetts Avenue, Suite 200, Cambridge, Massachusetts 02138. Tel. 617-868-7455.

184. The polygraph is a device which objectively measures and records physiological changes in an individual. John J. Canham, Jr., *Military Rule of Evidence 707: A Bright-Line Rule That Needs to be Dimmed*, 140 MIL. L. REV. 65, 68 (1993). The polygraph machine is an electronic instrument comprised of four components: the nomograph chest assembly which measures inhalation/exhalation ratio; the galvanic skin response [graph] which measures skin resistance and perspiration changes; the cardiosimulgraph which measures blood pressure and pulse rate; and the kimograph, which moves the chart paper at a steady rate to permit recordation of the examinee's reactions. United States v. Rodriguez, 34 M.J. 562, 563 (A.C.M.R. 1991).

185. "The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during, a drug-induced or hypnosis-induced interview are inadmissible in evidence in a trial by court-martial." MANUAL FOR COURTS-MARTIAL, United States, ¶ 142e (rev. ed. 1969).

186. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 855 (1991).

187. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (polygraph evidence inadmissible because it is not generally accepted within the scientific community).

188. 24 M.J. 246, 253 (C.M.A. 1987) (accused entitled to attempt to lay a foundation for admissibility of favorable polygraph evidence).

189. *Id.* at 251.

190. MCM, *supra* note 2, MIL. R. EVID. 702.

191. *See, e.g.*, United States v. Rodriquez, 34 M.J. 566 (A.C.M.R. 1991) (polygraph results were relevant to credibility of accused who testified he did not use cocaine), *rev'd*, 37 M.J. 448 (C.M.A. 1993).

192. Rule 707. Polygraph Examinations, provides as follows:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MCM, *supra* note 2, MIL. R. EVID. 707.

193. Canham, *supra* note 184, at 65 (citations omitted).

194. *See infra* notes 197-229 and accompanying text.

195. U.S. CONST. amend. V, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law*; nor shall private property be taken for public use, without just compensation. (emphasis added).

In March 1992, Airman Edward Scheffer began working as an OSI operative informing on two alleged drug dealers named Davis and Fink.[200] On 7 April, Scheffer provided a urine specimen as part of the normal procedure for controlled informants. On 10 April, Scheffer submitted to a government polygraph examination in which the examiner concluded that no deception was indicated.[201] At his court-martial for, *inter alia*, wrongful use of methamphetamine, Scheffer testified on his own behalf,[202] denied knowingly using drugs between the time he began working for OSI and the time the sample was provided, and claimed he did not know how his 7 April urine specimen tested positive.[203] The trial counsel cross-examined Scheffer about inconsistencies between his trial testimony and his earlier pretrial statements to OSI. The military judge then denied a defense request to lay a foundation for the admissibility of the exculpatory polygraph examination.[204] Scheffer's credibility was challenged by the trial counsel during closing argument to the members.[205]

The AFCCA affirmed the findings and sentence, but awarded one day credit for lack of a timely pretrial confinement review.[206] The court held that MRE 707 was "designed to assure both fairness and reliability in the ascertainment of guilt and innocence"[207] and that there was no constitutional right to present exculpatory polygraph evidence. The CAAF set aside the decision.[208]

The CAAF first noted that the right of an accused to call witnesses on his behalf[209] and present relevant and material testimony[210] may not be arbitrarily denied. The court said that the "per se exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil. R. Evid. 702 and Daubert [v. Merrell Dow Pharmaceuticals] violates his Sixth Amendment right to present a defense."[211] "A properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception."[212]

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196. U.S. CONST. amend. VI, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*; and to have the Assistance of Counsel for his defense. (emphasis added).

197. Canham, *supra* note 184, at 75.

198. 44 M.J. 442 (1996) (petition for cert. filed with the U.S. Supreme Court).

199. *Id*. at 445.

200. *Id*. at 443.

201. The relevant questions were: (1) have you ever used drugs while in the Air Force; (2) have you ever lied in any of the drug information you have given to OSI; and (3) have you ever told anyone other than your parents that you are assisting OSI? *Id.*

202. *See* United States v. Williams, 43 M.J. 348 (1995), *cert. denied*, 116 S. Ct. 925 (1996) (accused has no right to introduce polygraph evidence without first taking the stand, testifying and placing his credibility at issue).

203. Scheffer did testify that he remembered leaving Davis' house around midnight on 6 April and driving back to his quarters on March Air Force Base. The next thing he remembered was waking up in his car the next morning in a remote area, not knowing how he got there. *Scheffer*, 44 M.J. at 443-444.

204. The military judge denied the request without receiving any evidence; he ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence in courts-martial. United States v. Scheffer, 41 M.J. 683, 686 (A.F. Ct. Crim. App. 1995).

205. Trial counsel argued, "He lies. He is a liar. He lies at every opportunity he gets and has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II." *Scheffer*, 44 M.J. at 444.

206. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991); United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994); *see also* Amy M. Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 14.

207. *Sheffer*, 41 M.J. at 692 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

208. *Scheffer*, 44 M.J. at 442.

209. Rock v. Arkansas, 483 U.S. 44, 52 (1987).

210. Washington v. Texas, 388 U.S. 14, 23 (1967).

211. *Scheffer*, 44 M.J. at 445.

Despite the broad language used by the court, *Scheffer* does not stand for the proposition that exculpatory polygraph evidence is now automatically admissible in courts-martial. The degree to which the military judge can condition the admissibility of exculpatory polygraph examinations was the subject of two subsequent cases.

In *United States v. Mobley*,[213] the accused was charged with wrongful use of cocaine. At a pretrial hearing, the military judge refused to permit the defense to lay a foundation for the admissibility of three exculpatory polygraph examinations. Mobley thereafter testified it was inconceivable for him to ingest cocaine because he suffered from a seizure disorder for which he was taking prescription medicine. He had been told by his doctors that using illegal drugs would trigger a seizure, risking death.[214] He asserted he did not know how the cocaine got in his system. Several coworkers and supervisors testified on Mobley's behalf that it would be out of character for him to use illegal drugs.[215] The trial counsel attacked Mobley's credibility at length and ultimately argued to the panel that Mobley lied "because he's got everything at stake in his court-martial."[216]

For the reasons stated in *Scheffer*, the CAAF held the military judge erred in applying a per se exclusionary rule to the admissibility of polygraph evidence.[217] The case was remanded for a hearing to provide Mobley with the opportunity to lay a foundation for the admission of his exculpatory polygraph evidence.[218] Assuming the defense was able to lay a satisfactory foundation, the court also indicated that the military judge may condition admissibility of the evidence upon the accused submitting to a government polygraph examination.[219] Similarly, if the trial counsel has evidence the accused was shopping for a favorable examination, the military judge can also condition the admissibility of the exculpatory test by requiring disclosure of the results of all examinations taken by the accused.[220]

Exculpatory polygraphs were again the focus in *United States v. Nash*.[221] Staff Sergeant Chester Nash was also charged with wrongful use of cocaine. Before trial, he underwent a defense administered polygraph examination in which the examiner concluded that no deception was indicated. Nash also agreed to a government administered test; deception was indicated.[222] The military judge ruled that neither side would be permitted to present polygraph evidence because of the existence of a bright-line rule--MRE 707. The judge also indicated that, even without MRE 707, the evidence lacked any probative value because of the anticipated conflict between the two experts.[223]

In setting aside the decision of the AFCCA, the CAAF held the military judge's ruling was wrong on two counts. First, a per se exclusionary rule is unconstitutional.[224] Second, the fact that two experts may disagree does not make their testimony inadmissible or indicate that the evidence lacks probative value. "Conflicting expert opinions are to be resolved by the triers of

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212. *Id*. at 446. The scope of polygraph testimony is properly distinguished from the expert who wants to testify that a declarant is telling the truth, which is prohibited. *See, e.g.*, United States v. Marrie, 43 M.J. 35 (1996) (expert testimony that false allegations from preteen and teenage boys of homosexual assault were extremely rare improperly admitted as comment on victim's credibility); United States v. Cacy, 43 M.J. 214 (1996) (testimony that the expert explained the importance of being truthful and, based on child-victim's responses, recommended further treatment is an affirmation that the expert believed the child, usurping the responsibility of the fact-finder).

213. 44 M.J. 453 (1996).

214. *Id*. at 454.

215. *Id*.

216. *Id.*

217. *Id.* at 455.

218. *Scheffer*, 44 M.J. at 446-47. A proper foundation would include: (1) evidence of the scientific validity upon which the polygraph is based; that conscious lying is stressful and this stress manifests itself in physiological responses which can be recorded and objectively analyzed, *see, e.g.*, United States v. Piccinonna, 885 F.2d 1529, 1537 (11th Cir. 1989); (2) demonstrating the applicability of the theory to the case at hand; (3) evidence the examiner was properly qualified based on ability, experience and education, *see* W. Thomas Halbleib, *U.S. v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 Ky. L.J. 225, 226 (1991); (4) evidence the equipment was functioning properly on the day of the test; (5) evidence supporting the validity of the questioning technique; *see, e.g.*, United States v. Cato, 44 M.J. 82 (1996) (inartful questions posed by examiner called for legal conclusions not underlying facts); and (6) evidence supporting the reliability of the results; *see, e.g.*, United States v. Berg, 44 M.J. 79 (1996) (results unreliable where accused employed countermeasures before and during the examination).

219. *Mobley*, 44 M.J. at 455.

220. *Id*.

221. 44 M.J. 456 (1996).

222. *Id*. at 457.

223. *Id*.

facts after evaluating them in the context of the totality of the evidence and after proper instructions by the military judge."[225]

Where do these polygraph cases leave the trial practitioner? Assuming the accused has testified and his credibility is attacked, he is entitled to lay a foundation for the admission of an exculpatory polygraph examination.[226] If the defense successfully lays the foundation, the military judge can still condition admissibility upon the accused's agreement to submit to a government-administered polygraph. The military judge can also require the admission of all test results if there is evidence the accused has been shopping for a favorable examination. Most importantly, if eventually called as an expert witness, the polygrapher's testimony should be limited to the absence of indicia of deception at the time of the examination,[227] from which the factfinder would then draw any inference concerning the credibility of the accused's in-court testimony.[228]

While *Scheffer* and its progeny have gone far in desiccating the floodwaters of constitutional attacks on MRE 707, the military practitioner should be advised that the issues in these cases were limited to the admissibility of exculpatory polygraph examinations offered by an accused to bolster the credibility of his in-court testimony. Yet to be resolved are questions regarding the admissibility of polygraph examinations of witnesses other than the accused[229] and the government's unilateral use of polygraph results to impeach the credibility of the accused's in-court testimony.[230]

A Rose by Any Other Name is Still a Rose, Unless it is An Abused Rose.[231] Use of Dysfunctional Family "Profile" Evidence In Child Abuse Cases

The Supreme Court has sanctioned the use of "profile" evidence to satisfy the Fourth Amendment requirement for reasonableness in investigatory stops,[232] and military courts have allowed expert testimony regarding characteristics displayed by victims of sex offenses.[233] Testimony about offender profiles or other similar classifications of an accused, however, has almost always been deemed inadmissible.[234] In *United States v. Pagel*,[235] the CAAF has apparently taken a short detour off the narrow "profile path" and affirmed the use of expert testimony concerning the dynamics of an incestuous child sexual abuse situation.

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224. *Id.*

225. *Id*. at 458 (quoting United States v. Dock, 35 M.J. 627, 635 (A.C.M.R 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994)).

226. *But see* United States v. Baker, 45 M.J. 538 (A.F. Ct. Crim. App. 1996) (no constitutional right to present polygraph evidence to support credibility on motion in limine).

227. *Scheffer,* 44 M.J. at 446.

228. As one commentator has noted, "herein lies the danger of polygraph evidence. If the expert is allowed to testify to the specific questions posed to the accused and the responses, this will necessarily lead to a direct inference of guilt or innocence, coming perilously close to answering the ultimate issue in the case. Instead of a fact-specific rendition of the relevant questions, the proponent of the polygraph should be limited to generalized information, specific enough to avoid confusion." For example:

> Defense Counsel: What type of questions did you utilize during the examination?
> Polygrapher: Questions were put to PVT Boone relating to possible acts of misconduct.
> Defense Counsel: What were PVT Boone's responses?
> Polygrapher: The responses reflected a denial of misconduct.
> Defense Counsel: Do you have an opinion as to the credibility of the responses?
> Polygrapher: In my opinion, PVT Boone was non-deceptive in his responses.

Canham, supra note 184, at 98.

229. *Scheffer,* 44 M.J. at 445. For example, can the defense use a co-accused's or a victim's deceptive examination to impeach her in-court testimony?

230. *Id*. For example, the accused fails a polygraph examination in which one of the relevant questions was whether he was at the scene of the crime. At trial, the accused testifies he was somewhere else at the time of the offense. The defense does not introduce any polygraph evidence. Can the government impeach the accused's in-court denials with expert testimony that the accused's responses during the polygraph examination indicated deception?

231. What's in a name? that which we call a rose,
By any other name would smell as sweet;
So Romeo, were he not Romeo call'd

WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

Technical Sergeant Kenneth Pagel was charged with various sex offenses committed on his natural daughter. At trial, the government called an expert witness who testified concerning the common dynamics and characteristics of a family where sex abuse has occurred.[236] After setting forth these factors, the trial counsel then asked the expert, without objection, for a "point-by-point comparison of how [Pagel's] family picture reflected the key elements of that [profile]."[237] The expert then matched the specifics of Pagel's family life to the family where abuse might have occurred.[238] On appeal, Pagel alleged error, claiming that profile evidence of a dysfunctional family is specifically prohibited by *United States v. Banks*.[239]

To the casual observer, it would appear that the expert testimony admitted in *Pagel* was exactly the type of evidence as presented in *Banks*; namely, the trial counsel's presentation of a characteristic profile of child sexual abuse and then relying on the profile to bolster the government's case establishing guilt.[240] The court, however, was able to distinguish the cases in affirming Pagel's conviction.

The risk factors in *Banks* were not being used to support the credibility of the daughter's accusations or to explain her admitted unusual behavior. Instead, the "profile" was offered to present the accused's family in a situation as ripe for child sexual abuse, in effect purporting to present characteristics of a family that included a child sexual abuser. In *Banks*, the "prosecution's strategy of presenting a 'profile' and pursuing a deductive scheme of reasoning[241] and argument to prove Banks' a child abuser was impermissible."[242]

In *Pagel*, the court concluded the evidence was, instead, used to explain the behavior of the victim on the assumption that she had been abused by someone, not necessarily the accused. Using "profile" evidence to explain the counter-intuitive behavioral characteristics of the victim was permissible.[243]

Are these distinctions without substance? As Judge Darden so perceptively concluded in his concurring opinion in *Pagel*, "I am unconvinced that *Banks* is distinguishable; indeed, it seems to me to be entirely on point in every way."[244] Regardless, the court seems to have widened the shoulder of the child sexual abuse evidentiary highway by allowing dysfunctional family "profile" evidence, albeit under the apparent limited circumstances of explaining the victim's counter-intuitive behavior.[245]

In *Pagel*, the court has hopefully stretched the boundaries of permissible "profile" testimony to its rational limits. While the court did reconcile *Pagel* and *Banks*, though somewhat disingenuously, trial counsel should still be cautioned to tread carefully before entering this evidentiary quagmire. A slip of the tongue may turn otherwise admissible testimony focusing on the victim into inadmissible "profile" evidence focusing on the accused, including argument that the dynamics of the accused's family conclusively establish that abuse occurred. A rose by any other name.

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236. These characteristics purportedly include: (a) the child's role includes responsibilities commonly associated with adults; (b) the relationship between mother and daughter is usually strained; (c) the mother is very emotionally passive and dependent on her husband; (d) the father is not setting good limits for the child and is not being a good disciplinarian; (e) the child is running wild; (f) substance abuse is present; (g) marital conflict exists and (h) there are apparent sexual difficulties between the mother and father. United States v. Pagel, 40 M.J. 771, 774 (A.F.C.M.R. 1994).

237. *Pagel*, 45 M.J. at 70 (Darden, S.J., concurring).

238. *Id.*

239. 36 M.J. 150 (C.M.A. 1992). Sergeant Russell Banks was charged with the rape and sodomy of his seven-year old daughter; he denied committing the acts. During its case-in-chief, the government called an expert witness who explained, over defense objection, the profiles of families exhibiting the dysfunction of child sexual abuse and the behavior of a sexually abused child. The expert opined there were several risk factors that increase the risk of a child being a victim. These include: only one biological parent, a stepfather in the family, and marital dysfunction. The Court of Military Appeals rejected the use of a "profile" to show it was more likely than not that Banks abused his daughter; that is, to establish guilt or innocence. The court reversed the conviction.

240. *Id.* at 163.

241. The trial counsel used a syllogism to prove Banks' guilt. The major premise was that families with the profile present an increased risk of child sexual abuse. The minor premise was that Bank's family fit the profile, leading the panel to draw the conclusion that Banks was a child abuser. *Id.* at 162 n.11.

242. *Id.* at 163.

243. Unlike Banks, Pagel did not object to the family profile testimony or to whether the characteristics of his family fit the pattern of that profile. He only objected to counsel's actually comparing the family to the profile point-by-point. As Senior Judge Darden indicated in his concurring opinion, Pagel's objection was forfeited, absent plain error. *Pagel*, 45 M.J. at 71.

244. *Id.*

245. In this regard, *Pagel* is consistent with the belief by some, including this author, that child sexual abuse cases have their own special set of rules. *See, e.g.*, United States v. Johnson, 35 M.J. 17, 18 (C.M.A. 1991) ("Especially in child abuse cases, information is often imprecise, and courts . . . are wrestling with testimonial boundaries").

Tell Me Why It Hurts. The Medical Diagnosis and Treatment Hearsay Exception in Child Abuse Cases

However well a child-victim testifies in court, an aggressive, prepared trial counsel will always want to bolster that testimony with supporting evidence. Although such corroboration may include medical and physical evidence, expert psychological testimony concerning delayed reporting, and even the accused's own admissions, some of the most powerful evidence in child sexual abuse cases lies in the child's prior out-of-court hearsay statements.[246] One of the most common exceptions to the general hearsay ban used in child abuse prosecutions is statements made for purposes of medical diagnosis or treatment.[247]

This exception requires the proponent to show that: (1) any statements were made by the child for the purpose of medical treatment or diagnosis (medical purpose prong); and (2) the child made the statements with some expectation of promoting his or her well-being (expectation of treatment prong).[248] "While the expectation of the treatment prong is generally not a problem with adults and older children who can easily recognize health care practitioners, and intuitively appreciate the incentive to be truthful,"[249] small children typically cannot articulate that they were aware the statements were pertinent to successful treatment and would promote their well-being.[250] While a formal affirmation by the child that he or she expects some benefit is not a per se requirement for admission,[251] how can a proponent of medical diagnosis and treatment statements overcome this challenge? In *United States v. Siroky*,[252] the CAAF set forth some suggestions.

Staff Sergeant James Siroky and his wife, a native Filipina, had, by most accounts, an abusive and contentious marriage.[253] Most of their problems centered around Mrs. Siroky's repeated threats to report the accused to the authorities for abuse if he did not give her money and grant her desire to return to the Philippines with their twenty-nine-month-old daughter, J.[254] Mrs. Siroky eventually filed for divorce, seeking custody of their daughter. Mrs. Siroky's attorney thereafter sent J to a child therapist "experienced with treating psychological trauma associated with sexual abuse."[255] During several of their sessions together, J verbalized and demonstrated sexual abuse. At Siroky's subsequent court martial for, *inter alia*,[256] the rape and sodomy of his daughter, the military judge allowed the therapist to testify to certain admissions made by J, which constituted the government's only evidence of the sodomy charge and the only evidence of penetration supporting the rape charge.[257]

The CAAF affirmed the AFCCA's decision setting aside the findings of guilty as to the sodomy and rape offenses. Although J's statements may have satisfied the medical purpose prong,[258] there was insufficient evidence to show that J made the statements with an expectation of promoting her well-being.[259]

In child sexual abuse cases where counsel are attempting to introduce statements under the medical treatment exception to the hearsay rules, *Siroky* suggests several things to ensure their admission. First, the court suggested that someone, like a

246. Lucy Berliner and Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 130 (1984).

247. The military rules permit admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MCM, *supra* note 2, MIL. R. EVID. 803(4).

248. *See, e.g.*, United States v. Faciane, 40 M.J. 399 (C.M.A. 1994); United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993); United States v. Quigley, 35 M.J. 347 (C.M.A. 1992).

249. United States v. Siroky, 42 M.J. 707, 711 (A.F. Ct. Crim. App. 1995).

250. In cases involving small children, who do not themselves seek medical treatment but instead are brought by someone else, there must be some evidence that the child understood the doctor's role in order to trigger the motivation to provide truthful information. *See* United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993).

251. United States v. Ureta, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

252. 44 M.J. 394 (1996).

253. Although Mrs. Siroky testified the accused was a heavy drinker who became physically abusive, she was described by most individuals at trial as being dishonest, manipulative, and emotionally abusive to the accused. *Id*. at 395.

254. *Id*.

255. *Siroky*, 42 M.J. at 709.

256. Siroky was also found guilty of two specifications of assault and battery on his wife. The charge and specifications were affirmed on appeal.

257. J did not testify and there was no attempt by either party or the military judge to call her.

258. As the Air Force court noted, "[u]nquestionably, Mrs. Clifton [the therapist] needed J to speak to her in order for J's therapy to progress. We conclude, as did the military judge, that J's statements were for the purpose of medical diagnosis or treatment." *Siroky*, 42 M.J. at 711.

mother or father, explain to the child why he or she is going to see the doctor, the importance of the treatment, and that the child needs to tell what happened in order to feel better.[260] Second, the court recommended that caretakers specifically identify themselves as doctors, nurses or other medical professionals,[261] tell the child the purpose of the examination,[262] and engage in activities that would be construed by the child as treatment.[263] Third, the court implicitly recommended the military judge make express findings of fact as to the evidence submitted on both prongs of the medical diagnosis and treatment hearsay exception.[264]

Due to the reluctance of a child-victim to testify at trial, counsel are inevitably required to rely on exceptions to the hearsay rule. Because medical examinations are conducted as a matter of course in sexual abuse cases, statements made by the child-victim during the course of the examination are usually available for counsel's use as substantive evidence.[265] *Siroky* sets forth several things counsel can do to lay the proper foundation to admit them under the medical diagnosis or treatment exception to the hearsay rules.

Conclusion

It is beyond peradventure that mastery of evidence is a necessary task for the successful military trial practitioner. While not intended as a substitute for a more comprehensive and individualized reading of the cases, this article has attempted to distill the practical import of several of the more interesting developments in evidence during the last year. How the spin actually "plays in Peoria" is left for another day.

259. For example, the court noted the therapist did not present herself as a doctor or was otherwise there to help. In fact, she introduced herself to J as "Ms. Lindy," and asked J if she would like to have some fun playing with her toys. The record did not indicate that the therapist was dressed or otherwise was identified as a medical professional. She did not engage in any activities which J could construe as treatment and the interviews were conducted in a room filled with toys. *Siroky,* 44 M.J. at 399-401.

260. *Id.* at 400-401.

261. *Id.* at 401. The scope of Mil. R. Evid. 803(4) is not limited to doctors, but may include statements to other health care practitioners, or therapists. United States v. Cox, 45 M.J. 153 (1996). Statements made to a family counselor, social worker, clinical psychologist, psychotherapist, or other practitioners of the healing arts may also qualify for admission under Rule 803(4). "It is the purpose of the assertion, i.e., to aid in medical diagnosis or treatment, not the identity of its immediate recipient, that excepts it to the hearsay rule." DAVID F. BINDER, HEARSAY HANDBOOK 176 (3d ed. 1991); *see also* United States v. Morgan, 40 M.J. 405 (C.M.A. 1994), *cert. denied,* 115 S. Ct. 907 (1995) (MRE 803(4) not limited to medical doctors; key factor is motive and perception of patient).

262. The doctor, or other professional, should note the child's understanding in the medical records.

263. *See also,* United States v. Henry, 42 M.J. 593 (Army Ct. Crim. App. 1994). A fifteen year old victim's consent to rape protocol examination because she had been told that "medical evidence had to be gathered in these types of allegations," evidenced a belief that the exam was simply a continuation of the ongoing criminal examination and statements to the doctor implicating her father were not provided with an expectation of treatment or for the purpose of medical diagnosis. The court recommended that any statements obtained from the victim during the course of the investigation be taken after she has been treated and that any law enforcement personnel accompanying the victim to the medical facility remain outside the examining room during the examination.

264. *Siroky,* 44 M.J. at 398.

265. *See also* United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) (out-of-court statement of child's parent made to medical personnel for purposes of obtaining medical treatment admissible under Fed. R. Evid. 803(4)).

New Developments in Sentencing

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Introduction

Review of courts-martial sentencing cases decided over the past year reveals a trend to bring more information before the sentencing authority. A broader view of rules governing admissibility of evidence during presentencing provides the sentencing authority with additional information to consider when determining an appropriate sentence for the accused.

At a time when the overall number of courts-martial is in decline[1] and contested cases are even less common, one of the most fertile areas for advocacy is the presentencing phase of a court-martial. The presentencing phase includes information from all phases of the court-martial process, from investigation to trial on the merits to the providence inquiry in a guilty plea. In addition, Rule for Courts-Martial (R.C.M.) 1001[2] authorizes each side to present matters to aid the court-martial in determining an appropriate sentence. This article reviews some of the recent decisions that affect the presentencing procedure at courts-martial and the validity of punishments that a court-martial may adjudge.

Presentencing Evidence

R.C.M. 1001(b)(2): Personal data and character of prior service

Rule for Courts-Martial 1001 sets forth the presentencing procedure for courts-martial and provides a framework for review of developments in sentencing. One method for trial counsel to provide information to the sentencing authority is through personnel records, which "reflect the past military efficiency, conduct, performance, and history of the accused."[3] In *United States v. Weatherspoon*,[4] following convictions on several drug charges, the trial counsel offered under R.C.M. 1001(b)(2) a record of a prior Article 15 of the accused for use of marijuana.[5] The prosecution retrieved the Article 15 record from the Investigative Records Repository (IRR), United States Army Central Security Facility, where it was maintained under regulations for that facility.[6]

In finding that the military judge improperly admitted the prior Article 15, the Army Court of Military Review (ACMR)[7] identified *Army Regulation 640-10*[8] as "the controlling Army regulation for personnel records."[9] The court identified three records created and maintained to document a soldier's military service: the Official Military Personnel File (OMPF), the Military Personnel Records Jacket (MPRJ), and the Career Management Individual File (CMIF).[10] The court in *Weatherspoon*

1. In Fiscal Year 1992 (FY92) the total number of general, bad conduct special, and special courts-martial was 1,781; in FY94 the number was 1,220; and in FY96 the total number was 1,146. In each of those years over half of the courts-martial tried were guilty plea cases. Office of the Clerk of Court, United States Army Legal Services Agency, Falls Church, Virginia.

2. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1001 (1995 ed.) [hereinafter MCM].

3. *Id.* at 1001(b)(2).

4. 39 M.J. 762 (A.C.M.R. 1994).

5. *Id.* at 767.

6. *Weatherspoon*, 39 M.J. at 767; *see* DEP'T OF ARMY, REG. 381-45, MILITARY INTELLIGENCE: INVESTIGATIVE RECORDS REPOSITORY (IRR) (10 Aug. 1977).

7. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time a particular case was decided is the name that will be used in referring to that decision.

8. DEP'T OF ARMY, REG. 640-10, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: INDIVIDUAL MILITARY PERSONNEL RECORDS (31 Aug. 1989) [hereinafter AR 640-10].

9. *Weatherspoon*, 39 M.J. at 767.

10. *Id.*

further examined the purpose of the records repository and found the IRR existed to maintain counterintelligence investigative files, not personnel records reflecting a soldier's service.[11] If the record did not exist for the purpose called for under R.C.M. 1001(b)(2), i.e, to reflect the character of service of the soldier, then it would not constitute admissible presentencing evidence.

Unlike the ACMR in *Weatherspoon*, the Court of Appeals for the Armed Forces (CAAF) in *United States v. Davis*[12] did not limit its review of personnel records to those identified in *AR 640-10*, and the court upheld the prosecution's use of a Discipline and Adjustment (D&A) Board Report[13] at sentencing. Davis was an inmate at the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas, when he was convicted of attempted escape from that facility in 1993. The trial counsel offered as an exhibit the D&A Board Report to show Inmate Davis' "service record as a prisoner" under R.C.M. 1001(b)(2).[14] Defense counsel objected to the proffered evidence, but premised the objection on R.C.M. 1001(b)(3),[15] arguing that the D&A Board Report did not constitute a criminal conviction within the terms of the rule. On appeal, the defense further argued the report did not constitute a personnel record.[16]

In upholding the trial court's admission of the D&A Board Report, the CAAF noted that USDB Regulations provided for maintenance of a prisoner's correctional treatment file, and records of this type are within the R.C.M. 1001(b)(2) description of personnel records.[17] The CAAF declined the opportunity to examine the scope of records admissible under R.C.M. 1001(b)(2). Instead, the court held defense counsel waived the issue by objecting to the evidence only on the basis that it did not constitute a prior conviction. "This objection is clearly without merit since the D&A Board Report was admitted under R.C.M. 1001(b)(2),"[18] noted Judge Sullivan.

By premising its resolution of *Davis* on waiver due to defense counsel's failure to object specifically, the CAAF left room for counsel to litigate limitations on admissibility of records of prior disciplinary actions against an accused. Though Judge Gierke concurred in the result in *Davis*, he did not acquiesce in the prosecution's use of personnel records beyond those set forth in *AR 640-10*. He focused on R.C.M. 1001(b)(2) as authorizing use of records kept in accordance with *departmental* regulations, in contrast with regulations of local field commands, such as the USDB.[19] The concurrence in *Davis* also examined whether the proffered evidence is in fact the relevant evidence in evaluating admissibility of a personnel record under R.C.M. 1001(b)(2). "The relevant record," noted Judge Gierke, "is the record of action taken . . . not the board's recommendation or the evidence supporting that recommendation."[20] While leaving these issues open for defense counsel to pursue, the concurrence agreed that the defense counsel's limited objection had waived the issue of the D&A Board Report's admissibility under R.C.M. 1001(b)(2).[21]

Trial practitioners should continue to scrutinize documentary evidence closely to ensure it meets the strictures of R.C.M. 1001(b)(2). For the less frequently encountered document, such as the D&A Board Report in *Davis*, trial counsel should seek to link the document to a departmental regulation calling for the record in question. In offering additional documentary evidence, trial counsel should not seek to introduce otherwise inadmissible evidence simply by including it as part of a record. Counsel should examine the purpose of the document offered and focus on the record of action itself rather than on a document containing a recommendation for action.

For defense counsel, the lesson of *Davis* is clear--be specific in objections! Make the trial counsel clarify the basis on which the prosecution relies to admit the document under R.C.M. 1001(b), and respond directly to that provision. The CAAF has clearly shown in *Davis* it will not step in to cure misplaced objections to documentary evidence.

R.C.M. 1001(b)(4): Evidence in Aggravation

11. *Id.* at 768.

12. 44 M.J. 13 (1996).

13. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM (15 Aug. 1996).

14. *Davis*, 44 M.J. at 19-20.

15. MCM, *supra* note 2, R.C.M. 1001(b)(3), permits the trial counsel to introduce evidence of military or civilian convictions of the accused.

16. *Davis*, 44 M.J. at 19.

17. *Id.* at 20.

18. *Id.* at 19.

19. *Id.* at 20.

20. *Id.*

21. *Id.*

The most active area for review of prosecution sentencing matters is evidence in aggravation under R.C.M. 1001(b)(4).[22] The *Manual for Courts-Martial* notes that evidence in aggravation may include "any financial, social, psychological, and medical impact on . . . the victim."[23] *Army Regulation 27-10*[24] contemplates such impact evidence in directing the trial counsel to inform victims of crime of their opportunities to provide evidence at the sentencing phase of the court-martial. There are, however, some limitations on R.C.M. 1001(b)(4) evidence. R.C.M. 1001(b)(4) requires that the admissible evidence directly relates or results "from the offenses of which the accused has been found guilty."[25] In addition, the evidence must be more probative than prejudicial.[26] Notwithstanding a relaxation of the rules of evidence at sentencing,[27] evidence in aggravation still is subject to objection if it is unfairly prejudicial to an accused.

Background

In *United States v. Witt*,[28] the ACMR upheld admission of evidence in aggravation where there existed a "reasonable linkage" between the offense and the alleged effect that the prosecution sought to introduce at the presentencing phase.[29] The court reached a similar result in *United States v. Mullens*,[30] where uncharged misconduct offered by the prosecution at the presentencing phase was deemed "part and parcel"[31] of the charged conduct. Such additional information, reasoned the court, "merely informs the court members of the true extent of misconduct that was charged."[32]

Several decisions prior to 1996 showed an unwillingness to open wide the door for evidence in aggravation. In *United States v. Wingart*,[33] the Court of Military Appeals (CMA) rejected the government's proposition that, once evidence was admissible on the merits of the case under Military Rule of Evidence (MRE) 404(b),[34] it was *per se* relevant for sentencing purposes under R.C.M. 1001(b)(4).[35] The CMA subjected the uncharged misconduct evidence to an independent test for

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22. MCM, *supra* note 2, R.C.M. 1001(b)(4), provides, "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."

23. *Id.* at 1001(b)(4), Discussion. "Evidence in aggravation may include 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 adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

24. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 18-14(A) (8 Aug. 1994) [hereinafter AR 27-10], requires that,

> During the investigation and prosecution of a crime, the . . . trial counsel . . . will provide a victim the earliest possible notice of significant events in the case, to include . . . (8) The opportunity to consult with trial counsel about providing evidence in aggravation of financial, social, psychological, and physical harm done to or loss suffered by the victim.

25. MCM, *supra* note 2, R.C.M. 1001(b)(4).

26. *Id.* Mil. R. Evid. 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

27. *Id.* R.C.M. 1001(c)(3) provides that, "The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence." R.C.M. 1001(d) states, "If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree. *Id.*

28. 21 M.J. 637 (A.C.M.R. 1985). In *Witt*, the accused was convicted of distributing LSD to another soldier, who shortly thereafter, and while under the influence of the LSD he had ingested, attacked several other soldiers in the barracks with a knife. The assault victims all indicated the knife-wielding soldier was acting in a very unusual manner and was unprovoked in his attacks.

29. *Id.* at 641.

30. 28 M.J. 574 (A.C.M.R. 1989). In *Mullens*, the accused was found guilty of various acts of sodomy from 1983-86 at Fort Richardson, Alaska. In this guilty plea case, the accused signed a stipulation of fact which indicated additional indecent liberties by the accused against his son between 1979-83 at Fort Campbell, Kentucky. Though the accused agreed to a stipulation of fact containing information of the earlier acts, the court considered admissibility of those acts under R.C.M. 1001(b)(4).

31. *Id.* at 576.

32. *Id.*

33. 27 M.J. 128 (C.M.A. 1988).

34. MCM, *supra* note 2, Mil. R. Evid. 404(b) provides "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 . . . ." For a more complete discussion of the interplay of Mil. R. Evid. 404(B) and R.C.M. 1001(b)(4), see Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, ARMY LAW., Aug. 1996, at 3.

35. *Wingart*, 27 M.J. at 135-36.

admissibility as evidence in aggravation at the sentencing phase.[36] The CMA further tightened the inquiry into admissibility of evidence in aggravation in *United States v. Gordon*.[37] In *Gordon*, the accused was found guilty of negligent homicide, and at the sentencing phase the prosecution offered testimony from the accused's brigade commander that the actions of the accused undermined confidence of the soldiers in each other and compromised the unit's primary concern for safety.[38] The court found the proffered testimony did not properly constitute evidence in aggravation insofar as the findings of guilty only arose from negligent acts of the accused.[39] In evaluating admissibility under R.C.M. 1001(b)(4), the court noted "the standard for admission of evidence under this rule is not the mere relevance of the purported aggravating circumstance to the offense."[40] The court held there exists a higher standard of admissibility in the requirement that evidence in aggravation "*directly relate to or result from* the accused's offense."[41]

The foregoing precedents led two commentators to note, "the court is likely to apply a demanding test to aggravation evidence."[42] The CAAF continued to scrutinize evidence in aggravation in *United States v. Rust*.[43] A court-martial panel convicted Major Rust, an emergency on-call obstetrician, of dereliction of duty for failing to go to the hospital emergency room and examine an expectant mother complaining of vaginal pain. Subsequently, the woman gave birth prematurely, and the child died a few days later. Distraught over the child's death, the woman's lover--and putative father of the child--murdered the mother and committed suicide, leaving behind a suicide note.[44] At the presentencing phase in *Rust*, the trial counsel introduced the suicide note pursuant to R.C.M. 1001(b)(4).

The *Rust* court found the murder-suicide to be independent acts of the perpetrator,[45] not the accused. Even assuming the murder-suicide was logically connected to the accused's conviction, the court held the connection was too indirect to qualify for admission under R.C.M. 1001(b)(4) and too tenuous when measuring prejudicial impact to the accused against the probative value of the evidence at sentencing.[46]

Recent Developments

Recent decisions of the courts reflect a trend toward broadening admissibility standards under R.C.M. 1001(b)(4). In *United States v. Jones*,[47] the CAAF upheld the military judge's consideration on sentencing of facts related to another charge of which Jones had been acquitted.[48] Marine Corps Lance Corporal Jones tested positive for the human immuno-deficiency virus (HIV) during a routine physical examination. As a result of this medical condition and pursuant to regulation, Jones's commander counseled him regarding the virus and ordered him to inform future sexual partners of his medical condition.[49] Jones subsequently had sexual intercourse with a married woman and was charged with adultery and assault with a means likely to produce death or grievous bodily harm.[50] The military judge acquitted Jones of aggravated assault, but found him

36. *Id.* at 136. The accused was convicted of indecent acts on a female under sixteen years of age. The rebuttal evidence used by the prosecution consisted of photo slides of a former young neighbor girl partially clothed and in provocative poses. The photo slides were found by the accused's then-wife three years prior to the offenses of which he was found guilty at court-martial, and there was no charge relating to the photo slides. The court found admission of the photo slides may have had a prejudicial impact and warranted reversal.

37. 31 M.J. 30 (C.M.A. 1990).

38. *Id.* at 35.

39. *Id.* at 36.

40. *Id.*

41. *Id.*

42. Francis A. Gilligan and Fredric I. Lederer, 2 Court-Martial Procedure 48 (1991).

43. 41 M.J. 472 (1995).

44. *Id.* at 474.

45. *Id.* at 478.

46. *Id.* at 478.

47. 44 M.J. 103 (1996).

48. *Id.* at 103. The issue specified on appeal was: "Whether the Navy-Marine Corps Court of Criminal Appeals erred when it found that appellant was not improperly punished for an offense of which he was found not guilty."

49. *Id.* at 104.

50. UCMJ art. 128 (1988). Subparagraph (4)(a)(iii), "grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

guilty of adultery. In imposing sentence for the adultery conviction, the military judge noted Jones' "disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances . . . ."[51]

The CAAF relied upon the inability conclusively to prevent transmission of the disease in finding Jones's "medical condition was a fact 'directly relat[ed] to . . . the offense," and thus admissible under R.C.M. 1001(b)(4). Insofar as the sexual intercourse exposed Jones's paramour to the risk of disease, the medical condition became a circumstance surrounding the offense,[52] notwithstanding the acquittal of assault with a means likely to produce death or grievous bodily harm. Trial counsel should learn from *Jones* that failure to obtain conviction on a charged offense does not mean the evidence in aggravation from that offense is necessarily lost. Counsel should examine the relationship of the evidence in aggravation to the other offenses and consider offering it at the presentencing phase.

The Coast Guard Court of Criminal Appeals (CGCCA) addressed another type of evidence in aggravation in the prosecution's use of evidence of a specification withdrawn by the government in *United States v. Hollingsworth*.[53] Hollingsworth faced, *inter alia*, two specifications alleging indecent acts with his daughter.[54] The two specifications alleged the same offense (*i.e.*, indecent acts) with the same victim, committed at the same location on two occasions close in time, and in both instances the accused acted under the ruse of conducting a medical examination.[55] As part of a pretrial agreement, Jones pled guilty to the second specification--which alleged conduct subsequent to that in the first specification[56]--and the prosecution withdrew the remaining indecent acts specification.[57] At presentencing, however, the prosecution offered the daughter's testimony relating to the withdrawn specification. The trial court admitted the evidence based also on the prosecution's proffer that the *modus operandi* (under guise of a medical examination) applied to the indecent acts alleged in both specifications.

"Uncharged misconduct," noted the Coast Guard court, "is not *ipso facto* inadmissible as evidence in aggravation."[58] The court found the similarities between the specifications noted above (same offense, victim, location and proximity in time) rendered the offenses sufficiently directly related to meet the requirements of R.C.M. 1001(b)(4). Although the accused in this case pled guilty to only a single instance of indecent acts and not to a course of conduct, the accused's effort to limit his criminal liability to a single event "did not preclude the government from showing the true extent of the scheme with evidence of other transactions."[59] The closely interrelated evidence and its probative value in aggravation for sentencing overcame any unfair prejudice to the accused."[60]

The decisions in *Jones* and *Hollingsworth* are reinforced by the decision of the United States Supreme Court in *United States v. Watts*.[61] *Watts* involved a defendant acquitted of some charges and convicted of others at trial in federal district court.[62] The issue before the Supreme Court concerned the evidence related to the acquittals.[63] The court upheld consideration of

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51. *Jones*, 44 M.J. at 104.

52. *Id.* at 104-05.

53. 44 M.J. 688 (C.G.Ct.Crim.App. 1996).

54. *Id.* at 690. The first specification alleged the accused "placed his hand on his daughter's breasts," and the second specification involved the accused's "fondling and placing his hands on his daughter's clitoris and vagina."

55. *Id.* at 692.

56. *Id*. at 690. This distinction is important in the court's analysis of the admissibility of the evidence. Because the acts alleged in the first specification--later withdrawn by the government--occurred prior to the acts alleged in the second specification, then the acts of the withdrawn specification logically cannot "result from" the evidence, as one prong of R.C.M. 1001(b)(4) requires. Thus, the court's analysis is limited to whether or not the proffered evidence "relates to" the specification of which the accused was found guilty.

57. *Id.* at 690 n.2.

58. *Id.* at 690.

59. *Id.* at 692 (citing United States v. Shupe, 36 M.J. 431 (C.M.A. 1993)). The court noted that addressing the admissibility of such evidence in the pretrial agreement might lead to another result. For instance, if the parties agreed that "no evidence of the specification will at any point be offered by the government," then a different result would ensue, as the government would have bargained away its use of the evidence.

60. *Id.* at 692.

61. No. 95-1906, 1997 WL 2443, at *17 (U.S. Jan. 6, 1997).

62. Defendant Watts was convicted of possession of cocaine with intent to distribute, and acquitted at trial of using a firearm in relation to a drug offense. In the companion case of *United States v. Putra*, defendant Putra was charged with multiple distributions of cocaine, on successive days. At trial, Putra was convicted of distribution on the first day, but acquitted of distribution on the following day.

evidence at sentencing of acquitted charges on the broad federal provision that, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[64] The principle behind broad rules of admissibility of sentencing evidence is that "highly relevant--if not essential--to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[65]

In applying the statutory guidance and the ideal of an educated sentencing authority enunciated in *Williams*, the Supreme Court held that an acquittal does not prevent consideration of the facts underlying the acquitted charge by the sentencing court when the government proves such conduct by a preponderance of the evidence.[66] The defendant is not subject to a harsher sentence when the sentencing authority considers acquitted conduct; rather, the sentencing authority can adjudge an appropriate sentence for the manner in which the defendant committed the act subject of the charge of which he stands convicted.[67] Similarly, in courts-martial, the military judge instructs a panel not to increase punishment for acquitted conduct, by instructing that "a single sentence is to be adjudged only for offenses of which the accused has been convicted."[68]

Finally, in *United States v. Gargaro*,[69] the CAAF examined the events that triggered a criminal investigation and the extent of the overall criminal scheme, and found that the evidence met R.C.M. 1001(b)(4) and was therefore admissible. Gargaro was an Army company commander deployed to Saudi Arabia and Kuwait during the Gulf War. As the war ended, units captured enemy automatic rifles, and Gargaro conspired with several of his soldiers to ship the weapons home as personal war trophies.[70] On their return to Fort Bragg, Gargaro and the soldiers allocated and distributed the rifles.[71]

Gargaro's criminal activity in bringing home the rifles went undetected until local civilian law enforcement conducted an off-post drug arrest and recovered an AK-47 automatic rifle from a local drug dealer. The ensuing investigation traced the rifle to Gargaro's unit, although it was not apparently one of the rifles Gargaro himself had shipped back.[72] As this rifle was not linked directly to Gargaro, he contended its ultimate disposition to a local drug dealer was improper evidence in aggravation because it did not directly relate to or result from his offenses.[73]

The CAAF noted the triggering event for the investigation was discovery of the weapon possessed by a local drug dealer.[74] The circumstances surrounding the overall investigation related to Gargaro's convictions, even though he never had custody of the initial weapon found.[75] Furthermore, as in *Hollingsworth*, the weapon's ultimate disposition "showed the extent of the conspiracy and the responsibility that this commanding officer had in the matter."[76] The decision in *Gargaro* broadens the scope of the otherwise limiting language "directly related to or resulting from"[77] in evaluating admissibility of evidence for sentencing. As in *Jones* and *Hollingsworth*, similarities of

63. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62,832 (date). In federal district court, a criminal sentence is imposed by a judge under the federal sentencing guidelines. This situation contrasts with courts-martial under the Uniform Code of Military Justice in which a sentence may be imposed by a court-martial panel and no sentencing guidelines exist so that the military judge or panel has complete discretion to adjudge a sentence, from no punishment to the statutory maximum.

64. *Watts*, 1997 WL 2443, at *19. The court cited to 18 U.S.C. § 3661 (1986), which reads "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

65. *Watts*, 1997 WL 2443, at *19 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

66. *Id.* at *21.

67. *Id.*

68. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, ch. 2, at 91 (30 Sept. 1996) [hereinafter BENCHBOOK].

69. 45 M.J. 99 (1996).

70. *Id.* at 100. Gargaro was charged with conspiring with several soldiers to possess an unknown number of AK-47 rifles; violating a general order by wrongfully taking and retaining an AK-47 rifle; possessing an unknown number of AK-47 rifles near or about Fort Bragg, NC; larceny of an unknown number of AK-47 rifles, military property of the U.S.; conduct unbecoming an officer by unlawfully importing an unknown number of AK-47 rifles into the United States; the above done in violation of Articles 81, 92, 134, 121, and 133, Uniform Code of Military Justice.

71. *Id.*

72. *Id.* at 101.

73. *Id.*

74. *Id.* at 100.

75. *Id.* at 101.

offense, item, time and location open the door for consideration of the evidence by the sentencing authority.

The decisions interpreting and applying R.C.M. 1001(b)(4) evidence in aggravation show the courts' willingness to let the sentencing authority consider more information in determining an appropriate sentence. Trial counsel should examine the full extent of the offenses of which an accused is convicted and develop such evidence in aggravation. Defense counsel must demonstrate and argue the causal relationship between the acts done by the accused and the effects in aggravation alleged by the prosecution are so attenuated as to be inadmissible.

R.C.M. 1001(c)(2): Unsworn Statement by the Accused

One of the matters the defense may offer in the presentencing stage is an unsworn statement of the accused.[78] The accused is not subject to cross-examination on his unsworn statement, but the prosecution may rebut any statements of fact made by the accused.[79] The CMA prescribed limits on the prosecution's right of rebuttal in *United States v. Cleveland*.[80] In *Cleveland*, the accused made an unsworn statement. He claimed, in part, "I feel that I have served well and would like an opportunity to remain in the service."[81] The military judge granted the prosecution's request to offer evidence of prior misconduct to rebut the accused's statement.[82]

The CMA held it was error for the military judge to permit rebuttal of the accused's statement on the grounds that it was an opinion, not a statement of fact subject to rebuttal.[83] The prosecution, in the court's view, sought to use otherwise inadmissible uncharged misconduct evidence in the form of rebuttal.[84]

In a recent decision that took a broader view of what constitutes a statement of fact subject to rebuttal, the Air Force Court of Criminal Appeals (AFCCA) examined an accused's evidence of remorse. In *United States v. Willis*,[85] the court found the accused's unsworn statement in which he expressed personal remorse to be a statement of fact and upheld admission of prosecution evidence in rebuttal. Following conviction for, *inter alia*, premeditated murder of his estranged wife,[86] the defense introduced copies of letters that Willis sent the victim's family expressing remorse. Willis also made an unsworn statement expressing his remorse and apologizing to his deceased wife's family.[87]

The trial court found, and the AFCCA agreed, that the expression of remorse by Willis constituted a statement of fact, which was, therefore, subject to rebuttal by the prosecution.[88] Specifically, the trial counsel introduced statements made to family members by the accused that reflected "a gloating, sardonic expression of triumph over his crime."[89] In addition, the prosecution introduced Willis's response on a questionnaire that he "was not sorry or never [thought] about it" when asked about his having done illegal things.[90] The Air Force court

76. *Id.*

77. MCM, *supra* note 2, R.C.M. 1001(b)(4).

78. MCM, *supra* note 2, R.C.M. 1001(c)(2), permits the accused to make an unsworn statement in extenuation, mitigation or to rebut matters presented by the prosecution. The accused may limit his testimony or statement to any particular specification of which he has been found guilty. Further, the accused is not subject to cross-examination by the trial counsel, or examination by the court-martial, on his unsworn statement.

79. *Id.* at 1001(c)(2)(C).

80. 29 M.J. 361 (C.M.A. 1990).

81. *Id.* at 362.

82. *Id.*

83. *Id.* at 364.

84. *Id.*

85. 43 M.J. 889 (A.F. Ct. Crim. App. 1996).

86. *Id.* at 891 n.1. Willis also faced charges at trial of two specifications of assault, one of which was with a means likely to produce death or grievous bodily harm; three specifications of attempted murder; wrongful appropriation of a government vehicle; desertion; two specifications of violating a lawful order; carrying a concealed weapon and breaking restriction; a second desertion charge for the period of time during his escape; escape and resisting apprehension; in violation of articles 128, 80, 121, 85, 90, 134, 85 and 95, UCMJ. Willis was also charged, but acquitted, of attempted murder of his wife for an earlier incident, two specifications of obstruction of justice, and communicating a threat to kill another family member.

87. *Id.* at 901.

88. *Id.*

89. *Id.* The statements made to family members were left by the accused, while he was evading capture by law enforcement, on an audio tape of a telephone answering machine belonging to the brother of the deceased.

found such contradictory evidence of the accused's expressions of remorse admissible at trial because adequate information was needed to resolve whether in fact Willis was sorry.[91]

Willis differs from *Cleveland* in the nature of the evidence offered in rebuttal. In *Cleveland,* the trial counsel sought to rebut the accused's statement that he had served well by introducing evidence of prior off-duty misconduct by the accused, through the testimony of another witness.[92] The prosecution in *Willis*, on the other hand, offered prior inconsistent statements made by Willis himself to rebut his declaration of remorse at trial.[93] The prosecution's rebuttal evidence in *Willis* did not constitute uncharged misconduct in and of itself, but aimed to place the accused's expressions of remorse at trial in context. The court left open the issue of how close in time a prior inconsistent statement must be to rebut an accused's comments in an unsworn statement at the presentencing phase.

For the accused who only finds remorse at the time of trial, *Willis* gives trial counsel an argument to paint a more complete picture of the accused's personal feelings about his crime. The prosecution's evidence in this regard is limited by *Willis* to the accused's own prior inconsistent statements, but zealous trial counsel should interview friends, co-conspirators, or fellow inmates to find other ways the accused has characterized his crimes leading up to trial.

Defense counsel cannot generally control the bragging, gloating, or even idle musing by an accused about his crime. Counsel should, however, pause to consider the availability of rebuttal evidence by the accused's prior statements. But even careful witness preparation to couch expressions of remorse at trial by the accused in terms of "I think," or "I feel" may not escape rebuttal evidence. In *Willis*, the court noted this phraseology would only be a semantic difference and would not have altered the court's decision.[94]

The decision in *United States v. Britt*[95] imposed another limitation on an accused's right to make an unsworn statement. In *Britt*, the AFCCA upheld a military judge who prohibited an accused from including in his unsworn statement matter that was not extenuation, mitigation, or rebuttal of matters raised by the prosecution.[96] Thus, the accused could not explain to the panel his understanding that if the panel did not adjudge a punitive discharge, then Britt's commander would initiate administrative proceedings to discharge Britt.[97] The court specifically rejected the contention that an accused's unsworn statement is "an unfettered right."[98]

The *Britt* court focused on the issue of relevance as the legal basis for a military judge to limit matters raised by an accused in an unsworn statement.[99] If evidence offered by the accused was not in extenuation, mitigation, or rebuttal of the prosecution, then it was not relevant, reasoned the court. The challenge for defense counsel is thus to pigeon-hole statements of the accused in this regard into one of the authorized categories of evidence. Defense counsel might argue that additional administrative action (*e.g.,* administrative separation proceeding) is *certain* to occur if a specified condition is met (*e.g.,* no punitive discharge adjudged). That information, in the defense view, would often be useful for a sentencing authority to consider. The AFCCA, on the other hand, dismissed the *possibility* of administrative action as neither extenuation[100] nor mitigation,[101] and noted administrative consequences "are inappropriate during sentencing."[102]

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90. *Id.* The questionnaire was given to the accused by a Dr. Waid, apparently during pretrial investigation.

