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.