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*.