91. *Id.*

92. 29 M.J. 361, 363 (C.M.A. 1990).

93. *Willis*, 43 M.J. at 901.

94. *Id.*

95. 44 M.J. 731 (A.F. Ct. Crim. App. 1996).

96. *Id.* at 734.

97. *Id.* at 731.

98. *Id.*

99. *Id.* at 734.

100. MCM, *supra* note 2, R.C.M. 1001(c)(1)(A).

101. *Id*. at 1001(c)(1)(B).

102. *Britt*, 44 M.J. at 735. In contrast, however, note the comments in *United States v. Boone*, 42 M.J. 308, 314 (1995) (Sullivan, C.J., dissenting). In *Boone*, the CAAF found ineffective assistance by defense counsel to the prejudice of the accused, and set aside the lower court's decision as to the sentence. Then-Chief Judge Sullivan dissented, noting that the military judge knows an accused rarely serves the full sentence but the jury is uneducated in this area. Perhaps, according to then-Chief Judge Sullivan, it is time for "truth in sentencing." *Id*.

In *United States v. Sumrall,*[103] the CAAF acknowledged the relevance at sentencing of collateral consequences in the form of retirement pay. Such evidence for retirement-eligible service members[104] may include evidence that a punitive discharge would deny them retirement benefits and the potential dollar amount subject to loss.[105] Though recognizing the relevance of the evidence, the court in *Sumrall* denied constitutional challenges to the loss of retirement benefits that flows from a court-martial sentence.[106]

The court found due process[107] concerns satisfied by allowing the accused to introduce evidence of his potential loss of retirement pay as a matter in mitigation,[108] because the court would have that information to consider in adjudging a sentence. Second, the CAAF rebuffed Sumrall's constitutional challenge that the loss of retirement benefits constituted cruel and unusual punishment.[109] The court observed the long-recognized effect of dismissal on retirement pay and noted, "forfeiture of pay and retired pay are punishments that are well-recognized punishments at American courts-martial."[110] Third, the court denied Sumrall's challenge of loss of retirement pay as constituting an excessive fine[111] insofar as the projection of earnings based on predicted life expectancy was "clearly speculative."[112] Finally, the court held the additional loss of retirement benefits did not violate the Double Jeopardy Clause[113] because it was not the court-martial, but the service secretary, who denies retirement status.[114]

There was, however, a clarion call for reform by Judge Sullivan again in *Sumrall.*[115] He noted the severity of a huge loss of retirement pay as a by-product of a court-martial sentence. Perhaps, in Judge Sullivan's view, a new punishment option of a discharge with no loss of retirement benefits, "would allow better and more flexible justice in the present system."[116] Absent reform in the *Manual*, however, the task lies ahead for defense counsel to urge present collateral consequences as evidence in mitigation at sentencing.

R.C.M. 1001(f): Additional Matters to be Considered

In a guilty plea case, the military judge must question the accused under oath to determine whether there is a sufficient factual basis for the plea.[117] The CMA held in *United States v. Holt*[118] that statements of an accused made during the providence inquiry may be used in determining an appropriate sentence.[119] The court based its decision on the provision in

103. 45 M.J. 207 (1996).

104. *But see* United States v. Henderson, 29 M.J. 221 (C.M.A. 1989), in which the CMA upheld the military judge's refusal to allow defense evidence in extenuation and mitigation as to loss of retirement benefits the accused would suffer if he received a punitive discharge, where the accused was at least three years away from being retirement eligible and would have had to reenlist in order to become eligible for retirement benefits. In those circumstances, the court noted, the administrative consequences in the loss of retirement benefits were so remote as to risk confusing the sentencing authority.

105. *Sumrall*, 45 M.J. at 209.

106. *Id*. at 208. The court in *Sumrall* sentenced the accused to dismissal and confinement for four years. The CAAF noted the sentence did not include forfeiture of retirement pay or other retirement benefits, for which there is no expressly authorized punishment under the *Manual* or the Uniform Code of Military Justice. The decision to retire the accused rested with the Secretary of the Air Force, pursuant to 10 U.S.C. § 8911 (1990). In this case, the court noted, the accused had neither requested retirement nor otherwise been retired.

107. U.S. CONST. amend. V. The court focused on the meaningful opportunity to be heard, and found the accused had such an opportunity.

108. MCM, *supra* note 2, R.C.M. 1001(c)(1)(B).

109. U.S. CONST. amend. VIII.

110. *Sumrall*, 45 M.J. at 210.

111. U.S. CONST. amend. VIII.

112. *Sumrall*, 45 M.J. at 210.

113. U.S. CONST. amend. V.

114. *Sumrall*, 45 M.J. at 209. Title 10 U.S.C. § 8911 (1990) states: (a) The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this title, at least 10 years of which have been active service as a commissioned officer.

115. *Id*. at 211 n.3. Judge Sullivan noted the court lacked jurisdiction to affect the loss of retirement benefits suffered by the accused, and that the accused might have recourse to the civil courts to seek a remedy.

116. *Id.* at 218B.

117. MCM, *supra* note 2, R.C.M. 910(e).

118. 27 M.J. 57 (C.M.A. 1988).

R.C.M. 1001(b)(4) allowing the prosecution to introduce at the sentencing phase "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[120] A properly conducted providence inquiry would also address matters directly relating to the offenses to which the accused entered guilty pleas; therefore, such evidence logically might constitute aggravating circumstances under R.C.M. 1001(b)(4).[121] As a result, "sworn testimony given by the accused during the providence inquiry . . . can be received as an admission by the accused and can be provided either by a properly authenticated transcript or by the testimony of a court reporter or other persons who heard what the accused said during the providence hearing."[122]

In *United States v. Irwin*,[123] the prosecution submitted a tape recording of the accused's statements made during the providence inquiry. The defense objected, arguing the tape recording was outside the limitation envisioned by *Holt*.[124] The CAAF, however, held that the only limitation from *Holt* was the *kind* of evidence admissible. Thus, so long as that portion of the providence inquiry submitted to the panel met the test for admissibility under R.C.M. 1001(b)(4) and otherwise satisfied the Military Rules of Evidence, then the prosecution could provide it to the panel.[125]

Whether the military judge abandoned his impartiality in conveying to the panel statements of the accused during the providence inquiry was an issue dealt with by the CAAF this year in *United States v. Figura*.[126] Figura was a Criminal Investigation Command (CID) agent stationed in Korea when he engaged in a covert scheme for forging checks and obtaining cash.[127] Figura entered a plea of guilty pursuant to a pretrial agreement that included a stipulation of fact. The stipulation, however, lacked certain facts about dates on checks, when the checks were cashed, and where the checks were written.[128] During the presentencing phase, the trial counsel offered as evidence in aggravation the additional information provided by Figura during the providence inquiry. To get the evidence before the panel on sentencing, the trial counsel proposed calling as a witness a spectator[129] who observed the providence inquiry. Ultimately, the military judge gave the defense three options for presentation of the relevant matters[130] to the panel: (1) the witness testifying; (2) the court reporter testifying, or (3) the military judge conveying the information in the form of an instruction.[131]

The court reaffirmed that "information elicited from the defendant under oath during the providence inquiry may be considered during sentencing,"[132] and focused on the procedure to convey such testimony to the panel. "There is no demonstrative right or wrong way to introduce evidence taken during a guilty plea inquiry . . . . The judge should permit the parties ultimately to choose a method of presentation."[133] In *Figura*, the defense agreed to an instruction by the military judge, who then summarized the relevant portions of the providence inquiry.

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119. *Id.* at 60.

120. MCM, *supra* note 2, R.C.M. 1001(b)(4).

121. *Holt*, 27 M.J. at 60. The court noted that under some circumstances the providence inquiry may go into uncharged misconduct; e.g., when there is an issue of entrapment. Such evidence of uncharged misconduct might be admissible on the merits under Mil. R. Evid. 404(b), but would not necessarily be admissible for sentencing. *See* Kohlmann, *supra* note 34.

122. *Id*. at 60-61. In *Holt*, however, the trial was by military judge alone, and therefore no additional procedures were necessary to bring the statements of the accused during the providence inquiry before the sentencing authority.

123. 42 M.J. 479 (1995).

124. *Id.* at 481.

125. *Id*. at 482.

126. 44 M.J. 308 (1996).

127. *Id.* at 309.

128. *Id.*

129. The spectator the prosecution offered to call as a witness was the non-commissioned officer in charge (NCOIC) of the Office of the Staff Judge Advocate, who attended the providence inquiry for the express purpose of being available to testify as to statements made by the accused during the providence inquiry.

130. *Figura*, 44 M.J. at 309. The court noted that the military judge determined initially the matters proffered by the prosecution were not in the stipulation of fact admitted as part of the guilty plea. The judge then examined the relevance of the prosecution's proffer of evidence contained in the accused's statements and overruled the defense relevance objection although the court disallowed part of the prosecution's proffer as cumulative or not relevant. The defense then withdrew its objection as to relevance.

131. *Id.*

132. *Id*. at 310.

The defense acceded to the functional equivalent of an oral stipulation of fact presented by the military judge.[134]

Again, trial counsel should pay close attention to the statements of an accused made during the providence inquiry. Counsel should be attentive for additional facts that aggravate the offenses of which the accused is ultimately found guilty. Defense counsel must continue to try and keep an accused on a tight rein to avoid unnecessary aggravation evidence.

Punishments

In addition to reviewing evidence at the sentencing phase and the effects of courts-martial sentences, two recent decisions addressed direct constitutional attacks on the validity of punishments prescribed in the *Manual for Courts-Martial.*

R.C.M. 1003(b)(3): Fine

The issue of when a fine is an appropriate punishment[135] faced the Army Court of Criminal Appeals (ACCA) in *United States v. Smith*.[136] Smith pled guilty to kidnapping, rape and felony murder of a two year-old child. As part of the sentence,[137] the military judge imposed a fine of $100,000, with the following enforcement provision: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first."[138]

In reviewing the law relating to a fine as permissible punishment, the court concluded that "there is no legal requirement that an accused realize an unjust enrichment for the offense(s) he committed before a fine may be adjudged."[139] Additionally, the $100,000 fine imposed was not excessive or disproportionate in light of the heinous offenses the accused committed.[140] Moreover, the court noted Smith agreed to a possible fine in his bargained-for agreement to avoid the death penalty. The Army court did, however, find the military judge's creative fine enforcement provision represented an effort to circumvent the parole authority vested in the Secretary of the Army[141] and was therefore void.[142] Although the Army court disapproved the fine enforcement provision in *Smith*, the court approved the fine itself.[143]

133. *Id.*

134. *Id.* at 311. Concurring in the result, Judge Sullivan called for military judges to exercise their authority under MCM, *supra* note 2, R.C.M. 920(e)(7), Discussion, "to give the jury a good, exhaustive, accurate, and fair view of the facts in the case so the jury can do its job on a more informed basis."

135. MCM, *supra* note 2, R.C.M. 1003(b)(3).

136. 44 M.J. 720 (Army Ct. Crim. App. 1996).

137. *Id*. at 721. The military judge sentenced Smith to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private E1, in addition to the fine.

138. *Id*.

139. *Id*. at 722 n.2. The court pointed out the possibility of a fine must be provided for in the pretrial agreement, or be made known to the accused during the providence inquiry, in order for a fine lawfully to be adjudged.

140. *Id*. at 723.

141. *Id*. at 724; *see* DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD, para. 1-4 (9 Aug. 1989).

142. *Smith*, 44 M.J. at 725.

143. *Id.*

R.C.M. 1003(b)(10): Death

The *Manual for Courts-Martial* authorizes imposition of the death penalty[144] in accordance with the procedures and requirements of R.C.M. 1004.[145] Included within R.C.M. 1004 is the requirement that, in order to adjudge the death penalty, a court-martial panel[146] must find by unanimous vote[147] that at least one of the named aggravating factors exists.[148]

The President promulgated R.C.M. 1004 and the required aggravating factors for a sentence of death by Executive Order in 1984.[149] In *Loving v. United States*,[150] the United States Supreme Court upheld the President's authority to specify aggravating factors without usurping Congress' law-making function.[151]

Private Loving was convicted of premeditated murder and felony murder[152] at Fort Hood, Texas, in 1989. In addition to the findings of guilty, and in accordance with the procedures under R.C.M. 1004, a court-martial panel also found three aggravating factors and sentenced Loving to death.[153] *Loving* reached the United States Supreme Court on the issue of the President's authority to promulgate R.C.M. 1004, and, specifically, the aggravating factors specified in R.C.M. 1004(c).[154]

The Supreme Court held that, once Congress had established a criminal offense and the maximum penalty for that offense, delegation to the President was appropriate to prescribe aggravating factors that permit imposition of the death penalty within constitutional limitations.[155] The Court found precedent for the President's prescription of punishments in Articles 18 and 56, UCMJ.[156] The Court also found delegation in Article 36, UCMJ, authorizing the President to make procedural rules for courts-martial.[157] Thus, in light of Congressional delegations in Articles 18, 36, and 56, UCMJ, the President had authority to promulgate R.C.M. 1004.[158]

Finally, the Supreme Court rejected Loving's challenge that any delegation by Congress to the President to prescribe aggravating factors lacked an intelligible principle to guide such rule-making.[159] The Court focused not on the sufficiency of guidance to the President, "but whether any such guidance was needed,"[160] given the President's role as Commander in Chief of the armed forces. In that capacity, observed the Court, "the President . . . had undoubted competency to prescribe those factors without further guidance."[161]

144. MCM, *supra* note 2, R.C.M. 1003(b)(10).

145. *Id*. at 1004.

146. R.C.M. 201(f)(1)(C) prohibits a general court-martial composed of a military judge alone from trying any person for an offense for which the death penalty may be imposed, unless the charge has been referred to trial as noncapital.

147. R.C.M. 1004(b)(7) requires that all members concur in a finding of the existence of at least one aggravating factor in order to adjudge the death penalty.

148. *Id*. at 1004(c).

149. Exec. Order No. 12,460, 49 Fed. Reg. 3,169 (1984). These procedures became R.C.M. 1004. *See* MCM, *supra* note 2.

150. 116 S. Ct. 1737 (1996).

151. U.S. CONST. art. I, § 1.

152. MCM, *supra* note 2, pt. IV, ¶ 43.

153. *Loving*, 116 S. Ct. at 1740.

154. *Id*.

155. *Id*. at 1748.

156. *Id*. at 1749. Article 18, UCMJ, provides that "general courts-martial have jurisdiction to try persons and may, under such limitations as the President may prescribe, adjudge any punishment . . . ." Article 56, UCMJ, provides, "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

157. *Loving*, 116 S. Ct. at 1749. Article 36, UCMJ, provides, "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

158. *Loving*, 116 S. Ct. at 1749.

159. *Id.* at 1750. "The intelligible principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Id.*

160. *Loving*, 116 S. Ct. at 1750.

In upholding the President's promulgation of R.C.M. 1004, the Supreme Court also applied, which the Government did not contest, its own death penalty jurisprudence to the military.[162] Justice Thomas deferred in a broader sense to the President in his role as Commander in Chief and noted, "the applicability of *Furman v. Georgia* and its progeny to the military is an open question."[163]

Another issue unresolved in *Loving* is that of a "service connection" requirement. Justice Stevens commented that the Court's decision in *Solorio v. United States*[164] did not necessarily apply to capital offenses. As a consequence, and in order to ensure members of the armed forces enjoy constitutional protections equal to those of civilians in capital cases, Justice Stevens determined the issue of service connection was both open and substantial with regard to capital cases.[165] In *Loving*, however, Justice Stevens conducted his own examination of the evidence and found the "service connection" requirement satisfied.[166] The service connection requirement, however, becomes another issue for counsel to consider and litigate in capital litigation for service members.

Conclusion

As the door opens wider for evidence in the presentencing phase of courts-martial, trial practitioners find increased opportunities and demands for advocacy. Trial counsel can and should scour records, interview witnesses, and listen to the accused with an eye toward developing sentencing evidence, or to rebut issues raised by the accused at sentencing. Defense counsel must meet such evidence by distancing the client from the additional effects of the misconduct for which the accused stands convicted. Further, defense counsel may seek to expand admissibility of extenuation and mitigation evidence, particularly in the area of collateral consequences of a court-martial sentence. The end result of providing more information to the sentencing authority serves the ends of the military justice system.

161. *Id.*

162. *Id.* at 1742. The government did not contest the application, at least in the context of the facts in *Loving*, *i.e.*, conviction for murder under Article 118, committed in peacetime within the United States. The Court thus considered *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny to apply to courts-martial.

163. *Loving*, 116 S. Ct. at 1753 (Thomas, J., concurring). Justice Thomas noted, "It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military." *Id.*

164. 483 U.S. 435 (1987). In *Solorio*, the Court did away with the requirement that a service member's crime be connected to his duty as a soldier in order to subject him to court-martial jurisdiction, thereby effectively broadening the crimes over which courts-martial had jurisdiction. Prior to *Solorio*, court-martial jurisdiction over certain offenses had to be "service connected" according to the test set out in *O'Callahan v. Parker*, 395 U.S. 258 (1968), and clarified in *Relford v. Commandant*, 401 U.S. 355, 369 (1971), in which the Court held that "an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by court-martial."

165. *Loving*, 116 S. Ct. at 1751 (Stevens, J., concurring).

166. *Id.* Justice Stevens noted that Loving's first victim was an active duty soldier and the second victim was a retired service member who gave Loving a ride from the barracks on the night of the first killing. On these facts, Justice Stevens concluded *Loving* would not appear to have been an appropriate set of facts on which to challenge the applicability of *Solorio* to a capital case. Subsequent to the decision in *Loving*, the CAAF held in *United States v. Curtis*, 44 M.J. 106, 118 (1996), that the offenses in issue were service connected, relying on the fact that the offenses occurred on base and the victims were Curtis' commander and his wife. The *Curtis* court set forth the conclusion of service connection prior to addressing legal issues in the opinion, thereby apparently attempting to foreclose future litigation of the service connection issue.

"Just One More Thing . . . " and Other Thoughts on Recent Developments in Post-Trial Processing

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Introduction

Military courts, especially the Court of Appeals for the Armed Forces (CAAF), are determined to assert and protect the vitality of the post-trial process. The determination not to treat this stage as a mere "paper drill" is reflected in their willingness to return cases for new reviews and actions, and to reinforce the expectation that the government will respect time lines, the defense will make meaningful submissions, and the government will honor the requirement to consider the defense submissions and serve the defense with new matter at the addendum stage. We saw this year, continuing a recent trend, a high number of cases devoted to the addendum, most often addressing government decisions not to serve an addendum containing new matter on the defense. The courts seem willing to put some teeth into the usual quotations about the post-trial phase containing the accused's best chance for clemency,[1] and to reinforce the substantive requirements that the UCMJ and *Manual* place on the government,[2] while struggling to accommodate "technical" violations of the rules in an area where the violations are largely codal. The strongest of the recent trends is repeated reinforcement of the requirement that staff judge advocates not use the addendum to smuggle "new matter" to the convening authorities without first serving the defense.

Still, those same courts, again especially the CAAF, are increasingly concerned about distinguishing cases in which the post-trial errors are truly harmless and those in which the submissions or consideration might have made a difference in the outcome. Their newest ally in this regard is a 1993 case, *United States v. Olano*,[3] in which the Supreme Court set out a three-part test for determining the existence and significance of plain error.[4] Because many post-trial errors are plain but inconsequential, *Olano* provides a construct with which a court can diagnose error, chide the error-maker for sloppiness, but not alter the outcome and give a windfall to an accused for an error that would not have affected the findings or sentence ultimately approved.

The CAAF is frequently divided when analyzing and resolving post-trial issues. The majority seems determined to protect and perhaps reinvigorate the post-trial phase. Judge Crawford is the most consistent voice for the minority viewpoint. While not necessarily denigrating the significance of the post-trial process, she is unwilling to require substantive corrective action (or, in her view, meaningless remand) in cases in which she is not persuaded that the error would have made any difference in the outcome of the case. The problems run from the truly consequential --*e.g.*, failure to ensure that the convening authority sees defense submissions[5]--to the mind-numbing chain of avoidable errors, such as inclusion of new matter in an addendum that is not served on the defense. Most notable may be the sheer volume of post-trial cases. The service courts have always handled a fair number of post-trial cases, often producing unpublished opinions that correct ministerial-level errors such as failure to ensure that an accused retains one-third of his pay when not in confinement. In recent years, however, an increasing percentage of the CAAF docket has been consumed by post-trial cases *and* those cases are more likely to be non-unanimous opinions than in the areas of substantive criminal law or traditional criminal procedure.

Philosophical Division Reflected in Post-Trial Review Decisions

The philosophical division on the CAAF is not merely an academic one. It appears not only in the addendum opinions, but also in other areas, and it goes to the heart of how the military's supervising court views the vitality and significance of the post-trial process. The determination to keep the post-trial

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1. Perhaps the most frequently quoted passage is the following: "It is at the level of the convening authority that an accused has his best opportunity for relief." United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

2. *See generally* Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 860-876, arts. 60-76 (1988); MANUAL FOR COURTS-MARTIAL, United States, ch. 11 (1995) [hereinafter MCM].

3. 507 U.S. 725 (1993).

4. The Court held that convictions should not be overturned unless (1) there is error, (2) the error is plain (clear and obvious), and (3) the error affects substantial rights. *Id*. at 732-35.

5. *E.g.*, United States v. Dvonch, 44 M.J. 531 (A.F. Ct. Crim. App. 1996) (per curiam) (new review and action ordered after government conceded its failure to include two letters submitted by defense counsel as part of Rule for Courts-Martial (R.C.M.) 1105 matters).

process relevant is evident in recent decisions regarding the Staff Judge Advocate (SJA) Recommendation, commonly referred to as the post-trial review (PTR). This document, considerably leaner and more narrow in scope than it was before the 1984 *Manual*,[6] remains an important document.

In the leading case of the term regarding the PTR, *United States v. Hickok*,[7] the CAAF held that failure to serve the PTR on counsel is prejudicial error, even when counsel submitted matters before receiving the authenticated record of trial and PTR.[8] In this case, the original defense counsel was reassigned,[9] new counsel was never appointed, and the SJA office never tried to serve the PTR on another counsel. The CAAF found that the accused "was unrepresented in law and in fact" during this stage.[10] It stressed that a defense counsel is considered "absent" for post-trial purposes under these circumstances and that accused should not be made to suffer for a breakdown in the system. The fact that the R.C.M. 1105 clemency package was submitted at an early stage--and, all conceded, considered by the convening authority at action--cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106.[11]

In a dissent consistent with all of her opinions in this area, Judge Crawford argued that the case should be tested for prejudice and that the defense should be required to show what it would have submitted if it had been properly served. She also called on the court to overturn *United States v. Moseley*,[12] a 1992 opinion (from which she, unsurprisingly, also dissented) that required a new review and action in a case in which the government failed to serve the PTR on counsel.[13] In the majority opinion, the late Judge Wiss wrote "the only way to make up for the *absence* of counsel at that stage is to re-do that stage with benefit of counsel."[14] Judge Crawford's call to overturn *Moseley* makes sense, if for no other reason than the fractured opinion gives limited guidance. *Moseley* features four opinions, and the facts are of limited universal applicability.[15] Still, appellate litigants are waiting for a case or cases that clearly answer whether and in what circumstances the government's failure to serve the PTR can be harmless error. Currently, the

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6. The 1984 changes were designed to make the post-trial review a shorter document that merely informed the convening authority of the result of trial, accused's personal background, and other demographic factors, but was not an exhaustive recapsulization of the case and not a discussion of all possible legal errors or issues. Paragraph 85*b* of the MANUAL FOR COURTS-MARTIAL 1969 (Rev.), which required summarization of the evidence and review for legal error, was deleted in the 1984 revision. *See generally* United States v. Diaz, 40 M.J. 335, 340-42 (C.M.A. 1994). One pair of commentators noted that "[I]mperfections in the post-trial review, as distinguished from the underlying trial, required reversal of countless cases." FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 81 (1991). Observers of contemporary post-trial practice could be forgiven from drawing a similar conclusion. Though outright reversal is relatively rare for post-trial error, remand for new reviews and actions are extremely common for post-trial errors that do not go to the core of the matter at issue in trial.

7. 45 M.J. 142 (1996).

8. The defense has the opportunity to submit materials under R.C.M. 1105 and R.C.M. 1106 within ten days of receiving the PTR and authenticated record of trial. Each of the two R.C.M. provisions carries a separate ten day timetable, and each is extendible by another twenty days. Because the triggering events are different for each (R.C.M. 1105 requires service of the PTR and record of trial on the accused, while R.C.M. 1106 also requires service of the record on the accused, but separate service of the PTR on counsel), and because different individuals have authority to approve the twenty day delays (convening authority may delegate delay-granting authority to the SJA under R.C.M. 1105 but not R.C.M. 1106), litigants on both sides of the process, as well as SJAs, must be sure not automatically to collapse both provisions into one coextensive timetable.

9. As part of a routine "PCS," or Permanent Change of Station.

10. *Hickok*, 45 M.J. at 144.

11. R.C.M. 1105 essentially permits the accused (typically through counsel, but it is a right personal to the accused) to seek clemency by raising virtually any information or arguments he thinks might persuade the convening authority. R.C.M. 1106(f)(4) is the counsel's right, rooted in *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), to comment on the PTR. The Army Court of Criminal Appeals emphasized this distinction in one of the first cases construing *Hickok*. In *United States v. Liggan*, No. 9501523 (Army Ct. Crim. App. Jan. 8, 1997) (the court found that failure to serve the record and PTR on substitute counsel, after the detailed counsel had left the service (preparing an undated submission before he left), was prejudicial error because it deprived the accused of "an opportunity to review the record of trial or respond to the SJA's recommendation." *Id*., slip op. at 2. The Army Court reminded practitioners that an accused soldier's right to submit matters under R.C.M. 1105 "is separate and distinct from his right to respond to the SJA's recommendation under R.C.M. 1106 . . . . There is no logical or lawful way to view the clemency petition in this case [submitted before the PTR was served] as fulfilling the appellant's right to respond to the SJA's recommendation." *Id*.

12. 35 M.J. 481 (C.M.A. 1992).

13. *Id.* at 484.

14. *Id.* at 485 (emphasis in original).

15. "Unique facts" is, to some degree, the lot of most post-trial cases. Still, *Moseley*'s facts do not make for compelling precedent: the accused received the PTR, though his counsel did not; he pleaded guilty (making clemency generally less likely); and counsel did submit clemency matters, though *before* the triggering events of service of the record of trial and PTR. Premature submissions frequently plague counsel in post-trial cases, because they give appellate courts grounds to speculate that the convening authority at least saw *something*, although, importantly, that cannot have included a response to the PTR itself. Defense counsel should think hard about ever submitting post-trial submissions before they and their clients are properly served with both the PTR and authenticated record. Such premature zeal can play into the hands of a sloppy or calculating government (more commonly the former).

standard is not at all clear, and the cases are extremely fact-specific.

In one of the first post-trial cases of the new term, a unanimous CAAF seemed to bite its tongue and uphold the Navy-Marine Court's finding of prejudicial error in a case involving failure to serve proper counsel with the record of trial and PTR. In *United States v. Washington*,[16] the government failed to comply with the accused's request that the PTR and record be served on detailed military counsel. The government served it on civilian counsel only. The two counsel apparently did not communicate, nothing was submitted on behalf of the accused and the convening authority approved the sentence adjudged by the court.[17] On appeal, the accused said he would have submitted a letter from his fiancee, detailing the hardships the sentence would work on her and their baby daughter, and pointing out a portion of the PTR he believed to be misleading.[18] The CAAF upheld the Navy-Marine Court's remand for a new review and action, because it could not say that the Navy-Marine Court erred as a matter of law in finding that the procedural error was prejudicial.[19] It did, however, disagree with the reasoning of the lower court and take a strong step toward asserting a clear and consistent voice in assessing post-trial error.

The CAAF said there was no *actual* denial of counsel in the case, because both counsel remained under obligation to represent the accused.[20] Had there been an actual denial, the CAAF would have presumed prejudice.[21] If the accused were "effectively" denied counsel, the CAAF would examine whether later-provided counsel made up for the deprivation.[22] Having found that the accused was not *effectively* deprived in this case, the CAAF then applied its most recent and consequential post-trial precedent, *United States v. Hickok*.[23] The court said that *Hickok* applies when the accused has counsel, "but that counsel's ability to perform is adversely affected by a procedural error . . . [permitting the CAAF to] test the procedural error for prejudice."[24] In this sense, it reached the same point of analysis as the Navy-Marine Court--assessing prejudice--but by a different path, as the Navy-Marine Court applied a *per se* test, and only found prejudice after weighing the seriousness of the offenses against matters the accused said he would have submitted.[25] The lower court did find prejudice, however; a finding that the CAAF--which strongly implied (but did not state) that it would not have found prejudice--felt obliged to follow, given a line of cases that holds that the CAAF should "give the accused the benefit of the doubt rather than speculate about what the convening authority might have done absent a procedural error."[26]

In *United States v. Miller*,[27] substitute military defense counsel failed to formally establish an attorney-client relationship with the accused after the original counsel, who was about to leave active duty, submitted clemency materials before the government served the PTR. The CAAF found the government's failure to serve the substitute counsel with the PTR to be harmless, despite substitute counsel's failure to consult the accused or submit a clemency package, because the government was not on any reasonable notice that the substitute counsel and the accused failed to enter an attorney-client relationship. Citing the recently released *Hickok*, the CAAF held that it is proper to test for prejudice in such circumstances. Here, the CAAF ruled, the government failed to comply with the R.C.M. 1106(f)(1) requirement for service of the PTR "on counsel for the accused," but "had no way of knowing" that the attorney-client relationship had not been formalized. The opinion, written by Senior Judge Everett, distinguished cases such as *United States*

16. No. 96-5005 (CAAF Feb. 7, 1997) (to appear at 45 M.J. ___).

17. The court adjudged a sentence of three years, less than the pretrial agreement, which capped confinement at four years, considerably less than the maximum punishment of 355 years. *Id*. slip op. at 5. The accused was convicted of eighteen illegal distributions of drugs, eleven of them to fellow sailors aboard his aircraft carrier. *Id*.

18. *Id.* at 4-5.

19. The divided lower court held that it had "no basis to conclude that the clemency petition from [EM2 Washington's] fiancee would have had no effect on the convening authority's action." *Id*. at 5-6.

20. Notwithstanding the accused's expressed preference that the PTR and record be served on his detailed military counsel, *Id*. at 4, the CAAF found that neither counsel's representation "was terminated by competent authority. Thus, both . . . had a duty to actively represent EM2 Washington during the post-trial proceedings." *Id*. at 6; *See* United States v. Palenius, 2 M.J. 86, 93 (C.M.A. 1977).

21. *Washington*, slip op. at 6.

22. *Id.*

23. *Id; see also* United States v. Hickok, 45 M.J. 142 (1996).

24. *Washington*, slip op. at 6.

25. *Id.* at 7.

26. *Id.* (citations omitted).

27. 45 M.J. 149 (1996).

v. Cornelious,[28] in which counsel continued to take action on behalf of the accused after the accused had tried to fire the lawyer or had acted to clearly call into question their relationship.

Again in dissent, Judge Crawford emphasized in *Miller* that a later clemency submission would not have made any difference in light of the comprehensiveness of the initial submission and the offenses to which the accused pled guilty.[29] Such consideration "would elevate form over substance and be a useless act,"[30] according to Judge Crawford. At the other end of the spectrum, Judge Gierke also dissented, writing that the accused in fact "had no counsel within the meaning of R.C.M. 1106(f)(2)"[31] and that therefore "[p]rejudice should be presumed."[32] Judge Gierke stressed that the focus should be on the accused, who did not receive, in his view, the post-trial assistance he should have received. "It is immaterial who was at fault," Judge Gierke wrote, characterizing the substitute counsel as "a mere staff officer" who never entered into a proper attorney-client relationship with the accused.[33] "I cannot join in the majority's holding that Captain Stanton's appointment and actions . . . were 'close enough for government work.'"[34]

The issue of substitute service is most relevant for appellate practitioners, because counsel and SJA's should strive in every instance to comply with the *Manual* and to ensure proper and timely service of both the PTR and record of trial. It is shortsighted in the extreme to choose not to serve either document on *some* defense counsel, even when the defense appears to be disorganized or indifferent, and even when the defense may have submitted matters before service of the PTR and record.

Other PTR Pitfalls

There still is no better case for explaining the theory and importance of the SJA Recommendation than *United States v. Diaz*,[35] in which the Court of Military Appeals[36] emphasized that the PTR is a foundational document from which the convening authority's action stems. Therefore, mistakes in the PTR have enormous consequences, because it is the PTR on which the convening authority relies when making decisions on findings and sentences. If the PTR is in error--and the convening authority is thereby misinformed--the convening authority's action cannot be said to be an informed (and therefore valid) decision. That being said, courts have come to recognize, without wanting to ratify undue sloppiness, that not all PTR errors are created equal, and a degree of tolerance is necessary in weighing the significance of PTR errors.

In *United States v. Barnes*,[37] the Navy-Marine Court observed that "[t]here is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Barnes, a Marine staff sergeant with fourteen years' active duty service and no record of disciplinary problems, was convicted of a single use of marijuana. He had been awarded the Navy Commendation Medal related to service in Somalia less than a year before his trial. The PTR failed to mention the award. The court called the medal a "significant and worthy personal achievement."[38] It said the "failure to include these matters in the [PTR] deprives the convening authority of important information concerning the appellant's prior service and may well have affected the outcome of his sentence review."[39]

The Navy-Marine Court stated explicitly the concern that underlies the opinions of many courts in the post-trial area: an unwillingness to assume that the process is irrelevant or that the convening authority would not have taken some form of clemency action. "It is difficult to determine how a convening authority would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action."[40] Here, failure to include the

28. 41 M.J. 397 (C.M.A. 1995).

29. *Miller*, 45 M.J. at 151-52 (Crawford, J., dissenting).

30. *Id.* at 152.

31. *Id.* (Gierke, J., dissenting).

32. *Id.*

33. *Id.*

34. *Id.*

35. 40 M.J. 335 (C.M.A. 1994).

36. On 5 October 1994, Congress changed the name of the Court of Military Appeals to the Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941(n) (1995)).

37. 44 M.J. 680 (N.M.Ct.Crim.App. 1996).

38. *Id.* at 682.

39. *Id.*

citation for the Navy Commendation Medal was prejudicial error, requiring a new review and action. Practitioners should pay special attention to one of the court's footnotes which cites a Secretary of the Navy Instruction that lists the laudatory criteria for the medal including "'[o]utstanding and worthy of special recognition . . . . The performance should be well above that usually expected of an individual commensurate with his grade or rate . . . .'"[41] The Navy-Marine Court fell in line with the emerging CAAF majority in holding, oddly in a footnote, that it could "not assume that the convening authority . . . was aware of" the combat medal or Somalia service "merely because these matters were reflected in his personnel records or evidence of them was admitted at trial."[42] Again this points up the difference between items that the convening authority must consider (result of trial, PTR and defense submissions)[43] and those he *may* consider (other personnel records, relevant extra-record material, the record of trial).[44]

At the other end of the mistake spectrum is *United States v. Ross*.[45] The PTR in this case inaccurately stated that Ross was found guilty of drug use on 28 September when the real date was 22 July. Ross, an Air Force E-5, who was sentenced to reduction to E-1 and a bad-conduct discharge, waived post-trial submissions and the convening authority action reflected the correct July date. Notwithstanding the principle in *Diaz*[46] that a convening authority implicitly approves findings as reflected in the PTR unless he acts explicitly to the contrary, the conviction in this case was upheld on the grounds that "[*t*]*he essence of appellant's crime was drug use*--a date in July versus a date in September was inconsequential in the big picture of this trial."[47] *Diaz*, the court said, applies "to major errors" in the PTR, such as omission of offenses and incorrect maximum punishments.[48] The court said it was "reluctant to elevate 'typos' in dates to 'plain error' or grounds for setting aside a convening authority's action when an appellant expressly waives the right to complain."[49] Still, a published opinion of a military appellate court was devoted to whether an obviously typographical mistake should redound to the benefit of a servicemember. It illustrates both the governmental sloppiness that has meant a full post-trial docket for the appellate courts, and the heavy wheezing undertaken by many of the appellate courts before coming to a common sense conclusion.

Improper Authors

While courts have indulged a certain amount of clerical error in PTRs, they are less lenient regarding who writes and signs them. Both the CAAF and the service courts have used cases involving "nontraditional" authors of PTRs to reemphasize the significance of the PTR, the fact that it is an important piece of legal advice that is provided to a convening authority, and that a lawyer should write it.[50]

In *United States v. Edwards*,[51] a divided CAAF held that a naval legal officer (non-judge advocate) was disqualified from preparing the PTR in a case in which he had preferred the

40. *Id.*

41. *Id.* n.2. On appeal, the defense did a good job of building a case for the fact that omission of the award was consequential. The court appears implicitly to have balanced the gravity of the offense (one-time drug offense) against the strength of the accused's record (fourteen year NCO who was a strong performer with no prior record of disciplinary action), in determining that the omission may well have been consequential under these circumstances. Such characterization avoids the issue present in *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993), and some of its progeny, regarding how significant an award or decoration must have been before its omission is considered sufficiently consequential to warrant a new review and action. As in *Demerse*, there was no suggestion in *Barnes* of ineffective assistance of counsel for failing to highlight the service or point to the government's omissions in the PTR, presumably on the theory that the government is obliged to include the information in the PTR and the defense is not expected to be the editor of documents that the government has an independent obligation to generate accurately.

42. *Barnes*, 44 M.J. at 682 n.3.

43. *See* MCM, *supra* note 2, R.C.M. 1107(b)(3)(A).

44. *Id.* at 1107(b)(3)(B).

45. 44 M.J. 534 (A.F. Ct. Crim. App. 1996).

46. 40 M.J. 335 (C.M.A. 1994).

47. *Ross*, 44 M.J. at 537 (emphasis added).

48. *Id.*

49. *Id*. This kind of typo is different from a substantial omission of an element of the sentence, as occurred in *United States v. Schiaffo*, 43 M.J. 835 (Army Ct. Crim. App. 1996). In this case, the convening authority's action did not expressly approve the BCD, though it referred to it in "except for" executing language. *See, e.g.*, MCM, *supra* note 2, app. 16, for sample forms of actions. In a typical action, the convening authority approves the sentence "except for" the punitive discharge, because on initial review the convening authority is not empowered to approve a punitive discharge; sentences that include dismissal or punitive discharge must first undergo review by the service courts of criminal appeals. *See* UCMJ, arts. 66(b), 67 (1988). The Army Court returned it to the convening authority for a new action.

50. Before a convening authority takes action on a case his "staff judge advocate or legal officer shall . . . forward to the convening authority a recommendation under this rule." MCM, *supra* note 2, R.C.M. 1106(a).

51. 45 M.J. 114 (1996).

charges, interrogated the accused, and acted as evidence custodian.[52] Mere prior participation does not disqualify an author, the majority held, in an opinion written by Judge Sullivan, but involvement "far beyond that of a nominal accuser" did so here, and waiver did not apply because the defense did not know about the extent of the author's involvement at the time it submitted post-trial matters.[53] The majority called the authorship "plain error" and "obvious error . . . impacting on a substantial right of appellant."[54] Judge Cox wrote a short dissent in which he said the author's involvement in the case was "a bit too much,"(not a terribly objective legal standard, but not utterly cloudy either) but harmless.[55] In a longer dissent, Judge Crawford said she was not persuaded that the author was disqualified, and even if he were, waiver applied because the defense failed to raise the issue initially at trial.[56] Regardless, Judge Crawford tried to hold the court to the Code and precedent, asserting that mere prior involvement in a case does not necessarily disqualify a legal officer unless that officer has a "personal interest" or strong feelings or biases about the case.[57]

While other members of a staff, such as enlisted paralegals under the supervision of chiefs of justice, commonly draft PTRs, it clearly is unduly risky for someone other than a lawyer to sign a PTR. In *United States v. Cunningham*,[58] the Navy-Marine Court found that it was plain error and nearly always reversible error for an enlisted sailor (in this instance an E-6 legalman first class) to sign a PTR. The court remanded the case for a new review and action because of lack of complaint by the defense.[59]

The court emphasized that the PTR is an "enormously important" document, because "the better the convening authority is advised, the more fairly and justly will that authority exercise command discretion in acting on a case."[60] The court continued: "Complete and accurate advice in each case provides a convening authority with the guidance necessary" to act on a case, and the PTR "is much more than a ministerial action or mechanical recitation of facts concerning the trial. Its heart and soul exist in the judgment of the drafter as to whether the adjudged sentence is appropriate and whether clemency is warranted."[61] Because of this burden, "Congress mandated that the recommendation be done by a staff judge advocate or commissioned legal officer."[62] In addition, the CAAF "has held that an accused has a military due process right" to a PTR prepared by a statutorily qualified officer.[63] "Judge advocates and commissioned officers will almost always have more formal education than most sailors, and by virtue of their status as commissioned officers, they are charged with unique responsibility and stricter accountability, and hold the special trust and confidence of the President."[64]

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52. The *Manual* provides that "[n]o person who has acted as member, military judge, trial counsel . . . or investigating officer in any case may later act as a staff judge advocate or legal officer . . . in the same case." R.C.M. 1106(b). This non-binding discussion to the rule also suggests that the SJA or legal officer "may also be ineligible when . . . [he or she] testified as to a contested matter (unless the testimony is clearly uncontroverted) . . . [or] when the sufficiency or correctness of the earlier action has been placed in issue." R.C.M. 1106(b) Discussion.

53. *Edwards*, 45 M.J. at 116.

54. *Id.*

55. *Id.* at 117 (Cox, C.J., dissenting).

56. Even the majority opinion assumes that the issue could have been raised at trial, suggesting that the legal officer must also have prepared the pretrial advice. *Id*.

57. *Id.* (Crawford, J., dissenting).

58. 44 M.J. 758 (N.M.Ct.Crim.App. 1996) (en banc).

59. The accused, found guilty of a 110 minute AWOL and violating an order to shave, was sentenced to 60 days' confinement, reduction to E-1, and a bad-conduct discharge. *Id*. at 759.

60. *Id.* at 763.

61. *Id.*

62. *Id.*

63. *Id.* (citing United States v. Hill, 27 M.J. 293 (C.M.A. 1988)).

64. *Id*. (citations omitted). The majority seems to make the unremarkable point that lawyers can perform legal work better than non-lawyers. Certainly, commissioned officers are formally charged with the "special trust and confidence" of the President but there is no distinction among officers and no different standard for lawyers. In addition, the majority does not address a reality of which it surely is aware: non-lawyers routinely draft PTRs that lawyers or legal officers typically review and sign. The majority also took the occasion to express its frustration with Naval post-trial problems, though the Army in particular seems to have as many post-trial cases as the Navy. "The fact that this keeps recurring in the Navy detracts from the reputation of post-trial case processing in our service." *Id*. at 764. "Over the past few years, this Court has returned several other cases because of this error." *Id.* at n.11. The Clerk of Court of the United States Army Court of Criminal Appeals also sounded an early warning in 1996, writing that "[n]otwithstanding the fewer number of general and special courts-martial, post-processing times remain high." Information Paper, Clerk of Court (JALS-CCZ), U.S. Army Court of Criminal Appeals (11 Aug. 1996). A chart appended to the information paper showed that the time to process an Army general court-martial from end of trial to convening authority action has increased from 60 days in 1991 to 79 days in 1996. *Id*.

There was not much reasonable dispute about the existence of error in *Cunningham*, but it is significant that the court found the need to remand the case even after applying the three-part test *of United States v. Olano*.[65] In dissent, Judge Keating argued that the majority elevated form over substance by focusing on the military status of the preparer rather than, as in most cases involving PTR errors, the substance of the mistakes in the PTR (there were three).[66]

Even when the PTR is signed by a lawyer, that person should be the staff judge advocate or acting SJA. If the SJA is not available, others (most typically the deputy) should sign in the capacity of acting SJA, not in their ordinary capacities.[67] More importantly, if the SJA is disqualified, the deputy should not normally sign the PTR or addendum in any circumstance in which the conduct of the SJA, his superior, is reasonably called into question.[68]

Moving Toward a Standard

Lurking but not explicit in most of the opinions that resist harmless error tests in the post-trial area is a concern that it will turn the process into a *pro forma* drill, ratifying the sense of some defense counsel and their clients that it provides only a theoretical opportunity for relief. Still, a mature system of military justice should be able to distinguish between errors of true consequence--erring on the side of remand when a case is not clear--and those in which a reasonable person can say (*e.g.*, in a guilty plea with a pretrial agreement) that the outcome likely would not have been affected by the post-trial error. The tougher road for the court should not be in defining whether there can be harmless error in the PTR-addendum process, but in providing a reliable method of analysis for it. It involves, of course, balancing the nature of the error or omission (*e.g.*, ranging from the functional equivalent of a dotted "i"[69] to serious government negligence or outright misconduct) against the result of trial, determining whether there was a guilty plea, and comparing the sentence adjudged to that contained in the pretrial agreement. Should Judge Crawford find an ally in Judge Effron, the newest member of the court, for her harmless error analysis, the CAAF will remain closely divided in the post-trial area with Judge Cox providing the likely swing vote in cases where remand to convening authorities for new reviews and actions is an issue. Should Judge Effron side with the fairly predictable recent majority, then Judge Crawford will remain an eloquent, consistent, but clearly minority voice for the viewpoint that post-trial errors must be tested against the likelihood that they would have affected the outcome.

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65. *See supra* note 4.

66. *Cunningham*, 44 M.J. at 765-66 (Keating, Senior J., dissenting).

67. *See* United States v. Crenshaw, No. 9501222 (Army Ct. Crim. App. Sept. 25, 1996). (Fact that deputy SJA (DSJA) improperly signed PTR as "Deputy SJA," rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.)

68. *See* United States v. Havers, No. 9500015 (Army Ct. Crim. App. Nov. 6, 1996). The SJA was attacked for manipulating court membership in his exercise of delegated authority to approve excusals. After two days of post-trial testimony, he was cleared. The addendum, which addressed the post-trial session and the SJA's testimony, was signed by the DSJA as "acting Staff Judge Advocate." In it, he disagreed with the defense assertions and adhered to the original recommendation. Clearly the SJA was disqualified from signing the addendum, but so was his deputy, the court held. "[W]hen the staff judge advocate is disqualified because of possible bias or personal interest, so are the staff judge advocate's subordinates, because of the reluctance they may naturally feel to find fault with their supervisor." *Id*. slip op. at 3 (citations omitted). This is especially true where, as here, "the deputy necessarily had to consider the actions and credibility of his immediate supervisor." *Id*. "[T]he addendum was prepared by someone whose independent judgment could reasonably be questioned." *Id.* at 4. This case also reinforced the point, strongly made by CAAF in 1995 that staff judge advocates have an independent obligation to look at a case and cannot rely on (or critics might say, hide behind) findings and rulings by military judges. In *United States v. Knight*, 41 M.J. 867 (A.C.M.R. 1995), after extensive post-trial sessions, the military judge found no improper conduct by court members, a decision supported by the SJA in the PTR. When the Army Court found error, it chided the SJA for failing to independently analyze the case and to advise the convening authority to act contrary to the judge's ruling. *Id*. at 871. In *Havers*, the judge found that the SJA's behavior was not improper. Still, the court acknowledged, the hearing "reasonably called into question the staff judge advocate's actions . . . . The fact that the military judge found no error did not relieve the deputy of this duty [to independently assess his boss's actions]; although the rulings of a military judge may be entitled to some deference, they do not relieve the staff judge advocate from the obligation to independently weigh issues raised by the defense in its post-trial submissions." *Id*. Just as in *Knight*, when the court found that the SJA improperly relied on the military judge's ruling, the fact that a judge may have found no error that warranted altering any of his trial rulings does not relieve the SJA, often operating under a different standard and different mandates or regulatory guidance, of his obligation to make independent decisions. This is both because the SJA has his own obligations and because the SJA must analyze the case from his perspective as the one required by statute or regulation to independently advise the convening authority. In a *Havers* scenario, the problem is solved by transferring post-trial responsibility to another staff judge advocate.

69. As an example of the trivial end of the spectrum, see *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994) in which the Navy-Marine Court wrestled with whether a PTR was defective when it inadvertently listed an accused's Art. 15 as having the date of 21 Jan. 1989 when it really was 21 June 1989 (looking at the lateness of the defense complaint and the trivial nature of the error, the court concluded that it was harmless).

Begin with the End in Mind: Keep the Addendum Clean

The courts' overwhelming and least controversial concern in post-trial processing is simple fairness: ensuring the defense sees what the convening authority sees. This is especially important when the convening authority is about to take action. The defense must be permitted to see whatever the government, who has the ear of the convening authority, communicates to the convening authority before action. The addendum is the optional document, prepared after receipt of defense post-trial submissions, in which the SJA gives final advice to the convening authority regarding findings and sentence.[70] To the extent that the addendum merely reiterates the judgment in the post-trial review (which the defense will have seen),[71] it need not be served on the defense. If, however, it includes any "new matter"--consequential information or opinions not previously communicated during the post-trial phase in this case--it must be served on the defense which must be given ten days to comment.[72] We seem to be in a period in which the appellate courts are being forced to bludgeon practitioners with this elemental couplet: construe "new matter" expansively (*i.e.*, when in doubt, consider it new), and when new, ensure it is served on the defense with opportunity to comment.

Look "between the blue covers"

In *United States v. Leal*,[73] a divided CAAF held that if the additional information supplied in the addendum is not part of the record (*i.e.*, the trial transcript), it must be treated as new matter. In this case, the addendum referred to a letter of reprimand that was offered by the government, but not admitted at trial. It was, therefore, part of the "record of trial," in that all exhibits, including those not admitted, are part of the record.[74] The court emphasized, however, that it is insufficient that the item was "between the blue covers,"[75] because that would permit the government to highlight and smuggle to the convening authority evidence offered but not admitted. Presumably, this would encourage a forward-thinking if calculating government to salt the record with obviously inadmissible material simply to preserve the right to slip it before the convening authority. The court ordered a new review and action by a new convening authority.

The majority opinion, written by Judge Gierke, skirts a central issue: so long as the *Manual* permits a convening authority to *consider* the record of trial when making his decision regarding a case,[76] how can consideration of an item in that record--albeit one that refers to drug use eight years prior to trial and does not carry any substantiating evidence with it--violate another codal provision, such as the one prohibiting consideration of "new matter" of which the defense is not on notice? Judge Crawford comes close to this question in her dissent, in which she writes that an SJA "comment on an inadmissible reprimand . . . would be entirely consistent with the plain meaning of RCM 1106(d)(3)(B) . . . [and] RCM 1107(b)(3)(B)(iii)."[77] Here, the SJA added the reprimand in response to defense materials that characterized the accused, an Air Force staff sergeant convicted of attempted use of LSD, as an "exceptional NCO."[78]

Judge Crawford found this characterization to be offensive, misleading, and possibly unethical, bolstering her argument that "the SJA may use reliable evidence within the 'blue covers' of the record to rebut it."[79] Still, the issue is not so much whether the convening authority can be exposed to that information (even the majority does not contest this), but whether the information must first pass through the defense before the majority sees it. In that vein, Chief Judge Cox, who dissented

70. "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel . . . have been served with the recommendation and given an opportunity to comment." MCM, *supra* note 2, R.C.M. 1106(f)(7).

71. "Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused." MCM, *supra* note 2, R.C.M. 1106(f)(1).

72. "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days . . . in which to submit comments." MCM, *supra* note 2, R.C.M. 1106(f)(7).

73. 44 M.J. 235 (1996).

74. The *Manual for Courts-Martial* requires that "any exhibits which were marked for or referred to on the record but not received in evidence" be "attached to the record." MCM, *supra* note 2, R.C.M. 1103(b)(3)(B).

75. *Leal*, 44 M.J. at 236 (citation omitted).

76. "Before taking action, the convening authority may consider 'The record of trial . . .' " MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(i).

77. *Leal*, 44 M.J. at 237 (Crawford, J., concurring in part and dissenting in part). The *Manual* permits the convening authority to consider "[s]uch other matters as the convening authority deems appropriate," but if they are "adverse" and "outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii). Unresolved is the hyper-technical question of whether the items that the MCM requires to be "attached to the record" in R.C.M. 1103(b)(3)(B) are in fact *part of* the record; is a U-Haul attached to the Chevy that is pulling it part of the Chevy or a functional attachment?

78. *Leal*, 44 M.J. at 238.

79. *Id.*

in part, came closer to the core concern. "[T]here is absolutely nothing new about this matter,"[80] Judge Cox wrote, noting that all parties were aware of it because it was in the record of trial, as well as constructively aware of it because it was in the accused's personnel records. Therefore, "there is nothing unfair about sharing [it] with the convening authority. . . . What was unfair, however, was the Acting SJA's ambush" [81] in presenting the letter to the convening authority without notifying the defense. Judge Cox's dissent and concurrence is the most likely of the three *Leal* opinions to presage the direction of the court in this area. It is written with the Chief Judge's characteristic judiciousness, coupled with an accurate sense of the concerns of working counsel (especially SJA's),[82] not to mentioned the gentle cudgel of his status as chief judge. Still, the CAAF or the President need to contribute additional clarity to this area. Is there a "plain meaning" for a seemingly straightforward term such as "record of trial"--i.e., is it acknowledged to include all of the material inside the blue covers, or should it be read as "transcript," such that anything not spoken in court or admitted in court is beyond the record, barring the convening authority from considering it without the defense's being placed on explicit notice and given opportunity to respond?[83] And is the Chief Judge himself disingenuous to a degree in suggesting on the one hand that the item is not new but still suggesting that the defense was the victim of an ambush with "not new" matter? The new matter rule exists to prevent such an ambush. No patrol was ever ambushed in broad daylight by another patrol standing in front of it on the trail. At some point the CAAF has to conclude that the rules are designed to ensure a fair fight but that it cannot control or finely calibrate the results of the fight so long as it is satisfied that the rules of engagement were followed.

Answering Defense Claims of Error

The often prosaic work of drafting an addendum involves packaging all of the material for the convening authority and providing a response to defense allegations of legal error. The CAAF made it clearer than ever this past year that SJA's must address defense claims of error, but that these responses can hardly be too terse. In *United States v. Welker,*[84] a split CAAF reiterated the long-standing rule that SJA's must respond to defense assertions of legal errors made in post-trial submissions, but it also made clear that the response may merely consist of a statement of agreement or disagreement, without statement of rationale. The court will test for prejudice, and when (as here), the court finds no actual trial error, it will find no prejudice.[85] In one of the two dissents in the case, Senior Judge Everett argued that efficiency should permit appellate courts to grant relief in clearly warranted cases and to deny it in clearly meritless cases. He suggested that when "the *merit or lack of merit is not so clear-cut*," the accused "is entitled to make his case to the convening authority."[86] Judge Everett thought this was one of those unclear cases that should have gone to the convening authority. He emphasized even more strongly than the majority that preparation of an accurate addendum is the SJA's duty and that failure to address legal errors is normally prejudicial and will require remand.[87]

The government's obligations were further fleshed out in *United States v. Green*,[88] a case released simultaneously with

80. *Id.* at 241 (Cox, C.J., dissenting).

81. *Id.*

82. In a footnote, the Chief Judge said his "personal preference would be for staff judge advocates to serve everything upon the accused" but to "give the accused very limited time to respond to supplemental recommendations." *Id*. at 244. The key concern, Judge Cox wrote, is fundamental fairness, notice, and opportunity to respond. "That is all this case is about: The right to be heard." *Id.* Judge Cox gives no further content to his suggestion about "very limited time," so it is unclear whether he envisions a *Manual* change that would reduce the time from ten days or, for example, bar the defense from requesting an additional twenty days for addendum responses. While processing time always seems to be a concern, especially in the Army, it is not obvious that time was the central factor motivating the government in the recent addendum cases.

83. There is no end to the real-life difficulties posed by the state of the law after *Leal*. The convening authority retains his power, under R.C.M. 1107(b)(3)(B)(i), to *consider* the record of trial. *Leal* has constricted the definition of record of trial. SJA's commonly provide the convening authorities with a copy of the record to consult if they choose to do so (most of course do not, and the streamlined 1984 *Manual* is designed to reduce the *need* to do so but to preserve the *opportunity* to do so). SJA's now must determine whether they can or should provide the "raw" record to convening authorities for their perusal, which could include *Leal*-like information. Strictly, the defense will not be on notice (which is satisfactory to Chief Judge Cox) that the convening authority is considering that information, but the defense (as Judge Crawford hints) should be on perpetual constructive notice that the convening authority might consider it. As the law stands now, SJA's are probably on shaky ground if they annotate or "tab" portions of the record without notice to the defense, or orally brief the convening authority on such matters.

84. 44 M.J. 85 (1996).

85. *Id*. at 89. The dispute in this case concerned a defense claim, in its R.C.M. 1105 submission, that the military judge had permitted improper government cross-examination of the accused. *Id*. at 87-88 The asserted errors (questioning "beyond the scope" of direct, "berat[ing] and harass[ing] the accused," and eliciting uncharged misconduct, *id*.) are areas within the distinct province of the trial judge and extremely unlikely to yield relief at the post-trial or appellate stages.

86. *Id.* at 91 (Everett, Senior J., dissenting) (emphasis in original).

87. *Id.*

88. 44 M.J. 93 (1996).

Welker. Here, the CAAF held that, although SJAs are not required to examine records of trial for errors, they "must nonetheless respond to any allegations of legal error submitted by the defense . . . even if the errors are submitted after service of the [PTR], as long as that is done within the time prescribed by RCM 1105(c)(1)."[89] When it is unclear whether the accused made a timely submission "the bottom line is determining whether we are satisfied that appellant has not been prejudiced."[90]

Some of the service courts also addressed the addendum this past year, again emphasizing SJA responsibility, but also suggesting a band of tolerance for SJA failure to comment in open-and-shut cases. If brevity is the soul of wit,[91] then the author of the addendum in *United States v. Sofjer*[92] is Thomas More.[93] The seven-page addendum in this case recited defense-alleged errors and then concluded, "My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged." The SJA made no other comment regarding the assigned errors. According to the Navy-Marine Court, the government argued that the "only inference . . . is that the staff judge advocate disagreed with all of the errors that were raised. We agree with this assessment."[94] Staff Judge Advocates should accept direction from the court in this area and satisfy themselves with brief treatments of such defense claims. There is no need to analyze the defense's claims (and considerable risk associated with doing so). Acknowledging the claims, disagreeing, and then recommending no corrective action should be sufficient.

A final wrinkle on the "new matter" issue is when the SJA adds not so much new information (as in the letter of reprimand in *Leal*), but new analysis. This analysis, because it may affect the convening authority's judgment (why else would an SJA offer it?), also must be shared with the defense. In *United States v. Cook*,[95] the SJA wrote two post-trial memos in which he advised the convening authority about the military judge's qualifications and experience, addressed the likelihood of the accused's waiving an administrative separation board, and minimized the effects of a bad-conduct discharge (BCD). The Air Force Court of Criminal Appeals disapproved the BCD, because all of this analysis was obviously new discussion that was outside the record and should have been served on the accused with opportunity to comment.[96]

That same court expressed its displeasure with similar conduct by an SJA that yielded a different result only because of the accused's prior statements. In *United States v. Gonyea*,[97] the SJA bolstered his addendum with the statement that the accused was sentenced "by an extremely qualified and experienced military judge."[98] This clearly was new matter--analysis of extra-record material of which the defense would not reasonably be aware--that was not shared with the defense. The court found that this new matter was "a serious matter" because it violated the notion of "fair play."[99] It did not, however, grant relief, because "we can say with certainty that the error did not affect the outcome."[100]

It is important for critics and practitioners to remember that in *Cook* and *Gonyea*, as in most addendum cases, there is nothing inherently objectionable about the *material* contained in the SJA's memorandum.[101] He is always free to add virtually anything he deems relevant for the convening authority's decision. The danger comes when the SJA chooses to communicate unilaterally with the convening authority, contrary to the *Manual's*

89. *Id.* at 95.

90. In this case, where the accused claimed to have had delivery of his clemency package thwarted by prison authorities, the CAAF looked at the claims of legal error, concluded they were without merit, and affirmed rather than returning the case for a new review and action.

91. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2.

92. 44 M.J. 603 (N.M.Ct.Crim.App. 1996).

93. Sixteenth century Lord Chancellor of England known for his great wit, as well as the ardent faith that resulted in his losing his head when he refused to take an oath of theological loyalty to King Henry VIII. *See* RICHARD MARIUS, THOMAS MORE (1985).

94. *Id.*

95. 43 M.J. 829 (A.F. Ct. Crim. App. 1996).

96. *Id.* at 831.

97. 44 M.J. 811 (A.F. Ct. Crim. App. 1996).

98. *Id.* at 812.

99. *Id.* (citation omitted).

100. *Id*. In this case, the accused's clemency package discussed his alcoholism and the likely loss of veteran's benefits if his BCD remained in place. The addendum did not, *inter alia*, point out that the accused asked for a BCD in lieu of confinement at trial or address his weak performance record.

101. The *Gonyea* court at least implies that bolstering an addendum with an appeal "to the qualifications and experience of the military judge to support his recommendation, rather than simply referring to matters in the record of trial" is not necessarily effective staff work by an SJA. *Id*.

mandate that he provide the defense the opportunity to read and comment. Such practice is objectionable and almost inevitably requires a new post-trial review and action, often by a new SJA and convening authority, a chain of events that serves neither the SJA's client nor the interests of justice.

Philosophical Division: Moving Toward Harmless Error

The extent to which the dispute over the addendum is unresolved and hard to parse is highlighted in an opinion of the Air Force Court of Criminal Appeals released several months after *Welker*. Reflecting but not citing *United States v. Welker*,[102] the Air Force Court of Criminal Appeals held in *United States v. Mark*[103] that an SJA's failure to comment in the addendum on defense allegations of error made in R.C.M. 1105 matters does not entitle the accused to relief when the ignored allegation clearly has no merit. A failure to comment--that is, essentially choosing not to further advise the convening authority--falls on a lesser plain than providing analysis or guidance of which the defense is not made aware. The court relied on *United States v. Hill*,[104] a 1988 CMA opinion. It is instructive to consider the authors of the *Hill* and *Welker* opinions in discerning the guidance to take from the case and the likely direction of the CAAF.

Senior Judge Everett uses his dissent in *Welker* essentially to tell the majority that it has stretched *Hill* beyond its limits. *Hill* involved an SJA's decision not to address the defense's clemency package in the addendum, a case in which the court held that the service courts should be free to affirm (rather than remand) "when a defense allegation of legal error would not forseeably have led to a favorable recommendation"[105] by the SJA in the addendum. In his *Welker* dissent, Judge Everett argues that "I read the opinion in *Hill* most logically to say . . . that [when] an accused's post-trial assertion of error *clearly is without merit*, the accused is not entitled to the hollow gesture of a remand," but that in the close case he should be permitted to make his case to the convening authority.[106] Judge Everett should know how to read "the opinion in *Hill*," because he wrote the unanimous majority opinion in that case. Judge Crawford, author of the *Welker* majority opinion, liberally quotes from *Hill*, but seeks to extend it in a more blanket fashion.

Another 1996 addendum case showed that the CAAF can agree in at least some circumstances that some addendum material is either not new matter or is new but truly inconsequential, so that failure to serve it does not necessarily warrant a new review and action. In *United States v. Jones*,[107] the CAAF showed some inclination to consider the nature of the additional information in deciding whether the failure to serve an addendum containing such "new matter" is harmless error. Here the SJA commented on the slow record production process that precluded the accused from being eligible for an Air Force return to duty program cited by the defense counsel in his clemency submission. The court found that the SJA's citation of key dates regarding record production were "new" but harmless, because the information was "neutral, neither derogatory nor adverse."[108] Citing the regulation was not "new" because the defense counsel had referred to the regulation in substance, though not by name, and the SJA agreed with the defense counsel's interpretation of its effect. Judge Crawford's concurrence was pithier: she agreed that the citation to the regulation was not new matter and considered the other information to be "so trivial as to be harmless."[109]

Welker and *Jones* are symptomatic of more than the mere issue of what kind of SJA addendum error will warrant a remand. They reflect the division on the court regarding how to treat most errors in the post-trial area. The majority of the CAAF opinions continue to interpret government post-trial error strictly, insisting on keeping that part of the process vital.[110] Judge Crawford generally has been in the minority,

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102. 44 M.J. 85 (1996). The *Welker* opinion is dated 29 May 1996, and *Mark* is dated 8 Oct. 1996.

103. 44 M.J. 792 (A.F. Ct. Crim. App. 1996). In this case the defense counsel claimed in R.C.M. 1106 matters that the trial counsel made two errors in his sentencing argument. The SJA failed to address the assertions (both highly dubious) in the addendum, though he did, importantly, advise the convening authority to consider all matters submitted by the defense.

104. 27 M.J. 293 (C.M.A. 1988).

105. *Id*. at 297.

106. *Welker*, 44 M.J. at 91. In fact, Judge Everett's *Hill* opinion does not expressly set out such a middle ground, and such a posture is hard to discern from a reading of the opinion.

107. 44 M.J. 242 (1996).

108. *Id*. at 244.

109. *Id*. (Crawford, J., concurring in the result).

110. Such concern about the true significance of many long-standing procedures is not limited to the post-trial arena. *See, e.g., United States v. Nix*, 40 M.J. 6, in which the CMA found that the a disqualified special court-martial convening authority (because of personal interest in the case) meant that the general court-martial was improperly convened, because "we cannot assume Captain Finta's recommendation had no bearing on the ultimate decision to refer the charges against appellant to court-martial . . . Accordingly, we must assume the recommendation influenced the GCM convening authority's decision to refer the charges to a general court-martial." *Id*. at 8.

insisting that the defense show what it would have presented and how the convening authority's actions would have been different if the convening authority had considered the disputed information or if the defense had the opportunity to respond. *Welker* is the only majority opinion that Judge Crawford has written in the post-trial area in the past two years. In the past year, she dissented several times, each time expressing variations of the theme that won the rare and thin majority reflected in *Welker*.

The Navy-Marine Court was the first to attempt to reconcile the divergent strands in the 1996 addendum opinions with prior case law in the area. In *United States v. Jordon*,[111] the court held that the government's failure to serve the defense with an addendum that included a letter calling the accused a high recidivism risk was improper.[112] The court determined that *Jones* "effectively overruled the *per se* rule in *Narine*,"[113] a 1982 CMA decision that held that the accused must always have the chance to comment on an addendum that contains new matter.[114] The Navy-Marine Court interprets *Jones* to require the appellate courts to "apply a harmless-error analysis in resolving" addendum issues.[115] The court found that the defense likely would have submitted rebuttal material, and because "there is a reasonable possibility that the convening authority might have granted the appellant clemency after considering all the information he *should have had before him*,"[116] it set aside the action and required a new review and action. *Jordon* is an egregious case that begins the process of applying *Jones*, *Leal*, and other recent addendum cases, and it formally retreats from *Narine* in suggesting the "reasonable possibility" test. The court made clear, however, that it still considered the issue to be "a mere violation of a Rule for Courts-Martial."[117] Because of this--*i.e.*, the fact that it is not error of constitutional dimension--the government need not prove the error to be harmless beyond a reasonable doubt; the defense merely must show prejudice "beyond the merely speculative or trivial," and then it carries no further burden of proving harm, but "the Government has the entire burden of rebutting the presumption."[118]

The case also shows that strong defense counsel often will receive the benefit of the doubt when a court is struggling to determine, as Judge Crawford frequently propounds in her post-trial opinions, whether a submission might have made any difference. Here the court pointed in part to the "defense counsel's track record for zealous advocacy," prompting the conclusion that "we have little doubt that he would have objected" to the SJA's failure to serve him with the addendum and "would have provided comments and, perhaps, additional evidence, if given the opportunity."[119] As in most addendum disputes, the government generated the "bad facts" that underlie this decision: sentence was announced July 1994; the PTR was served in October, 1994; and defense matters were received on 1 and 16 December, 1994.[120] Then, more than seven months elapse until the fifteen-page addendum, which included the disputed letter as an attachment, is served on July 25, 1995; the convening authority approved the findings and sentence the following day.[121]

Jordon also is noteworthy for its rejection of the government plea that it apply the *Olano* plain error test, which would require the defense to establish prejudice. The court said that "reliance on *Olano*'s plain-error analysis is inapposite" in a situation in which the defense never had an opportunity to object to the addendum or to make comments.[122]

Clearly the days of the *per se* test for addendum error are gone. Just as clearly, however, the government will not be permitted to blithely ignore the requirement to serve the defense

111. 44 M.J. 847 (N.M.Ct.Crim.App. 1996).

112. The letter, written by a social worker at the United States Disciplinary Barracks, was particularly important because it contradicted trial testimony from a doctor (not clear from the opinion whether a physician or Ph.D.) that the accused was not a danger and helped defeat the military judge's "strongest possible recommendation" that the convening authority suspend the dismissal and one of the two years confinement. *Id.* at 848.

113. *Id.* at 850 (referring to United States v. Narine, 14 M.J. 55 (C.M.A. 1982)).

114. The court noted that the recent change to R.C.M. 1106(f)(7), requiring service of an addendum that contains new matter, derives directly from *Narine*. *Id*. at 848. *Narine*, frequently cited in the past, had required a new review and action any time the government failed to serve an addendum containing new matter, regardless of the nature of the addendum error.

115. *Id.* at 850.

116. *Id.* (emphasis added).

117. *Id.*

118. *Id.*

119. *Id.* at 849.

120. *Id*. at 848.

121. *Id*.

122. *Id.* at 849.

with opinions or documents that substantially undercut a significant part of the defense's case or its plea for clemency.

Minimal Due Process: Serve the Defense

There is no area of post-trial practice in which the equities are more obvious and where misconduct or error by the government is less excusable. Criminal procedure is wedded to the concept of due process: notice and opportunity to be heard. The addendum is the final formal communication between the SJA and the convening authority. When it performs its minimalist function--packaging the defense submissions, and reminding the convening authority of his obligations--there is no requirement to serve the addendum on the defense in advance, because it does not change the picture of the case. When, however, the addendum contains information to which the defense has not had an opportunity to respond, the defense must have that opportunity, or else the government is improperly smuggling information to the convening authority.

As strict as the courts have become regarding defense waiver--requiring timely and precise objections to government misconduct, even in the post-trial area--they tend to be indulgent regarding the addendum, because the defense cannot have known about its contents if it was not served on them. Therefore, the government's risk is greatest here (and easiest to reduce to nothing). The clear message of the past several years, punctuated in 1996 by *Leal* and other cases is this: if the SJA wants to communicate anything to the convening authority, after having received the defense materials, it should be served on the defense unless it is (1) a mere reiteration of the convening authority's rights and obligations in the case (e.g., "you must consider all written matters submitted by the defense"), or (2) a conclusory characterization of or response to the defense materials (e.g., "I have considered the defense allegations regarding trial error and find them to be without merit"). An SJA also owes a convening authority his legal and prudential judgments, when asked for them. He does not, however, have license to orally communicate information or judgments that he would be forbidden from communicating in writing.

In one of the first cases of the new term, the CAAF reinforced this point in a case in which the government generated two huge addendums--and served neither on the defense.[123] In *United States v. Haney*, the SJA generated an addendum that included more than 120 pages of defense submissions that included suggestions of ineffective assistance of counsel.[124] In the addendum, the SJA summarized the defense submission, raised the possibility of ineffective assistance, and concluded that the accused "received a vigorous defense and was competently represented."[125] This document was not served on the defense. A second addendum, centering mainly on a claim that one of the members slept during part of the trial, was generated after a post-trial hearing on the issue; it, too, was not served on the defense.[126]

The CAAF opinion, written by Senior Judge Everett, treated it as a straight "new matter" case, finding that the first addendum, which characterized the defense case, and the second, which dismissed the sleeping member allegations, both contained new matter and should have been served on the defense.[127] All of this led the majority back to *Hickok*, testing the errors for prejudice. Though *Hickok* addressed errors in the PTRs,[128] the majority reiterated one of its favorite post-trial themes, that it "should not speculate that the convening authority would have granted no relief if he had been able to consider appellant's significant and substantive response to the two addenda."[129] It found itself unable to overcome the presumptive prejudice of failure to serve an addendum containing new matter.[130]

In a critical concurrence, Judge Gierke suggested that the sleeping member addendum was not an addendum at all, but akin to a second PTR--either, he acknowledged, would have to have been served, but he said the presumption of prejudice for lack of service, stemming from *Leal* and *Jones* would not apply because the second addendum only responded to a defense claim of legal error, not a traditional clemency petition.[131] In her now-traditional dissent, Judge Crawford ignored the first addendum (the clearer call in this case) and focused only on the second, which addressed the sleeping member claim. While

123. United States v. Haney, No. 93-0157 (CAAF Dec. 17, 1996).

124. Haney's submission said there "were many problems with the evidence that was presented by my attorney and the manner in which he presented what was submitted and what was withheld." *Id*. slip op. at 8. Haney also suggested that his attorney, who had started out as a prosecutor in the case before Haney individually requested him, might not have been fully independent. *Id*.

125. *Id*.

126. *Id*. at 10-11.

127. *Id*. at 12, 13.

128. *See generally* text accompanying notes 7-26.

129. *Haney*, slip. op at 15.

130. *Id*. (citations omitted).

131. *Id*. at 21 (Gierke, J., concurring).

agreeing that the failure to serve this addendum was error, Judge Crawford pointed out that "both the prosecutor and the defense counsel agreed with the military judge that such an allegation was untrue. Thus, service of the second addendum for a defense response would now be a futile exercise."[132] Judge Cox's short, witty but unilluminating concurrence suggests that an addendum "is either redundant and not necessary, or is always new matter."[133] In this case he found it was "clearly significant, and thus . . . should have been served,"[134] suggesting, with no further detail, a "significance" overlay to the "new matter" definition in the *Manual* and case law.

Haney is still another example of the recent travails of the post-trial process: government sloppiness, a splintered CAAF, and the appearance that no real relief ultimately will go to the accused. Major Haney was tried in November, 1989. The CAAF opinion came more than seven years later. The case will receive a new review and action sometime this year and, in all likelihood, the original findings and sentence will be affirmed by CAAF late in 1997, about eight years after a court of mainly awake Air Force officers sentenced him to confinement and a dismissal. Form is not unimportant, and it is glib to characterize the post-trial process as form over substance--relief *should be* relatively infrequent, given all the checks in the process--so it is important to the integrity of the system that the government scrupulously follow the rules, even when relief is relatively rare. Still, neither justice nor the appearance of justice is served by such a labyrinthine path. The PTR (which should not have taken eleven months to generate) explained the offenses of which Major Haney was convicted. The addendum appears to have been a well-assembled, comprehensive product. It simply should have been served on the defense. Now, the five-person CAAF generated four opinions: a three-man majority found that the government committed prejudicial error in failing to serve two separate addendums, each of which contained new matter, on the defense; one concurrence found that one addendum contained new matter for different reasons than the majority, and was reluctant to call the second document an addendum at all; another judge found the second document to be an addendum that should have been served, but found harmless error; another judge pulled out the dictionary to suggest that addendums inherently contain new matter, but then obliquely inserted another standard--"clear significance"--for measuring the significance of new matter that requires service on the defense. Small wonder practitioners feel bereft of guidance from the appellate courts in this area.

Practitioners must keep in mind three essentials regarding the addendum: (1) new matter will be strictly construed against the government, erring in close cases on the side of characterizing disputed information as new matter; (2) new matter must always be served on the defense, which must have time to comment; (3) the government must address defense claims of legal error, but it may dismiss them with virtually no analysis. The CAAF already has heard arguments in three addendum-related cases for this term, so practitioners can look forward to additional reinforcement of the message.[135]

Convening Authority Action

After considering the defense submissions and the SJA's addendum, the convening authority takes initial action on a case, approving or altering the findings and sentence.[136] In no area is the distinct nature of the military justice system more clearly on display than in the convening authority's action. Some areas of military practice have at least some loose parallels to the civilian world (e.g., the frequently cited and abused equivalence between an Article 32 investigation and a grand jury), but it is hard to find anything quite like the plenary and unreviewable right of the officer who convened the court to do anything regarding the findings and sentence except make them harsher.[137] In a case in which the Navy-Marine Court again contributed a decision of noteworthy clarity, the court wrote that the "convening authority's action on the results of a court-martial is a substantive exercise of power over the results of a court-martial."[138] The convening authority has "unique and absolute control over the fate and future of convicted servicemembers," empowering him to "disapprove the guilty findings and the sentence, or any part thereof, for any or no reason, legal or otherwise."[139]

The biggest change regarding the convening authority's action this past year came about as a result of a legislative change, designed to bring the UCMJ in line with the *Manual*. The *Manual* always has required defense submissions to be in writing, but the UCMJ simply spoke of "matters" submitted by the accused,[140] raising the perennial question about whether non-written matters, most typically videotapes, must be consid-

132. *Id.* at 23.

133. *Id*. at 18 (Cox, J., concurring).

134. *Id*.

135. On 4 February 1997, the Court heard argument in *United States v. Chatman*, No. 96-0306/AF, *petition granted*, 44 M.J. 63 (1996), in which the issue is whether the staff judge advocate erred, in violation of RCM 1106(f)(7) and to the prejudice of the accused, by including new matter in the addendum and failing to serve the accused with new matter so that he was deprived of the opportunity to respond. On 5 February 1997, the CAAF heard argument in *United States v. Buller*, No. 96-0232 (A.F. Ct. Crim. App. 1996) on the same issue as in another Air Force general court-martial: whether the SJA erred by including new matters in the addendum without serving it on the accused. The issue in *United States v. Catalani*, No. 96-0875 (A.F. Ct. Crim. App. 1996), an Air Force special court-martial, is whether the addendum was defective in (1) failing to direct the convening authority to consider the accused's clemency matters, and (2) injecting "new matter" not provided to the defense counsel for comment.

136. *See* UCMJ art. 60 (1988); MCM, *supra* note 2, R.C.M. 1107.

ered by the convening authority. Last February's amendments to the UCMJ removed the ambiguity by adding a sentence to the UCMJ, to make it consistent with the *Manual*. Article 60, UCMJ, now reads, in part: "The accused may submit to the convening authority matters for consideration . . . with respect to the findings and the sentence. *Any such submission shall be in writing.*"[141]

Because the convening authority's action is so important, the documents on which the action hinges, especially the post-trial review and addendum, are of great consequence. Many of the recent decisions challenge the courts to gauge the gravity of an error involving one of these documents, measuring the error against the document's inherent significance. While the courts have found harmless error from time to time, this should not embolden government practitioners to try to "work the system" to exploit these possibilities; the harmless error analysis is not sufficiently consistent, and the government should willingly shoulder the responsibilities of the post-trial phase in the interests of serving convening authorities and the system of justice.

Coast Guard Court Sees Many Actions

The Coast Guard Court issued several rulings regarding convening authority action that, while not binding on the other services, offer instructive scenarios and sensible resolutions, along with helpful analysis.

One common concern is creating a paper trail that makes clear that the convening authority considered all matters properly presented before taking action. In *United States v. Garcia*,[142] the government presented an affidavit from the SJA swearing that the defense clemency package was delivered to and considered by the convening authority before he took action. The court found this was adequate to comply with the requirement of Article 60 that the convening authority consider defense submissions.[143] The court, in guidance that all services would do well to follow, said it was ideal that convening authorities write "considered" on the matters and initial and date them. It made clear, however, that such a practice is not required to enable the court to apply a presumption of regularity, which it did in this case.[144]

In *United States v. Bright*,[145] the court found that the convening authority's right to consider "[s]uch other matters as the convening authority deems appropriate"[146] includes, in this instance, a letter from the accused's estranged wife, when the defense was given a copy and time to reply.[147] The defense did not respond to this letter. The SJA advised the convening authority that he was submitting the mother's letter "in the spirit" of the DOD Victim and Witness Assistance Program.[148] The defense asserted that she was not really a victim of the accused's larcenies and that the letter alleged unrelated misconduct.[149] The court skirted the victim-witness argument, emphasizing that the UCMJ and *Manual* place no limitation on what the convening authority may consider, as long as the informa-

137. "The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." MCM, *supra* note 2, R.C.M. 1107(d)(1). In his concurring opinion in a recent case, Chief Judge Cooke of the Army Court reinforced the plenary power of a convening authority to take any action he pleased regarding findings and sentence. "Under such circumstances," he wrote, "the convening authority is free to approve, in his discretion, whatever sentence he deems appropriate . . . limited only by the maximum punishments authorized by the Manual . . . ." *United States v. Carroll*, No. 9501522, slip op. at 9 (Army Ct. Crim. App. Jan. 27, 1997) (per curiam) (Cooke, C.J., concurring). Chief Judge Cooke also suggested that when the convening authority is not acting in his unchecked realm as convening authority but in a quasi-appellate role of adjusting a sentence after correcting a legal error, he should follow the dictate of *United States v. Sales*, 22 M.J. 305, 307 n.3 (C.M.A. 1986) and only approve a sentence that a court reasonably would have adjudged (based on the altered findings). *Id.* In such circumstances, Chief Judge Cooke wrote that the service courts have a clearer obligation to review that decision and to adjust the sentence under the court's mandate, under Art. 66(c) to "only affirm such sentence which we find 'correct in law and fact . . . .'" *Carroll*, slip op. at 10.

138. United States v. Cunningham, 44 M.J. 758 (N.M.Ct.Crim.App. 1996) (en banc).

139. *Id.* at 762 (citations omitted).

140. *See* MCM, *supra* note 2, R.C.M. 1106(f)(4) ("Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation . . ."); R.C.M. 1105(b) ("The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision . . .").

141. 10 U.S.C. § 860(b)(1), as amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) (emphasis added).

142. 44 M.J. 748 (C.G.Ct.Crim.App. 1996).

143. *Id.* at 749.

144. *Id.*

145. 44 M.J. 749 (C.G.Ct.Crim.App. 1996).

146. MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii).

147. *Bright*, 44 M.J. at 751.

148. *Id.*

tion is served on the accused and counsel, who receive a chance to reply. "[W]hile appellant may be correct that the letter from his wife does not qualify as one from a victim, consideration by the convening authority was not dependent on that rationale."[150]

As in so many post-trial cases, the defense complaint also was tardy. The court said the defense "should have made that challenge known at the time the letter was served on him, not for the first time on appeal."[151] The *Bright* scenario is not an uncommon one. Especially in this time of increasingly high stakes or highly publicized cases, convening authorities and SJAs receive "over the transom" submissions from time to time. It is clear that convening authorities must not consider these items without disclosing them to the defense, but they are free to consider them--falling broadly under the R.C.M. 1107(b)(3)(B) rubric of "additional matters"[152]--so long as the defense gets the chance to read them and respond. The Coast Guard Court suggested that "there may be limitations on what the convening authority may consider" beyond those stated in the *Manual* or UCMJ.[153] Because it based its decision on waiver, the court did not expressly find that the letter from Bright's wife was properly considered by the convening authority. The court observed that "no particular standards for what may or may not be considered are set forth in the" UCMJ or *Manual*,[154] though it later suggested that the letter was properly "within the discretion of the convening authority whether he considered" it under the victim-witness rubric "or some other."[155]

The case contained an additional instructive wrinkle. After the convening authority took action, but before notice or publication, the convening authority received a letter sent to him directly from the accused's mother. The mother's letter contradicting the letter from Bright's wife. The SJA did not provide the letter from the accused's mother to the defense, but did give it to the convening authority, telling him of his right to recall and modify his action[156] (he chose not to do so). The mother's letter was somewhat atypical in its timing, as such matters rarely arrive in the relatively short time between taking action and publishing it or giving notice to the accused. It is only in that narrow time window that the convening authority retains the right to recall and modify his decisions with no limitations;[157] after publication or notice he may only make modifications that are not "less favorable to the accused than the earlier action."[158]

Finally, in *United States v. Haire*,[159] the court stated what has since become indisputable: that a convening authority is not required to give a personal appearance to an accused. In *Davis*, the court had held that a convening authority must consider a videotape, a viewpoint clarified by the February 1996 change to the UCMJ that makes clear that convening authorities are only required to consider "written" materials submitted by the defense.[160] In *Haire*, the court said that the obligation only extends to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority."[161]

To Err is Human, To Fix it Must Be Done Early

The *Manual* drafters long have recognized that not all actions come out right the first time. Sometimes there are mere clerical errors such as inaccurate personal data, and sometimes

149. *Id.*

150. *Id.*

151. *Id.*

152. Before action, the convening authority may consider "[s]uch other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii).

153. *Bright*, 44 M.J. at 751. The court gave no indication of what those limitations might be or the source for them.

154. *Id.* at 750.

155. *Id.* at 751.

156. MCM, *supra* note 2, R.C.M. 1107(f)(2) (permitting a convening authority to "recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action.").

157. *Bright*, 44 M.J. at 751.

158. *Id.*

159. 44 M.J. 520 (C.G.Ct.Crim.App. 1996).

160. *See supra* note 107.

161. *Haire*, 44 M.J. at 526.

important matters such as discharge or confinement are misstated. The *Manual* permits convening authorities to call back erroneous actions and fix them.[162] A recent Navy case illustrates the limitations of the correction provisions. The convening authority action in *United States v. Smith*,[163] which included accused and defense counsel on the distribution list, contained numerous errors.[164] Later, the government purported to correct the action with a document entitled "corrected copy." It is unclear when or how this document, generated "long after the record had been forwarded . . . for review,"[165] was promulgated. The *Manual* clearly restricts the convening authority's plenary right to make any changes to the action to the time "before it has been published or before the accused has been officially notified."[166] Because of the *Manual*'s clear prohibition, the attempt in *Smith* to alter the action long after forwarding it meant that "the attempted correction was a nullity."[167]

The Navy-Marine Court continues to chide practitioners about the consequences of their actions in the post-trial arena. The *Smith* opinion was written by Judge Dombrowski and joined by Judge Lucas, both of whom were in the *Cunningham* majority. In this case the opinion concludes with the reminder that "words very often have rather precise meanings and consequences,"[168] and "processing and review of courts-martial could quickly become chaotic"[169] without respecting clear rules on who has authority to act on a case at what time and the extent of that authority. The court continued: "The failure to carefully craft the appropriate language and to proofread legal documents does an enormous disservice to the client being served and wastes scarce resources in the rework required to correct defects."[170]

Practitioners simply must follow R.C.M. 1107 as scrupulously as possible. The Drafters could significantly improve this provision by defining the terms "publication" and "notice." In the meantime, cases such as *Smith* are easy; after an action has left the installation, the convening authority has forfeited his right to act on it, and that cannot be skirted by republishing an altered action under the guise of its being a "corrected copy."

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162. *See* MCM, *supra* note 2, R.C.M. 1107(f)(2).

163. 44 M.J. 788 (N.M.Ct.Crim.App. 1996).

164. The most significant errors were that the action reflected a BCD, instead of the adjudged dishonorable discharge, and it said "SPECIAL" court-martial instead of general court-martial. *Id*. at 789.

165. *Id*. at 790 (footnote omitted).

166. MCM, *supra* note 2, R.C.M. 1107(f)(2).

167. *Smith*, 44 M.J. at 791.

168. *Id*.

169. *Id*.

170. *Id*.

Conversion, Suspensions and Vacations

The seemingly contrary trends toward fewer courts-martial[171] but harsher sentences[172] has renewed emphasis and attention on the convening authority's power to convert and suspend sentences.[173]

It is important to remember that there is no rigid equation for converting sentences.[174] While no part of a sentence may be converted to a punitive discharge if a punitive discharge is not adjudged,[175] there is no precise formula for converting punitive discharges to confinement, especially when the conversion comes pursuant to an open-ended request by the defense. In *United States v. Carter*,[176] the convening authority lawfully converted a sentence that included a bad-conduct discharge and 12 months' confinement to 24 *additional* months' confinement (and equivalent but uncollectable forfeitures) in response to a defense request that the accused be permitted to retire. The CAAF reinforced the convening authority's virtually plenary power to grant clemency, while reminding practitioners that the commutation must be truly clement, "not 'merely a substitution'" of sentences.[177] There was no issue in this case, the unanimous court held, because the BCD was disapproved, giving the accused his stated wish to be permitted to retire, saving the $750,000 he had cited as a potential loss of retirement income.

Most important for practitioners is the fact that the defense neither set any conditions on the commutation (e.g., setting a cap on confinement he was willing to endure),[178] nor protested the commutation in the post-trial submission to the convening authority.[179] It was, in all likelihood, a conscious and intelligent decision by the defense. If, in fact, it was most important to the accused, a retirement-eligible Air Force master sergeant, that he remain eligible to retire,[180] it was wise bargaining not to set a condition--e.g., I will accept a conversion of no more than 12 additional months' confinement. Obviously, the court had little sympathy for Carter's getting the benefit of his request and then later complaining that the benefit was too taxing.[181]

The issue of fines is likely to gain added attention in coming years, because there is no longer much flexibility in the realm of traditional forfeitures, and accused soldiers will seek some way to accept a finite, quantifiable portion of a sentence that leaves little stigma and least affects their future earnings potential. In *United States v. Lee*,[182] the Navy-Marine Court held that it was permissible to include a fine as part of a converted sentence. The court held that a sentence that includes a fine is not

171. The rate of general courts-martial per 1000 soldiers was 1.60 per thousand in FY 1996, almost exactly the same as it has been for the past four years. The rate of general courts-martial remains relatively high by historical standards (about double the rate of the 1970s and 1980s), but the reduction in court-martial load is better reflected by the dramatic drop in BCD special and "straight" special courts-martial, which have dropped by more than two-thirds from the rate in the 1970s and 1980s. All figures are from the United States Army Clerk of Court's Office, Falls Church, Virginia.

172. The average sentence for Army prisoners entering the United States Disciplinary Barracks at Fort Leavenworth, according to the Director of Inmate Administration, was 2.2 years in 1982; and in 1996 it was 14.7 years. This reflects, *inter alia*, that two trends have converged: dramatically fewer trials and lower overall court-martial rate with an increase (and later cresting) of the general court-martial rate. In short, the military is trying fewer cases, but of greater gravity, more "felonies" and many fewer "misdemeanors."

173. Convening authorities have the power, under UCMJ, art. 64(c)(1)(B) and R.C.M. 1107(d)(1), to commute sentences so long as the severity of the sentence is not increased.

174. R.C.M. 1103(b)(6), (7) provides guidance for converting certain restrictions on liberty.

175. A punitive discharge must be adjudged by a court. If it is not part of the adjudged sentence, it cannot arise as a result of a conversion. All other components of a sentence may be part of a conversion even if not part of the original sentence. *See* United States v. Barratt, 42 M.J. 734, 735 (Army Ct. Crim. App. 1995) ("a punitive discharge, as a matter of law, is not a lesser included punishment of confinement"). *See also* R.C.M. 1107(d)(1) Discussion.

176. 45 M.J. 168 (1996).

177. *Id*. at 170 (citation omitted).

178. The court noted that the accused "requested commutation of the bad-conduct discharge to confinement without setting any conditions as to the length of confinement to be substituted." *Id*.

179. In addition, the court wrote, the accused "entered no protest when the SJA recommended this action to the convening authority." *Id*. at 171. Presumably the SJA recommended the conversion in the PTR, which was served on the accused. The CAAF cites R.C.M. 1106(f)(4), the provision that permits the defense to respond to the PTR, following the above sentence, implying that the defense was on notice of the recommended conversion in the PTR.

180. In his submission to the convening authority the accused wrote: "Sir, if it means serving more confinement time in order that I may retain my retirement, then so be it. I will serve more confinement in exchange for the opportunity to retire from the Air Force." *Id*. at 170-71.

181. Judge Sullivan, who is not shy about suggesting changes to the justice system (*see, e.g.*, United States v. Boone, 42 M.J. 308, 314 (Sullivan, C.J., dissenting) in which he observed that the military's sentencing process was so stilted that "[p]erhaps it is time to have 'truth in sentencing'"), concluded the unanimous opinion with the suggestion that "a more formal notice procedure might be appropriate," but that is more a matter of comity than anything that would have affected this case in particular. *Id*. at 171.

182. 43 M.J. 794 (N.M.Ct.Crim.App. 1995).

necessarily more severe than one that includes forfeitures. In this instance, the convening authority reduced the accused's confinement from 18 months to 12 months, and total forfeitures (which the court calculated at about $5,800) was converted to a $5,000 fine. As in *Carter*, it was especially significant that the conversion came at the request of the accused.[183] This case predates the April 1996 change to the forfeiture provisions, which likely changes the analysis in cases that involve total forfeitures as a matter of law. Counsel need to think carefully when seeking to convert any part of a sentence to a fine, which is always a lawful punishment, because a fine becomes an immediate debt to the U.S. Treasury. Neither *Carter* nor *Lee* presumes to set out a formula, but in the context of these cases, the conversion was permissible.

A recent Navy case reinforces the indisputable point that convening authorities possess the power to suspend sentences, while making clear that a sentence cannot be suspended until it is approved by the convening authority in the initial action. As a general rule, misconduct *anytime during a period of suspension* may be a basis for vacating a suspension, though a hearing must be conducted by the special court-martial convening authority, who must then make a recommendation to the general court-martial convening authority, who makes the decision.[184] In *United States v. Perlman*,[185] the convening authority acted to vacate the suspension in the period between the trial and the initial action. While emphasizing that a convening authority cannot vacate a suspension until he acts on the sentence, the court also noted that parties to a pretrial agreement may agree that the suspension itself will begin on the date of sentence (or any other date).[186] Therefore, the dispute will not concern whether the subsequent misconduct fits into the proper time window, but only whether it constitutes a violation of the suspension provisions. "It is doubtful that such substantial due process rights [as the right to a hearing on vacating a suspension] may be waived in a pretrial agreement,"[187] the court held. "All of the procedural requirements for vacating a suspension [mainly a hearing held by the special court-martial convening authority] can be accomplished prior to the convening authority's action except for the order from the OEGCMJ[188] vacating the suspension . . [;] until that point there is no suspension to vacate."[189] The dissent argued that an accused should be able to waive this process as part of a pretrial agreement.[190]

Placing a Clemency Recommendation on the Record

While clemency remains the exclusive province of convening authorities, these officers are free to consider recommendations made by anyone. A 1995 change to the *Manual* obliges SJAs to include in the PTR any clemency recommendation "by the sentencing authority, made in conjunction with the announced sentence."[191] The right of the panel or individual members to make such a recommendation is not new. What is unresolved is the number or percentage of members who must concur in a clemency recommendation for it to qualify as a recommendation of "the sentencing authority." In *United States v. Weatherspoon*,[192] the CAAF pointed out that the *Manual* does not require a threshold minimum before a panel's clemency recommendation qualifies as "official." In this case, the court did not have to rule on the validity of the trial judge's instruction that three-fourths must concur in the clemency recommendation, because only three of nine members did so, meaning that under virtually any interpretation of the term, it would not qualify as the recommendation of a "court-martial."[193] Still, the court implored the drafters of the *Manual* "to consider recommending to the President an amendment to an appropriate [R.C.M.] that will address . . . [w]hat percentage of the members . . . must support a recommendation for clemency before it becomes the recommendation of 'the court-martial.'"[194]

Courts in a box: how to fashion "meaningful relief"

The futility of fashioning meaningful post-trial relief was highlighted in a recent decision by the Army Court of Criminal

183. "Even if we were not convinced that the approved sentence was not more severe than the adjudged sentence, it was the appellant himself who proposed the sentence that was finally approved. He is the one who brought up the fine as a possible punishment in exchange for a reduction of his confinement, elimination of the forfeitures and a mitigation of his discharge." *Id*. at 800.

184. *See* MCM, *supra* note 2, R.C.M. 1109(d).

185. 44 M.J. 615 (N.M.Ct.Crim.App. 1996).

186. *Id*. at 616.

187. *Id*. at 617.

188. Officer Exercising General Court-Martial Jurisdiction, the sea services' abbreviation for General Court-Martial Convening Authority or GCMCA.

189. *Perlman*, 44 M.J. at 617 (citation omitted).

190. *Id*. at 618 (Keating, Sr. J., dissenting).

191. MCM, *supra* note 2, R.C.M. 1106(d)(3)(B).

192. 44 M.J. 211 (1996).

193. *Id*. at 214.

Appeals. Most commonly, courts will grant relief in one of the areas that is unaffected by error or the passage of time. Courts have extended forfeiture relief, but their ability to craft meaningful relief in this area was curtailed in April 1996 when the statutory change to the forfeiture rules took effect, essentially barring convicted soldiers from receiving pay after the convening authority approves their sentences.[195] In *United States v. Collins*,[196] a special court-martial, the accused was sentenced to six months' confinement, forfeitures, reduction to E-1 and a BCD. The convening authority approved the BCD and reduction to E-1. Exercising his clemency power (not pursuant to a pretrial agreement), he approved only three months' confinement and disapproved the forfeitures. The accused's release date from a three month sentence, computed after giving credit for "good time" earned in jail, ended up being five days *before* the convening authority took action.[197] By the time the government figured out its error and notified the confinement facility, the accused served 22 extra days. The opinion provides an excellent, detailed discussion of the court's normal requirement to afford "meaningful relief." Such relief, however, must be "proportional to the error," and the court stressed that "[e]ven error of Constitutional dimension does not necessarily require disapproval of a punitive discharge when no other meaningful sentence relief is possible."[198]

The unanimous court, in an opinion written by Judge Cairns, acknowledged that in this instance disapproval of the BCD would be "the only meaningful relief . . . [but it] would be totally disproportionate to the harm suffered, would provide the appellant a major windfall, and would be too drastic a remedy in light of the seriousness of appellant's misconduct."[199] The court acknowledged the "serious harm" of loss of liberty, but said there was no "bad faith or intentional desire to punish" the accused.[200] In fashioning a remedy, the court started from the assumption that "[a] bad-conduct discharge is far more severe than twenty-two days of confinement," which "was relatively short and certainly more transient in nature."[201] In this case, the court also considered the irony that the accused was held beyond his release date "as a direct result of the convening authority's decision to grant clemency . . . compounded by the staff judge advocate's failure to appreciate the effect of the good time rules and to advise the confinement facility in a timely manner."[202] The court balanced all this against "the sordid details of appellant's misconduct and the significant impact on the victim" in concluding that "disapproving the BCD would be a grossly disproportionate remedy and would fail to vindicate society's interests."[203] Because the convening authority already had disapproved forfeitures, the court disapproved the adjudged confinement that already had been served.

Conclusion

The clearest message to practitioners is a dull but important one: the post-trial stage remains a vital one of great *potential* consequence. Government errors will trigger the ire of the courts but in some circumstances will not yield substantive corrective action when the courts find the error would not have affected the outcome. Future disputes are likely to center on the question of under what circumstances a reviewing court can find harmless error, while protecting the integrity and vitality of the post-trial process. Defense attorneys are expected to craft timely and unique submissions in which they object at the time closest to the making of an error. If a trial error is not raised in the R.C.M. 1105/1106 submissions and post-trial errors are not timely raised, courts are extremely unlikely to entertain protests later.

CAAF has the opportunity to resolve the tensions implicit in many of the recent post-trial opinions, which critics or cynics could characterize on one extreme as conflating an essential codal process into quasi-constitutional dimensions, and on the other extreme contributing to the evisceration of one of the unique procedures carefully created to give maximum protection to court-martialed soldiers.

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194. *Id.* n.2. The court also suggested that perhaps there need not be a recommendation "of the court-martial," so long as the members announced "the number who support the recommendation." *Id*.

195. As of 1 April 1996, Art. 58b, UCMJ, requires maximum forfeitures (*i.e.*, total forfeitures at a general court-martial, two-thirds at a special court-martial) for those receiving sentences of more than six months confinement or any confinement along with a punitive discharge or dismissal.

196. 44 M.J. 830 (Army Ct. Crim. App. 1996) (opinion of the court on remand).

197. *Id.* at 833.

198. *Id.*

199. *Id.* at 833-34.

200. *Id.* at 834.

201. *Id.*

202. "Had the convening authority not granted clemency, the appellant would not have been harmed." *Id.*

203. *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Don't Forget Basic Contract Theories!

A recent case decided by the Appellate Court of Connecticut reminds us that statutory protections are not the only remedies available to consumers. Many times, contract law theories provide winning approaches to consumer problems. In *Family Financial Services, Inc. v. Spencer,*[1] the theory of unconscionability provided just such an effective remedy.

Spencer involved the owner of a home who needed a loan to repair a roof.[2] The court described the facts behind the second mortgage to finance these repairs as follows:

> The amount of the loan was $30,000 with an interest rate of 20 percent. The note required eleven monthly payments of $500 with a final balloon payment of $30,500 on July 20, 1991. In the defendant's loan application, she stated that her monthly income was $1126.67 and that she owed a monthly amount of $1011 to Peoples Bank on a first mortgage. The plaintiff placed the defendant in a class C category that did not require income verification.[3]

As one might expect, the homeowner was not able to meet the balloon payment when it came due. Consequently, she arranged to take out another loan to pay off the first. The terms of this loan were as follows:

The amount of the note in this transaction was $44,000 with an interest rate of 20 percent. The defendant was required to make eleven monthly payments of $733.33 with a final balloon payment of $44,733.33 on 22 July 1992.[4]

Again, the homeowner could not make the balloon payment and the finance company brought a foreclosure action. The homeowner filed special defenses to this action. Among them was the assertion that this second mortgage was both procedurally and substantively unconscionable.[5] The trial court found for the homeowner and the finance company appealed.[6]

Unconscionability at common law applies to a contract that is "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on another."[7] In recent times, the use of unconscionability as a consumer protection tool has become more widespread.[8] To simplify consideration of the topic, courts often distinguish between procedural and substantive unconscionability. Procedural unconscionability "has to do with lack of fairness in the formation of the contract."[9] Substantive unconscionability, on the other hand, "refers to the content or substance of the contract and includes such matters as price, credit terms, forfeiture provisions, and so on."[10]

In *Spencer*, the trial court had found the following facts regarding the transaction:

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1. 677 A.2d 479 (Conn. App. Ct. 1996).

2. *Id.* at 481.

3. *Id.*

4. *Id.* It is also interesting to note that, in addition to the onerous terms of the loans, the homeowner was required to pay one year's interest in advance. *Id.*

5. *Id.* at 482. The other defenses were that "the mortgage was a scheme to defraud . . . lacked consideration because the plaintiff failed to release the July 16, 1990 mortgage, and violated [provisions of the Connecticut] General Statutes." *Id.*

6. *Id.*

7. HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW 245 (1986).

8. *See generally id.* at §§ 171-80.

9. *Id.* at 272. Courts look at all aspects of the transaction, but their considerations can be lumped generally into the categories of inequality of bargaining power, merchant's conduct, and the consumer's weaknesses. *See id.* at §§ 187-93.

> (1) the defendant had a limited knowledge of the English language, was uneducated and did not read very well; (2) the defendant's financial situation made it apparent that she could not reasonably expect to repay the second mortgage; (3) at the closing, the defendant was not represented by an attorney and was rushed by the plaintiff's attorney to sign the documents; (4) the defendant was not informed until the last moment that, as a condition of credit, she was required to pay one year's interest in advance; and (5) there was an absence of meaningful choice on the part of the defendant.[11]

Based upon these facts and the concealment of the actual creditor by the finance company, the appellate court agreed with the trial court that the loan was procedurally unconscionable. The court also found the loan to be "unreasonably favorable to the [finance company]."[12] Based on this, the appellate court also upheld the trial court's finding of substantive unconscionability.[13] As a result, the court upheld the trial court's injunction against the foreclosure action.[14]

Spencer shows the efficacy of unconscionability in helping to "prevent oppression and unfair surprise."[15] While statutory protections should never be ignored when they are available, the common law and UCC doctrine of unconscionability offers a valuable alternative basis for consumer relief. Of course, legal assistance practitioners will not be litigating these cases absent an extended legal assistance program (ELAP). Even so, all practitioners must keep basic contract law doctrines in mind so they can properly advise clients on the merits of their case, the relief available to them, and whether they should seek civilian counsel to pursue the matter. Major Lescault.

Family Law Note

Many Retirees Still Liable for Payment of Up to Half Their Retirement Pay Despite Uniform Services Former Spouse's Protection Act and Mansell Holding

Legal assistance attorneys drafting separation agreements in divorce cases need to closely consider the language on division of military retirement pay to protect their client's interest and ensure the intent of the parties is clear. The Uniform Services Former Spouse's Protection Act (FSPA) allows states to treat disposable military retirement pay as property in a divorce action.[16] The FSPA definition of disposable retired pay specifically excludes pay received from the Veteran's Administration as a result of a disability determination.[17] In order to prevent double dipping, the service member must waive a portion of the retirement pay to collect the disability pay. The United States Supreme Court addressed this issue in *Mansell v. Mansell*,[18] holding that states were preempted from dividing the disability pay under the FSPA. Thus, a service member who elects to accept the disability pay in lieu of retirement pay often drastically reduces the amount of disposable retired pay available for division under the FSPA.

Despite *Mansell* and the language of the FSPA itself, many courts require the service member to pay an amount equivalent to what the former spouse would have received if the service member did not elect disability payments.[19] Usually, this results because of equitable or contract principles. Generally, this situation happens due to the drafting of the separation agreement which later is incorporated by the divorce decree.

The following cases illustrate common separation agreement clauses that resulted in the court awarding additional payments to the former spouse. *Dexter v. Dexter*[20] involved a separation agreement ultimately incorporated into the divorce decree simply awarding "47.5% of the military pension on a monthly basis, as, if and when it is paid by the Department of

10. *Id.* at 272.

11. *Spencer*, 677 A.2d at 486.

12. *Id.* at 485.

13. *Id.*

14. *See id.* at 482. The court overturned an award of attorney's fees that the trial court had awarded based on a statutory violation. *See id.* at 489.

15. *Id.* at 485.

16. 10 U.S.C.A. § 1408 (West 1996).

17. *Id.* § 1408(a)(4)(B).

18. 490 U.S. 581 (1989).

19. McHugh v. McHugh, 861 P.2d 113 (Ct. App. Idaho 1993), Kraft v. Kraft, 832 P.2d 871 (Wash. 1992), Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992), Owen v. Owen, 419 S.E.2d 267 (Ct. App. Va. 1992).

20. 661 A.2d 171 (Ct. App. Md. 1995).

the Army to [the appellant]"[21]. The service member retired after the divorce and eventually waived a portion of retirement to accept disability pay. The former spouse filed suit for a money judgment in the amount of the lost retirement pay. Both the trial and the appellate court relied on basic contract theory to hold that the service member owed the former spouse the full amount contemplated by the original bargain in the separation agreement. Specifically, the court said, "We hold the voluntary waiver of appellant's Army retirement pension was a breach of contract, for which the measure of past damages is the amount the receiving spouse would have received had appellant not committed the breach."[22] The court also found that *Mansell* did not apply to this case since the trial court did not order the appellant to pay the appellee a percentage of his disability pay.[23]

In *Hisgen v. Hisgen*,[24] the separation agreement stipulated that the service member would instruct Air Force Accounting and Finance to pay the spouse one-half of his gross annuity payments per month beginning 1 August 1993. During the negotiations of the separation agreement both parties knew the service member was applying for military disability benefits. After waiving a portion of retirement for disability, the disposable retired pay portion for the spouse was $50.00, a decrease of $300.00 per month. The spouse sought enforcement of the agreement as a breach of contract. The South Dakota Supreme Court agreed that the intention of the parties was for the spouse to receive *a specific monthly sum* regardless of the source.[25] Again, the court found *Mansell* was not dispositive. The holding in *Mansell* prevents divorce courts from awarding a spouse veteran's disability payments when military retirement pay has been waived to receive such benefits. However, that does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to half a veteran's retirement entitlement.[26]

Practitioners need to be aware of the potential consequences of separation agreement language. Simply dividing the military pension is not sufficient to address the potential consequences down the road when retirement actually occurs. Remember the basic principles of contracts and carefully define terms and the intentions of the parties. Major Fenton.

21. *Id.*

22. *Id.* at 172.

23. *Id.* at 174.

24. 554 N.W.2d 494 (S.D. 1996).

25. *Id.* at 497.

26. *Id.* at 498.

Tax Law Note

Rental Property Depreciation

Taxpayers who rent out real property are entitled to deduct depreciation.[27] Since a taxpayer's basis in his rental property is reduced by the greater of the amount of depreciation that the taxpayer took or the amount of depreciation that he should have taken, taxpayers should always deduct depreciation on rental property.[28] Unfortunately, legal assistance attorneys will occasionally encounter a client who for some reason failed to take depreciation on their tax return. Prior to 1996 the only solution for these clients was to take depreciation in the current year and file amended returns for returns filed within the statute of limitations, which is three years. If the taxpayer rented the real property for more than three years, they lost the depreciation that they should have taken during the period outside the statute of limitations. Now taxpayers have a new option, which is outlined in Revenue Procedure 96-31.

A taxpayer who has failed to take depreciation on rental property for more than three years can now recapture the entire amount of depreciation that the taxpayer should have taken.[29] The taxpayer needs to file two copies of IRS Form 3115 no later than 180 days after the start of the current tax year, which is 29 June 1997 for this tax year, to the Commissioner of Internal Revenue, ATTN: CC:DOM:P & SI:6, Room 5112, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. When the taxpayer files his tax return for 1997, the taxpayer will be able to claim all of the depreciation to which he was entitled during the entire rental period. Following this procedure is substantially more beneficial to the taxpayer who has rented property and not previously taken depreciation for a period that exceeds the three year statute of limitations. Major Henderson.

Soldiers' and Sailors' Civil Relief Act Note

Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"

27. I.R.C. § 167 (RIA 1996).

28. I.R.C. § 1016(a)(2) (RIA 1996).

29. Rev. Proc. 96-31, 1996-20 I.R.B. 11.

According to a 1995 ruling by the United States District Court of Nevada, service members who terminate a pre-service lease pursuant to section 534(2), Title 50 Appendix, United States Code [The Soldiers' and Sailors' Civil Relief Act (SSCRA)],[30] may be subject to landlord counterclaims for an "equitable offset" that can amount to more than the military member's remaining monthly rental obligations and security deposit under the lease agreement.[31]

On 25 September 1985, Omega Industries, Inc. (Omega), a commercial real estate development company, leased Las Vegas, Nevada medical office space to Dr. Thomas Raffaele (Dr. Raffaele), a licensed optometrist. Doctor Raffaele leased the premises without incident and on 21 August 1991, signed a new five year lease with Omega for a larger office in the same office complex, commencing on 1 November 1991. Omega agreed in exchange for the long lease period to make a number of improvements to Dr. Raffaele's office space and to reduce its per square foot rental rate. Dr. Raffaele also agreed to sign a personal guaranty which covered all rent, attorney fees, and costs in enforcing the lease. On 30 October 1992, Dr. Raffaele submitted an application to join the United States Public Health Service (USPHS) to the United States Department of Health and Human Services (HHS), and HHS accepted his application in February 1993, commissioning him in the rank of Lieutenant Commander, and giving him a report date of 5 April 1993 for his initial duty assignment at the USPHS Indian reservation medical clinic at Lame Deer, Montana.[32]

During the month of March 1993, Dr. Raffaele notified Omega of his USPHS appointment and of his desire to terminate his office lease at the end of March 1993. Also, on 16 March 1993, HHS notified Omega that Dr. Raffaele was entitled to terminate his medical office lease without penalty or loss of security deposit pursuant to the SSCRA. On 25 April 1993, Dr. Raffaele notified Omega in writing that he had vacated his leased office space and terminated his rental agreement. Omega immediately attempted to re-lease Dr. Raffaele's office space but did not obtain a new tenant until ten months later for a lesser per square foot rental rate.[33]

Omega filed suit against Dr. Raffaele for breach of his 1991 lease agreement, seeking damages for lost rental income, reduced rental value of the office space, uncompensated tenant improvements added to the office space at tenant's request, realty commissions, and attorney fees and court costs. While acknowledging the lease termination provision of the SSCRA, Omega argued that under section 534(2), the court may modify or restrict the right of a tenant to seek lease termination under the SSCRA if the landlord can demonstrate "undue hardship" or countervailing equity considerations. Omega argued that Doctor Rafaele demonstrated "bad faith" by signing a long-term lease and then going on voluntary military duty, which justified their recovery for breach of the lease.[34]

Doctor Rafaele argued that (1) the SSCRA lease termination provision provides the courts with no authority to hold him liable for tenant improvements, realty commissions, and attorney fees and costs; (2) Omega failed to credit him for improvements he added to the office premises at his own expense; (3) Omega failed to mitigate damages by recovering cabinets he added to the leased premises prior to reletting the premises; (4) Omega had "unclean hands" by failing to credit him with his security deposit; and (5) Omega recouped its losses through tax loss deductions and other business venture offsets.[35]

The court found that Dr. Rafaele was covered by the SSCRA as a USPHS officer on active duty[36] and was entitled to invoke section 534(2) of the Act. The court, noting this was a case of first impression, proceeded to interpret section 534(2), and held that the plain language of the section and its legislative history give courts broad discretion in fashioning an equitable remedy for an aggrieved landlord, which may not be limited by the total amount of a military member's rental obligation and security deposit under the lease.[37]

The court first reviewed the statutory language of section 534(2), which allows service members to terminate pre-service leases and receive a refund of any unpaid rent or security deposit.[38] The court concentrated on the statutory language which provides that SSCRA relief "shall be subject to such modifications or restrictions as in the opinion of the court jus-

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30. Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, §§ 100-605, 54 Stat. 1178 (1940) [hereinafter SSCRA], *codified at* 50 App. U.S.C. §§ 501-593, as amended. Henceforth, the citations to the SSCRA will be to the statute sections of Title 50 Appendix, rather than the original Act.

31. Omega Industries, Inc., v. Dr. Thomas Raffaele, 894 F. Supp. 1425 (D. Nev. 1995).

32. *Id.* at 1427-28.

33. *Id.* at 1428.

34. *Id.*

35. *Id.* at 1428-29.

36. *Id.* at 1429-30, and 42 U.S.C. § 213(e) (1994).

37. *Omega*, 894 F. Supp. at 1430.

38. *Id.*

tice and equity may in the circumstances require."[39] The court then suggested that "equity and justice" may require that a service member compensate a landlord for damages caused by early lease termination in excess of the military member's rental obligations and security deposit, to fully compensate the landlord for losses incurred.[40] The court used the example that a remedy beyond the military member's remaining rent and security deposit obligations would be appropriate where the landlord brought forth evidence that the military member intentionally asked the landlord to make improvements in a commercial property, knowing that he intended to break the pre-service lease and join the military.[41] The court pointed out that the statutory language did not limit the court's authority to fashion such an equitable remedy.[42]

The court looked at the legislative history of the SSCRA, and determined that Congress intended to grant courts broad discretion in determining remedies under the Act.[43] The court found nothing in the legislative history preventing a court from awarding a landlord damages resulting from SSCRA pre-service lease termination greater than the military member tenant's total remaining rent and security deposit obligation.[44]

The court reviewed the equitable doctrine of unclean hands[45] as applied to the parties in this case. The court determined that the failure of Omega to credit Dr. Rafaele for his monetary contributions to tenant improvements to the leasehold, including cabinets, which Omega removed from the office upon Dr. Rafaele's lease termination, and discarded without any attempt made to resell them or seek at least salvage value was not bad faith. The court further determined that Omega's retaining Dr. Rafaele's security deposit in violation of section 534(2) was not bad faith. The court based its decision on contractual, procedural, equitable, and factual grounds.[46]

The court noted that Dr. Rafaele's lease included a provision that all tenant improvements became the sole property of the

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39. *Id.*, *quoting* 50 App. U.S.C. § 534(2) (1994).

40. *Id.* at 1430.

41. *Id.* The court's example evokes a situation that would be extremely rare and has not been documented in reported cases.

42. *Id.*

43. *Id.* at 1430-31, 1430 n.4. The court looked only at the general intent of Congress in passing the original Soldiers' and Sailors' Act of 1918 (40 Stat. 440) and not at the legislative history of either the 1940 reenactment of the Soldiers' and Sailors' Civil Relief Act [Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 App. U.S.C. §§ 501-591 (1994)] nor the actual legislative history of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, wherein section 304(2), (codified at 50 App. U.S.C. § 534(2)) was enacted [Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 12, 56 Stat. 772 (1942) (codified as amended at 50 App. § 534(2) (1994))].

44. *Omega,* 894 F. Supp. at 1430-31, 1430 n.4. The actual legislative history of section 534(2) is reflected in U.S. House of Representatives Congressional Hearings on H.R. 7029, which was the basis for section 304(2) of the SSCRA Amendments of 1942, 77th Congress, 2d Session, 22 May 1942. The drafter of section 304(2), on behalf of the War Department, Major William Partlow, was questioned by the United States House of Representatives Committee on Military Affairs about section 304(2):

> Major PARTLOW. Of course, the theory behind this section is that the person in military service is no longer able to enjoy the use of the property rented under the lease. In other words, he would be paying for something he is not getting, no matter how much money he might have or how many means he may have to discharge his obligations under the lease. Nevertheless, if on account of his military service, he is not able to enjoy the use of the property, it seems to me equitable that he should not have to pay for it.
>
> Mr. ELSTON. This includes business property as well as other property?
>
> Major PARTLOW. Yes, Sir.
>
> Mr. KILDAY. It would protect, for instance, the lawyer who had an office from which he practiced his profession, who was drafted into the Army as a Private, as many of them are being. If we put him in the position of taking him into the Army, and giving him military compensation, and then also keeping him tied to the terms of his lease, with no opportunity to enjoy it, we would put him in a position where, when he came out of service, he would have a large financial obligation, and subject to a judgment. That would put that soldier in exactly the mental attitude that we are attempting to take him out of by every provision of this act.
>
> Major PARTLOW. Yes, Sir.
>
> Mr. ADDISON. [I]f I own a piece of property and a man has to go into the Army, and I had a lease with him, certainly I ought to go without any rent until I can find another tenant, or even if he is a professional man, a dentist, say, he ought to have a fair chance of salvaging that lease in renting to someone else, but if that particular dentist had required that I spend $5000, maybe, 2 years whole rent, to bring the facilities that he especially wanted, usable for himself only--if after I had spent that for his use, then I would have to get it back if I couldn't get another lessee that would take it.

Hearings Before the Committee on Military Affairs on H.R. 7029, A Bill to Amend the Soldiers' and Sailors' Civil Relief Act of 1940, 77th Cong., 2nd Sess., at 24-26, 64 (1942).

45. *Omega,* 894 F. Supp. at 1431, *citing* Ellenburg v. Brockway, Inc., 763 F.2d. 1091, 1097 (9th Cir. 1985). The "unclean hands doctrine" says that he who would invoke the equitable powers of the court, must come with clean hands or be barred from equitable relief.

46. *Id.* at 1431-32.

landlord, which meant that Omega had no obligation to salvage or resell its own property. The court opined that Dr. Rafaele failed to file a counterclaim for reimbursement for tenant improvements and improper security deposit withholding, which the court found to be no fault of Omega's. The court found that Omega "may have been negligent" by its failure to recover the salvage value of fixtures installed by the tenant, its wrongful withholding of Dr. Rafaele's security deposit, and its failure to seek mitigated damages, but such negligence did not translate into sufficient bad faith to invoke the unclean hands doctrine.[47] Finally, the court found that Dr. Rafaele failed to produce sufficient evidence to determine if Omega had in fact recouped any losses by tax write-offs on the vacant office space.[48]

The court, having disposed of Dr. Rafaele's equitable defenses, reviewed whether Omega was entitled to recovery of its lost rent and expenses on equitable grounds. Omega argued that Dr. Rafaele should be equitably estopped from utilizing section 534(2) of the SSCRA because he intentionally deceived Omega as to his true intent to join the military when he signed his lease. The court found that Dr. Rafaele did not act in bad faith in signing his five year office lease, as he had not considered USPHS service until after he had signed the lease and was unaware of section 534(2) of the SSCRA when he signed the lease. Furthermore, the court took notice that Dr. Rafaele had to apply to USPHS during the lease period or he would have been too old to apply for USPHS service after July 1993. The court also took notice that Dr. Rafaele obtained no financial advantage from his USPHS service which resulted in a drop in his actual income, his standard of living, and living conditions. The court concluded that Dr. Rafaele was motivated by a desire for public service and love of country, not personal financial gain in joining the USPHS.[49]

Omega argued that Dr. Rafaele should not be allowed to take advantage of section 534(2) of the SSCRA since he was not involuntarily activated for military duty during "a time of crisis such as the Persian Gulf War."[50] The court responded by recognizing that the SSCRA applies in time of peace as well as war, but added, "it is not to be applied for any unwarranted purpose."[51] The court conceded that the SSCRA is to be liberally construed and applied with "a broad spirit of gratitude towards service personnel."[52] The court then determined that since public policy interests were involved, that the court in making its equity decision will go "farther both to grant and withhold relief in furtherance of the public interest."[53] The court devised a test that it would withhold the protection of section 534(2), SSCRA, only if there is "clear and strong evidence indicating that he is utilizing the Act for "purely unwarranted purposes"[54] Upon review of the facts of Dr. Rafaele's case, the court determined that his voluntary entry into USPHS service and termination of his office lease was not outside the proper scope of the Act.[55]

This first impression case raises serious questions as to whether courts may allow landlords to eviscerate the intent of the Act by asserting claims for lost rent and consequential damages resulting from pre-service lease terminations allowed by section 534(2), SSCRA, for amounts greater than the military member's remaining rental obligation and security deposit. Judge Advocate officers advising individuals wishing to assert section 534(2), SSCRA, to terminate a pre-service commercial or professional office lease where the landlord has expended significant amounts in modifying the premises at the tenant's request, should advise their clients of the strong possibility of landlords asserting an "equitable offset" lawsuit to recoup their costs. In the case of most residential tenants who terminate pre-service leases under section 534(2), the strong equities of their situations should dissuade any landlord attempts to assert "equitable offsets." Major Conrad.

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47. *Id.* The court relied upon dicta in *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc*., 890 F.2d 165, 171 (9th Cir. 1989) that a party's gross negligence does not rise to the level of bad faith necessary to invoke the clean hands doctrine. The court misconstrued the *Dollar Systems* dicta, which only states that simple breach of contract did not constitute bad faith sufficient to invoke the clean hands doctrine. In this case, the plaintiff landlord did not merely breach a term of a lease, but disobeyed a federal law [Section 304(2), SSCRA] not to withhold prepaid rent or security deposit where a pre-service lease was properly terminated. *See also* Patrikes v. J.C.H. Service Stations, Inc., 41 N.Y.S.2d 158 (N.Y. City Ct. 1943).

48. *Omega*, 894 F. Supp. at 1432.

49. *Id.* at 1433-35.

50. *Id.* at 1434.

51. *Id., quoting with approval*, Patrikes v. J.C.H. Service Stations, Inc., 41 N.Y.S.2d 158, 165 (N.Y. City Ct. 1943).

52. *Id.*

53. *Id., citing* Virginian Railway Co. v. System Federation, 300 U.S. 515, 552 (1937).

54. *Id.* There is no statutory or equitable basis for a "clear and convincing" or "strong evidence" test in determining whether service members may avail themselves of section 534(2) to terminate pre-service leases. The court has no discretion under equity or the statute to make such a determination. The court only has discretion to modify or restrict those applications of the pre-service lease termination provision that work undue hardship on the lessor on a case by case basis. The *Patrikes* case provides no basis for creating such a judicial test of service member "worthiness" to obtain the ability to terminate pre-service leases.

55. *Id.* at 1435.

AR 15-6 Developments

New developments in commander-directed investigations under Army Regulation 15-6[56] should enhance the quality and credibility of these investigations, particularly the informal ones. First, and most importantly, the regulation has recently been changed. Several of the new provisions are intended to ease the burden on civilian-heavy organizations, while others are intended to tighten requirements to improve the reliability of the final product.

Investigations can now be appointed by a Department of the Army GS-14 supervisor assigned as the head of an Army agency or activity or as a division or department chief.[57] Army Material Command units should also find relief in the authorization for Army GS-13s to be assigned as investigating officers or voting members of boards.[58] One appointment limitation has been added: only the general court-martial convening authority can appoint an investigation or board into incidents involving property damage of $1 million or more, the loss or destruction of an Army aircraft or missile, or an injury or illness resulting in or likely to result in death or permanent total disability.[59] In serious cases, such as death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action or will be relied upon by higher headquarters, a legal review is now required.[60]

Requirements have also added to the selection process for investigating officers and board members: as with court-martial members, they will be those who are "best qualified" for the duty.[61] Further, before beginning an informal investigation, the investigating officer must consult with the servicing judge advocate for legal guidance.[62]

To assist judge advocates in providing guidance for investigating officers, the Administrative Law Division of the Office of The Judge Advocate General has developed an investigation guide,[63] which has been distributed through the Staff Judge Advocate Forum. The guide is designed to be tailored for local use, so it can be revised to include local points of contact and to address local regulations and local conditions; for example, cadre-student prohibitions at training installations. As part of the briefing with the investigating officer, the judge advocate can use the guide as a talking paper and can provide a copy to the investigating officer for use during the investigation. The guide incorporates the recent regulatory changes and will be periodically updated to keep it current and useful. Recommended improvements should be sent to Chief, General Law Branch, Office of The Judge Advocate General. Lieutenant Colonel Sullivan.

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56. Dep't of Army, Reg. 15-6, Procedure for Investigating Officers and Boards of Officers (11 May 1988) (C.1, 30 Oct. 96).

57. *Id.* para. 2-1a(1)(e).

58. *Id.* para. 2-1c(1).

59. *Id.* para. 2-1a(3).

60. *Id,* para. 2-3b.

61. *Id.* para. 2-1c.

62. *Id.* para. 3-0.

63. Dep't of Army, Reg. 15-6, Investigation Guide for Informal Investigations (Jan. 1997).

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The tables below reflect the average pretrial and post-trial processing times of general, special and summary courts-martial for the fiscal years 1993 through 1996.

General Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records received by Clerk of Court	1035	789	827	793
Days fr chgs or restnt to sentence	54	53	58	62
Days from sentence to action	66	70	78	86
Days from action to dispatch	7	8	7	9
Days enroute to Clerk of Court	8	9	8	9

BCD Special Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records received by Clerk of Court	174	150	161	167
Days fr chgs or restnt to sentence	38	37	35	45
Days from sentence to action	59	58	63	85
Days from action to dispatch	7	7	6	6
Days enroute to Clerk of Court	7	9	8	8

Non BCD Special Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records reviewed by SJA	65	53	46	57
Days from charging or restraint to restraint	35	33	44	50
Days from sentence to action	66	28	32	44

Summary Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records reviewed by SJA	353	335	297	226
Days from charging or restraint to restraint	14	14	16	22
Days from sentence to action	8	8	8	7

Litigation Division Note

Witnesses: The Rules for Army Health Care Providers

Frequently, a private attorney will attempt to obtain an Army health care provider (HCP) to serve as a witness in litigation. This article will examine the rules governing whether an Army HCP may serve as a witness, and in what capacity. For purposes of this article, "litigation" is broadly defined as "[a]ll pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards . . . or other tribunals, foreign and domestic."[1] This broad definition also includes "responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation."[2]

Two factors determine whether an Army HCP may serve as a witness in litigation: (1) the nature of the litigation involved; and (2) the type of testimony sought. For purposes of determining if an Army HCP may serve as a witness, litigation is divided into two categories. The first category is litigation in which the United States has an interest.[3] This includes cases in which the United States is either a named party or has an official interest in the outcome of the litigation. Examples of this category are medical malpractice complaints brought under the Federal Tort Claims Act[4] and cases in which the government, pursuant to the Medical Care Recovery Act,[5] attempts to recover the cost of providing medical care.

1. DEPARTMENT OF DEFENSE, DIR. 5405.2, para. C.3 (23 July 1985), *reprinted in* DEP'T OF ARMY, REG. 27-40, LITIGATION, Appendix C (19 Sept. 1994) [hereinafter AR 27-40].

2. *Id.*

3. For a detailed definition of this term, *see* AR 27-40, Glossary, *supra* note 1.

4. 28 U.S.C. §§ 2671-2680 and 1346(b) (1982 & Supp. 1993).

5. 42 U.S.C.A. § 2651 (West 1997).

The second litigation category is so-called private litigation. "Private" litigation is defined as a case in which the government is not a party and has no official interest in the outcome of the litigation.[6] This category encompasses both civil and criminal proceedings. Examples include some personal injury cases in which the Army provided medical care, some medical malpractice cases, divorce proceedings, child abuse hearings, and competency hearings of a retiree or dependent.

The second factor governing whether an Army HCP may serve as a witness in litigation is the type of testimony sought. For purposes of determining whether an Army HCP may serve as a witness, testimony is categorized as expert testimony or factual testimony. Expert testimony involves an Army HCP testifying solely as an "expert" witness for the litigant. That is, the litigant is seeking a professional opinion from an Army witness. Factual testimony, on the other hand, involves the facts concerning medical care provided to one of the parties.

When the United States is a party or has an interest in the litigation, there is generally only one restriction on the testimony of Army health care providers: they may not provide opinion or expert testimony for a party whose interests are adverse to those of the United States.[7] Requests for an Army HCP to serve as an expert or opinion witness for the United States will be referred to Litigation Division unless the request involves a matter that has been delegated to an SJA or legal advisor.[8]

A request for an interview or a subpoena for the testimony of an Army HCP will be referred to the Staff Judge Advocate or legal adviser serving the provider's Military Treatment Facility (MTF).[9] Travel arrangements for witnesses for the United States normally are made by the Department of Justice through the Litigation Division. Litigation Division will issue instructions for the witness' travel, to include a fund citation, to the appropriate commander. An SJA or legal advisor may make arrangements for the local travel of Army health care providers requested by a United States Attorney, or by an attorney representing the government's interests in an action brought under the Medical Care Recovery Act, provided the health care provider is stationed at an installation within the same judicial district or not more than 100 miles from the place of testimony.[10] All fees provided to Army health care providers for their testimony as an expert or opinion witness which exceed their actual travel, meal, and lodging expenses, will be remitted to the Treasurer of the United States.[11]

In private litigation, Army HCP's may not provide expert or opinion testimony.[12] That restriction applies even if the HCP is to testify without compensation.[13] Moreover, although certain exceptions apply to other Department of the Army personnel,[14] Army Medical Department (AMEDD) personnel are strictly prohibited from providing expert or opinion testimony in private litigation.[15] If a court or other appropriate authority orders an Army HCP to provide expert or opinion testimony, the witness must immediately notify Litigation Division. Litigation Division will determine whether to challenge the subpoena or order and will direct the witness either to testify or to respectfully decline to comply with the subpoena or order.[16]

Although Army health care providers may not provide expert or opinion testimony in private litigation, they may provide factual testimony in private litigation concerning patients they have treated, investigations they have made, or laboratory tests they have conducted.[17] In such cases, the health care provider's testimony must be limited to factual matters[18] and may not extend to hypothetical questions or to a prognosis.[19] Similarly, if, because of off-duty employment, an Army HCP is

6. *See supra* note 1, AR 27-40, Glossary.

7. *Id.* paras. 7-10a & 7-13; 32 C.F.R. §§ 516.49(a), 516.52 (1996). Other restrictions or privileges may also restrict the health care provider's testimony; *e.g.*, nondisclosure of drug and alcohol treatment records and classified information.

8. *See supra* note 1, AR 27-40, paras. 7-10a & 7-13; 32 C.F.R. § 516.52 (1996).

9. 32 C.F.R. § 516.51 (1996).

10. *See supra* note 1, AR 27-40, para. 7-15b. *See also* 32 C.F.R. § 516.54(b) (1996).

11. *See supra* note 1, AR 27-40, para. 7-10e; 32 C.F.R. § 516.49(e) (1996).

12. *See supra* note 1, AR 27-40, para. 7-10a; 32 C.F.R. § 516.49(a) (1996).

13. *See supra* note 1, AR 27-40, para. 7-10a; 32 C.F.R. § 516.49(a) (1996).

14. *See supra* note 1, AR 27-40, para. 7-10b.

15. *Id.* para. 7-10c.

16. *Id.* para. 7-10d; 32 C.F.R. § 516.49(d) (1996).

17. *See supra* note 1, AR 27-40, para. 7-10c(1); 32 C.F.R. § 516.49(c)(1) (1996).

18. For example, observations of the patient; the treatment prescribed or corrective action taken; the course of recovery or steps required for repair of the patient's injuries; and contemplated future treatment. *See supra* note 1, AR 27-40, para. 7-10c(2); 32 C.F.R. § 516.49(c)(2) (1996).

required to participate in private litigation as either a defendant or as a treating physician, any testimony provided must be limited to factual matters. This limitation helps ensure that no government imprimatur is given to the health care provider's testimony. Under no circumstances are AMEDD personnel allowed to "moonlight" as expert witnesses.[20]

Despite the regulatory restrictions against expert testimony, frequently at a deposition or at trial counsel will ask a treating physician to provide expert or opinion testimony. Consequently, a judge advocate or Army civilian attorney "should be present during any interview or testimony to act as legal representative of the Army."[21] If a question seeks expert or opinion testimony, the legal representative should advise the Army HCP not to answer the question. In the case of court testimony, the legal representative should advise the judge that Department of Defense directives and Army regulations prohibit the witness from answering the question without the approval of Headquarters, Department of the Army.[22]

In conclusion, the rules governing when an Army HCP may serve as a witness in litigation, and in what capacity, are clear. All too often, however, an attorney will attempt to obtain the services of an Army HCP as an expert witness in violation of the regulatory provisions discussed above. Consequently, Department of the Army attorneys must be familiar with the rules governing the use of Army health care providers as witnesses in litigation and must ensure those rules are followed. Major Smith.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference and the Environmental Law Forum of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS). The issue, volume 4, number 5 is reproduced below.

Editor's Note

Spaces are still available to attend the United States Air Force's Basic Environmental Law course. The course will be held in Montgomery, Alabama, from 5 through 9 May 1997. There is no tuition; however, participants are responsible for their travel and per diem costs. If you would like to attend, please send a facsimile with your name, rank or grade, installation, and telephone number to the attention of SSG Stannard of the Environmental Law Division. The facsimile number is (703) 696-2940 or DSN 426-2940.

Beginning with the March edition of the Environmental Law Division Bulletin, CPT Silas DeRoma will take over as the *Bulletin's* editor. Any inquiries regarding the *Bulletin* should be addressed to CPT DeRoma at (703) 696-1230 or DSN 426-1230, or electronic mail address deromasi@otjag.army.mil. Thank you for the support and cooperation that you have shown in helping us to bring the *Bulletin* to you via electronic mail. Ms. Fedel.

Environmental Structured Settlements

Structured settlements have been used for a number of years to spread out payments in personal injury and medical malpractice cases, but only recently have they been applied to environmental cleanup cases. Structured settlements can take a number of forms and can be tailored to meet a variety of different situations. A common manner of setting up such a settlement involves the creation of a reversionary trust, where a trustee manages the corpus of the trust, the United States retains ownership, and any reversion left in the trust is returned to the United States Treasury after the obligation has been satisfied. Not only does this allow the trustee to invest the money not yet paid out of the trust to the benefit of the United States, but the beneficiary may avoid significant tax liability by not realizing the full amount of the settlement in the first year.

Structured settlement payments can be made according to a pre-determined schedule, or they may be used to pay a percentage of cleanup costs on an ongoing basis. For example, in one rather complex structured settlement, the private potentially responsible parties (PRPs) have agreed to perform the cleanup (using their own contractors) while the United States has agreed to fund a percentage of cleanup costs. Under this arrangement, the private PRPs will submit bills to the United States' trustee, and will receive reimbursement for costs that the trustee determines are "allowable." In addition, the trust will hire (1) an investment manager in order to leverage the maximum possible

19. *See supra* note 1, AR 27-40, para. 7-10c(3); 32 C.F.R. § 516.49(c)(3) (1996). Despite those regulatory restrictions, however, the courts have not always upheld the regulations under challenge by a plaintiff seeking an Army HCP's expert testimony against the United States. *See, e.g.*, Romero v. United States, 153 F.R.D. 649 (D. Colo. 1994).

20. *See supra* note 1, AR 27-40, para. 7-10c.

21. *Id.* para. 7-9; 32 C.F.R. § 516.48(b) (1996).

22. *See supra* note 1, AR 27-40, para. 7-9; 32 C.F.R. § 516.48(b) (1996).

amount of time-value out of the funds in the trust, (2) an accounting firm to conduct periodic audits, and (3) an environmental consulting firm to act as a technical advisor. The cost savings in such a case can be considerable, and in this example, where cleanup costs may run as high as $300 million, savings to the United States are estimated to be more than $20 million. Captain Stanton.

Did you know? . . . Road traffic kills an average of forty-five endangered Key Deer in Florida annually and is the subspecies' single largest cause of death. Average annual mortality is 63 deer from a total population of approximately 300.

RCRA General Permit To Be Proposed In Upcoming Rulemaking

The U.S. Environmental Protection Agency (USEPA) is nearing completion of a plan for a streamlined permitting process that will allow some generators and recyclers to qualify for a general permit rather than the more complex individual permit. The agency's Permit Improvement Team (PIT) has been working on improving and streamlining the permitting process for the past two years. The PIT recommendations for a general permit will be included in an upcoming rulemaking that will amend the definition of solid waste and modify the current recycling program.

Through this new initiative, the general permit would be available to off-site recyclers and to hazardous waste generators who accumulate their wastes in tanks or containers on-site for more than 90 days. The USEPA would formulate technical and management standards for a general permit that would be applicable to facilities nationwide. Under the general permit, the RCRA requirements would remain the same; however, the USEPA would require much less information for permit approval.

Under the new scheme, a facility interested in a general permit would first hold a public meeting to discuss the planned waste management activities. In place of filing a Part A application, the facility would file with the permitting agency a notice of intent to be covered by a general permit. The notice of intent includes a summary of the public meeting and information on waste streams, management practices, and volumes of waste managed. Based on this information, the permitting agency would make the initial determination whether the facility meets the scope of the general permit. If necessary, site-specific conditions are added to the general permit and public notice of the tentative decision is provided. On the request of a stakeholder, a public hearing and public comment period of forty-five days follows the notice of the tentative decision. After considering the public comments, the agency would make the final decision on the permit; the permit is effective after thirty days.

In addition to streamlining the review of the initial application, any modifications to the permit would also be expedited. Changes such as an addition of new waste streams or increases in capacity would require only the submission of the information, not agency oversight or approval. The USEPA plans to formally propose the rule in April 1997. Major Anderson-Lloyd.

Did you know? . . . Radial tires can boost your gas mileage by as much as 10%.

New Ozone and Particulate Matter Standards

The United States Environmental Protection Agency (USEPA) published new proposed National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter on 13 December 1996.[23] The USEPA proposed these new standards because it is believed that the current standards inadequately protect the public from the adverse health effects caused by ozone and particulate matter. These new standards will likely have an adverse effect on military operations.

One of the standards involves ozone. Ozone is used as an indicator of photochemical smog and is caused by the chemical reaction of ozone precursors in the atmosphere. Exposure to ambient ozone concentrations has been linked to increased hospital admissions for respiratory causes such as asthma and is associated with ten to twenty percent of all of the summertime respiratory-related hospital admissions. Repeated exposure to ozone increases the susceptibility to respiratory infection and lung inflammation, and can aggravate preexisting respiratory diseases. Long-term exposures to ozone can cause repeated inflammation of the lung, impairment of lung defense mechanisms, and irreversible changes in lung structure which could lead to chronic respiratory illnesses such as emphysema, chronic bronchitis, or premature aging of the lungs.

Mobile and stationary combustion sources are the primary source of ozone precursors. The primary stationary source of ozone precursors on Army installations is fossil fuel boilers.

The USEPA projects that a number of counties that are currently in attainment for either ozone or particulate matter will be in nonattainment under the proposed standards. Based on these projections, the new standards will place thirteen Army installations that are currently located in ozone attainment areas into ozone nonattainment areas. These installations include Forts Bragg, Gordon, and Jackson.

The United States Army Center for Health Promotion and Preventive Medicine (USACHPPM) evaluated the costs of

23. 61 Fed. Reg. 65,638-65,872 (1996).

meeting the new ozone standards. Their study indicates it will cost installations currently in attainment areas, and that will be placed in nonattainment areas, from one to five million dollars to comply with the new standards. Installations that are currently in nonattainment areas may also incur additional costs if regulators impose additional control measures on sources.

The other standard involves particulate matter. Particulate matter refers to solid or liquid material that is suspended in the atmosphere. It includes materials of both organic and inorganic chemicals, and is divided into primary and secondary components. Primary particulate matter consists of solid particles, aerosols, and fumes emitted directly as particles or condensed droplets from various sources. Secondary particulate matter is produced from gaseous pollutants that react with one another and with oxygen and water in the atmosphere to form new chemicals that are particles or condensable compounds.

The current particulate matter program is designed to protect the public from the effects of "coarse" particulate matter of ten microns or smaller (PM10). Coarse particles affect the respiratory system and contribute to health effects such as aggravation of asthma. PM10 at military installations primarily consists of dust kicked up on unpaved roads from vehicular traffic or from soldier training activities. The USEPA proposed minor changes to the PM10 standard, and these changes will not adversely affect Army operations.

A number of recently published community epidemiological studies indicate that "fine" particulate matter of 2.5 microns or smaller (PM2.5) are more likely than coarse particles to adversely affect health (e.g., premature mortality and increased hospital admissions). As a result, the USEPA proposed PM2.5 standards. The new annual PM2.5 standard is set at 15 micrograms per cubic meter, and a new 24-hour PM2.5 standard is set at 50 micrograms per cubic meter.

PM2.5 is generally emitted from activities such as industrial and residential combustion and vehicle exhaust. PM2.5 also is formed in the atmosphere from gases and volatile organic compounds that are emitted from combustion activities and become particles as a result of chemical transformations in the ambient air. Dust is also a major contributor to PM2.5.

The new PM2.5 standards will have a major adverse affect on obscurant training (smoke consists of particulates of 0.5 - 1 microns), open burning, open burning/open detonation operations, troop training exercises that produce a large amount of dust, and Army Materiel Command (AMC) installations with industrial activities. Using the USEPA's projections, twenty-two Army installations will be in PM2.5 nonattainment areas.

The USEPA has solicited comments regarding the impact of the new proposals, as well as the impact of several other possible standards to better control ozone and particulate matter. It should be noted that industry, many state regulators, and some members of Congress have been very critical of these proposed rules, asserting that they are both unnecessary and too costly. Lieutenant Colonel Olmscheid.

Did you know? . . . Environmentalists refer to Theodore Roosevelt's presidency as the "Golden Age of Conservation."

Environmental Law Division On Line

The Environmental Law Division's Environmental Law Link pages are up and running. The pages may be reached by the link off of the Judge Advocate General's (JAG) Corps home page at http://www.jagc.army.mil/jagc2.htm, or by going to http://160.147.194.12/eld/eldlinks.htm directly. The site is designed to be used as a starting point for environmental and general law research. The pages contain links to the following areas: DOD environmental sites, DA environmental sites, environmental regulations, environmental legislation, environmental statutes, courts, case law, United States Government environmental departments and agencies, environmental interest groups, international environmental sites, search engines, general law sites, and general points of contact in the armed forces. You may also view an e-mail listing of personnel in the Environmental Law Division. Please enjoy the site and e-mail us your comments. Captain DeRoma.

Did you know? . . . The Snowy Owl weighs 4 to 6 pounds and has a wing span of 5 feet.

Ninth Circuit Rules on Natural Resource Damages

The United States Court of Appeals for the Ninth Circuit has held in favor of Federal natural resource trustees on two important issues concerning natural resource damage (NRD) recoveries.[24] The Ninth Circuit decision overrules a district court decision holding that the Trustees' action was barred by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations.[25] Section 113(g)(1) provides that an action for NRDs must be commenced within three years of the later of (A) the date of discovery of the loss and its connection with the release in question, or (B) the date on which regulations are promulgated under CERCLA section 301(c).[26] Section 301(c) instructs the United States Department of Interior (DOI) to promulgate two types of regulations governing NRDs--"Type A" and "Type B" regulations. The district court had held that the statute of limitations

24. U.S. v. Montrose Chemical Corp., et al., No. CV-90-03122-AAH, 1997 U.S. App. LEXIS 704 (9th Cir. Jan. 17, 1997).

25. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 113(g)(1), 42 U.S.C. § 9613(g)(1) (1986).

began to run when the Type B regulations were promulgated in 1986, and since the Trustees had filed the complaint in 1990, the action was time barred. The Trustees argued that the statute of limitations did not begin to run until the Type A regulations were promulgated in 1987. The Ninth Circuit agreed with the Trustees, stating that:

> [T]he phrase in section 9613(g)(1)(B) that triggers the statute of limitations on the 'date on which regulations are promulgated under section 9651(c)' should also be interpreted as referring to 'regulations' as used by section 9651(c)--including both Type A and Type B regulations.[27]

The court also reversed the district court's ruling that the Montrose defendants' liability was capped at $50,000,000 pursuant to CERCLA section 107(c)(1).[28] Section 107(c) limits each owner's and operator's liability for "each release of a hazardous substance or incident involving release of a hazardous substance" to the costs of response plus $50,000,000. The Montrose defendants had argued successfully to the district court that the legislative history of CERCLA demonstrates that the term "incident" is a term of art synonymous with "contaminated site," and that the complaint had alleged only one "incident involving release."[29] The Ninth Circuit disagreed, holding that the term "incident involving release" should be interpreted in accord with its common definition and the legislative history to mean an "occurrence" or "event." As stated by the court, "a series of events that lead up to a spill of hazardous substance would be considered an incident involving release; however, a series of releases over a long period of time might or might not."[30] Therefore, the record was insufficient to support the district court's conclusion that the complaint only alleged one "incident involving release." The court reversed the district court's holding and remanded the case for further determination of whether the Montrose defendants' liability was capped at $50,000,000. Ms Fedel.

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26. 42 U.S.C. § 9651(c) (1986).

27. *Montrose*, 1997 U.S. App. LEXIS 704, at *13. Therefore, the statute of limitations did not begin to run until all of the regulations contemplated in the statute had been promulgated.

28. 42 U.S.C. § 9607(c)(1) (1994).

29. *Montrose*, 1997 U.S. App. LEXIS 704, at *33.

30. *Id.* at *35.

Claims Report

United States Army Claims Service

Personnel Claims Notes

GAO is Now DOHA

The General Accounting Office (GAO), which issued Comptroller General Decisions to settle household goods disputes, is now out of the claims business. The Defense Office of Hearings and Appeals (DOHA) which is part of the Defense Legal Services Agency has taken over GAO's claims functions.

In 1996, the United States Code was amended to provide that the Secretary of Defense shall settle appeals by transportation carriers involving amounts collected from them by offset for loss or damage to property shipped at government expense.[1] The effective date for this transfer was 30 June 1996.[2] The Secretary of Defense further delegated this authority to the DOHA.

The DOHA is working on a draft regulation which it plans to widely distribute for comment and publish in the Federal Register. Depending on the comments received, the new regulation may result in significant changes to historical practices and procedures.

At this point, however, the DOHA generally follows GAO practices and procedures. For example, it has adopted the procedures outlined in the Code of Federal Regulations[3] which provide for the issuance of a settlement certificate with the right to an appeal. Under DOHA and prior GAO procedures, a settlement certificate is not precedent setting, and it applies only to the particular claim at hand. The military service or carrier may appeal the settlement. For appeals purposes, the DOHA has substituted a Claims Appeals Board for GAO's Comptroller General. Unless otherwise indicated, the Board's decisions are precedent setting and may be quoted. Each appeal is considered by three attorney members of the Board, and all three members sign each decision. The Board's decisions are cited, for example, as DOHA Claims Case No. 96081208 (Dec. 20, 1996), where the case numbers represent the year, month, date and the order of sequence that the claim was received at the DOHA on that particular day. The Board also has continued the Comptroller General's practice of entertaining requests for reconside ration.

Because the DOHA follows existing GAO practices and procedures the Comptroller General decisions involving this area remain good precedent. They may be used to respond to any issue to which they apply unless modified, overruled, or distinguished by a later Comptroller General decision or a DOHA decision. The Board has cited Comptroller General decisions in its own decisions.

If you have questions about the process, please contact the Chairman of the Claims Appeals Board, Mr. Michael D. Hipple, at (703) 696-8524 or DSN 426-8524, or you may write to him at P.O. Box 3656, Arlington, VA 22203-1995. Ms. Schultz and Mr. Hipple.

Preparation of Recovery Documents

During the past few months a high percentage of the claims coming to the U.S. Army Claims Service (USARCS) for both reconsideration and recovery action have arrived without the requisite paperwork. The high volume of records processed through this headquarters makes the preparation of these forms by claims offices essential.

Paragraph 11-24 of Army Regulation 27-20,[4] makes field claims offices responsible for preparing recovery documents. Chapter 3 of Department of Army Pamphlet 27-162[5] explains the preparation of these documents and their placement in the claim file. It is easier to complete these forms during the regular adjudication of the claim.

Demand packets should accompany *all* Chapter 11 claims forwarded to USARCS for either centralized recovery *or* reconsideration. This rule also applies to claims forwarded to USARCS for reconsideration where the field office recommends denial of further payment. All documents required for the demand packet must be completed and a demand packet must be assembled in accordance with para. 11-36, Army Regulation 27-20.[6] USARCS personnel can adjust amounts of third

1. General Accounting Office Act of 1996, Pub. L. No. 104-316 (1996) (amending 31 U.S.C. § 3702 (1988)). This Act codified earlier legislation and an interim delegation of authority from the Director, Office of Management and Budget (OMB).

2. The OMB Director established this effective date by interim delegation of authority.

3. 4 C.F.R. §§ 30-32 (1996).

4. Dep't of Army, Reg. 27-20, Legal Services: Claims (1 Aug. 1995) [hereinafter AR 27-20].

5. Dep't of Army, Pamphlet 27-162, Legal Services: Claims (15 Dec. 1989).

6. *See* AR 27-20, *supra* note 4.

party liability entered on these forms for items affected by a reconsideration. Remember that files forwarded for centralized recovery must be held by the local claims office to ensure upload of disk data prior to receipt of the claim. However, files forwarded for reconsideration should be sent immediately and must be accompanied by a transfer disk. Mr. Lickliter and Ms. Shollenberger.

Increase in Warehouse Liability

Contractor liability for loss or damage to household goods lots awarded (booked) into nontemporary storage (NTS) on or after 1 January 1997 will be increased from $50 per line item to $1.25 times the net weight of the shipment. This means that liability on household goods booked into NTS as of 31 December 1996, or earlier, will be calculated at the current rate of $50 per line item even if the goods are picked up on or after 1 January 1997. Only goods booked into NTS on or after 1 January 1997 will be eligible for the increased liability. The appropriate Regional Storage Management Office (RSMO) can resolve questions concerning the date a storage was booked. Calculations of NTS liability will mirror the method used to calculate carrier liability under increased released valuation. Therefore, amounts pursued against warehouses will usually be the amount paid to the claimant.

The increase in contractor liability is intended to improve the quality of service and provide military claims services more equitable recovery of amounts due for personal property loss and damage during DOD-sponsored NTS. RSMOs will notify contractors of the change. Claims offices should incorporate this change into local standard operating procedures. For shipments affected by the Atlanta RSMO test program, send claims directly to that office for dispatch of demands to NTS warehouses in their jurisdiction (in accordance with prior instructions).

This information must reach all field claims personnel performing recovery functions. For further information, call the U.S. Army Claims Service point of contact, Ms. Nola Shollenberger, at (301) 677-7009 ext. 402. Ms. Shollenberger.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978, ext. 380.* Major Rivera.

1996-1997 Academic Year On-Site CLE Training

On-Site instruction provides an excellent opportunity to obtain CLE credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Legal automation instruction provided by the Legal Automation Army-Wide Systems Office (LAAWS) personnel and enlisted training provided by qualified instructors from Fort Jackson will also be available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Remember that *Army Regulation 27-1,* paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army judge advocates, National Guard judge advocates, and Department of Defense civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program.

If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380. You may also contact me on the Internet at *riveraju@otjag.army.mil.* Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....tromeyto@otjag.amy.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

LTC Peter Menk, ...menkpete@otjag.army.mil
ARNG Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera, ...riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATTRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZHA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code--**181**

Course Name--133d **Contract Attorneys 5F-F10**

Class Number--**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

April 1997

21-25 April:	27th Operational Law Seminar (5F-F47).
28 April-2 May:	8th Law for Legal NCOs Course (512-71D/20/30).
28 April-2 May:	47th Fiscal Law Course (5F-F12).

May 1997

12-16 May:	48th Fiscal Law Course (5F-F12).
12-30 May:	40th Military Judges Course (5F-F33).
19-23 May:	50th Federal Labor Relations Course (5F-F22).

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Workshop (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	AC (Phase II) (5F-F55).
16-27 June:	JATT Team Training (5F-F57).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-55A0-RC).
22 June-12 Sept.:	143d Basic Course (5-27)C20).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July:	Professional Recruiting Training Seminar
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference

August 1997

4-8 August:	1st Chief Legal NCO Course

(512-71D-CLNCO).

4-15 August: 139th Contract Attorneys Course (5F-F10).

5-8 August: 3d Military Justice Managers Course (5F-F31).

11-15 August: 8th Senior Legal NCO Management Course (512-71D/40/50).

11-15 August: 15th Federal Litigation Course (5F-F29).

18-22 August: 66th Law of War Workshop (5F-F42).

18-22 August: 143d Senior Officers Legal Orientation Course (5F-F1).

18 August 1997-28 May 1998: 46th Graduate Course (5-27-C22).

September 1997

3-5 September: USAREUR Legal Assistance CLE (5F-F23E).

8-10 September: 3d Procurement Fraud Course (5F-F101).

8-12 September: USAREUR Administrative Law CLE (5F-F24E).

8-19 September: 8th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1997

April

26-1 May, AAJE: Advanced Evidence, Carmel, CA

May

2-3, ABA: Environmental Law, Victoria Inn, Eureka Springs, AR

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603

(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, Va 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal
Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

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
School of Law
Office of Continuing Legal Education
727 Est 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually

Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth--new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the November 1996, *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School 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. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through your installation library. Most libraries are DTIC users and would be happy to identify and order the material for you. If your library is not registered with DTIC, then you or your office/organization may register for DTIC services.

If you require only unclassified information, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1, fax (commercial) (703) 767-8228, fax (DSN) 426-8228, or e-mail to reghelp@dtic.mil.

If you have a recurring need for information on a particular subject, you may want to subscribe to our Current Awareness Bibliography Service, a profile-based product, which will alert you, on a biweekly basis, to the documents that have been entered into our Technical Reports Database which meet your profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents document for a case may obtain them at no cost.

You may pay for the products and services that you purchase 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 a NTIS credit card will be included in your user packet.

You may also want to visit the DTIC Home Page at http://www.dtic.mil and browse through our listing of citations to unclassified/unlimited documents that have been entered into our Technical Reports Database within the last eleven years to get a better idea of the type of information that is available from us. Our complete collection includes limited and classified documents, as well, but those are not available on the Web.

If you wish to receive more information about DTIC, or if you have any questions, please call our Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1 or send an e-mail to bcorders@dtic.mil. We are happy to help you.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A263082	Real Property Guide--Legal Assistance, JA-261-93 (293 pgs).
AD A305239	Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
*AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide,JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-95 (517 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A280725	Office Administration Guide, JA 271-94 (248 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
*AD A322684	Tax Information Series, JA 269-97 (110 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

Administrative and Civil Law

AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

Labor Law

AD A308341 The Law of Federal Employment, JA-210-96 (330 pgs).

*AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text,JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Admin-*

istrative Center (PAC). A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33 you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed

by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States Income Tax guide for use with 1994 state income tax returns, April 1995.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	July 1996	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, June 1996.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.

CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, November 1995.
FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
ALM1.EXE	September 1996	Administrative Law for Military Installations Deskbook
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations--Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, November 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1997	Federal Tort claims Act, June 1996.
JA260.ZIP	September 1996	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide--Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law guide--Part II, June 1994.
JA267.ZIP	September 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA269.DOC	December 1996	Tax Information Series, December 1996
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.

JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA275.EXE	December 1996	Model Income Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1 & 5, (LOMI), February 1997.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 4, Legal Assistance), February 1997.
JA285V1.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA285V2.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.

JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3,ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95.ZIP	January 1996	Operational Law Deskbook 1995.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.

YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

5. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS “Main System Menu” window.

(2) Double click on “Files” button.

(3) At the “Files Libraries” window, click on the “File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the “Find Files” window, click on “Clear,” then highlight “Army_Law” (an “X” appears in the box next to “Army_Law”). To see the files in the “Army_Law” library, click on “List Files.”

(5) At the “File Listing” window, select one of the files by highlighting the file.

a. Files with an extension of “ZIP” require you to download additional “PK” application files to compress and decompress the subject file, the “ZIP” extension file, before you read it through your word processing application. To download the “PK” files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the “PK” files, execute your download task (follow the instructions on your screen and download each “PK” file into the same directory. *NOTE: All “PK”_files and “ZIP” extension files must reside in the same directory af-*

ter downloading. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP FEB.97.ZIP

At this point, the system will explode the zipped files and they At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. In paragraph 3 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

6. Articles

The following information may be useful to judge advocates:

Rebecca Baily-Harris, *The Family Law Reform Act 1995 (Cth): A New Approach to the Parent/Child Relationship,*18 ADEL. L. REV. 83 (1996).

John S. Blackman, *Alternative Dispute Resolution and the Future of Lawyering,* 23 LINCOLN L. REV. 1 (1995).

7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.