"Just One More Thing . . . " and Other Thoughts on Recent Developments in Post-Trial Processing

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Introduction

Military courts, especially the Court of Appeals for the Armed Forces (CAAF), are determined to assert and protect the vitality of the post-trial process. The determination not to treat this stage as a mere "paper drill" is reflected in their willingness to return cases for new reviews and actions, and to reinforce the expectation that the government will respect time lines, the defense will make meaningful submissions, and the government will honor the requirement to consider the defense submissions and serve the defense with new matter at the addendum stage. We saw this year, continuing a recent trend, a high number of cases devoted to the addendum, most often addressing government decisions not to serve an addendum containing new matter on the defense. The courts seem willing to put some teeth into the usual quotations about the post-trial phase containing the accused's best chance for clemency,[1] and to reinforce the substantive requirements that the UCMJ and *Manual* place on the government,[2] while struggling to accommodate "technical" violations of the rules in an area where the violations are largely codal. The strongest of the recent trends is repeated reinforcement of the requirement that staff judge advocates not use the addendum to smuggle "new matter" to the convening authorities without first serving the defense.

Still, those same courts, again especially the CAAF, are increasingly concerned about distinguishing cases in which the post-trial errors are truly harmless and those in which the submissions or consideration might have made a difference in the outcome. Their newest ally in this regard is a 1993 case, *United States v. Olano*,[3] in which the Supreme Court set out a three-part test for determining the existence and significance of plain error.[4] Because many post-trial errors are plain but inconsequential, *Olano* provides a construct with which a court can diagnose error, chide the error-maker for sloppiness, but not alter the outcome and give a windfall to an accused for an error that would not have affected the findings or sentence ultimately approved.

The CAAF is frequently divided when analyzing and resolving post-trial issues. The majority seems determined to protect and perhaps reinvigorate the post-trial phase. Judge Crawford is the most consistent voice for the minority viewpoint. While not necessarily denigrating the significance of the post-trial process, she is unwilling to require substantive corrective action (or, in her view, meaningless remand) in cases in which she is not persuaded that the error would have made any difference in the outcome of the case. The problems run from the truly consequential --*e.g.*, failure to ensure that the convening authority sees defense submissions[5]--to the mind-numbing chain of avoidable errors, such as inclusion of new matter in an addendum that is not served on the defense. Most notable may be the sheer volume of post-trial cases. The service courts have always handled a fair number of post-trial cases, often producing unpublished opinions that correct ministerial-level errors such as failure to ensure that an accused retains one-third of his pay when not in confinement. In recent years, however, an increasing percentage of the CAAF docket has been consumed by post-trial cases *and* those cases are more likely to be non-unanimous opinions than in the areas of substantive criminal law or traditional criminal procedure.

Philosophical Division Reflected in Post-Trial Review Decisions

The philosophical division on the CAAF is not merely an academic one. It appears not only in the addendum opinions, but also in other areas, and it goes to the heart of how the military's supervising court views the vitality and significance of the post-trial process. The determination to keep the post-trial

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1. Perhaps the most frequently quoted passage is the following: "It is at the level of the convening authority that an accused has his best opportunity for relief." United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

2. *See generally* Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 860-876, arts. 60-76 (1988); MANUAL FOR COURTS-MARTIAL, United States, ch. 11 (1995) [hereinafter MCM].

3. 507 U.S. 725 (1993).

4. The Court held that convictions should not be overturned unless (1) there is error, (2) the error is plain (clear and obvious), and (3) the error affects substantial rights. *Id*. at 732-35.

5. *E.g.*, United States v. Dvonch, 44 M.J. 531 (A.F. Ct. Crim. App. 1996) (per curiam) (new review and action ordered after government conceded its failure to include two letters submitted by defense counsel as part of Rule for Courts-Martial (R.C.M.) 1105 matters).

process relevant is evident in recent decisions regarding the Staff Judge Advocate (SJA) Recommendation, commonly referred to as the post-trial review (PTR). This document, considerably leaner and more narrow in scope than it was before the 1984 *Manual*,[6] remains an important document.

In the leading case of the term regarding the PTR, *United States v. Hickok*,[7] the CAAF held that failure to serve the PTR on counsel is prejudicial error, even when counsel submitted matters before receiving the authenticated record of trial and PTR.[8] In this case, the original defense counsel was reassigned,[9] new counsel was never appointed, and the SJA office never tried to serve the PTR on another counsel. The CAAF found that the accused "was unrepresented in law and in fact" during this stage.[10] It stressed that a defense counsel is considered "absent" for post-trial purposes under these circumstances and that accused should not be made to suffer for a breakdown in the system. The fact that the R.C.M. 1105 clemency package was submitted at an early stage--and, all conceded, considered by the convening authority at action--cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106.[11]

In a dissent consistent with all of her opinions in this area, Judge Crawford argued that the case should be tested for prejudice and that the defense should be required to show what it would have submitted if it had been properly served. She also called on the court to overturn *United States v. Moseley*,[12] a 1992 opinion (from which she, unsurprisingly, also dissented) that required a new review and action in a case in which the government failed to serve the PTR on counsel.[13] In the majority opinion, the late Judge Wiss wrote "the only way to make up for the *absence* of counsel at that stage is to re-do that stage with benefit of counsel."[14] Judge Crawford's call to overturn *Moseley* makes sense, if for no other reason than the fractured opinion gives limited guidance. *Moseley* features four opinions, and the facts are of limited universal applicability.[15] Still, appellate litigants are waiting for a case or cases that clearly answer whether and in what circumstances the government's failure to serve the PTR can be harmless error. Currently, the

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6. The 1984 changes were designed to make the post-trial review a shorter document that merely informed the convening authority of the result of trial, accused's personal background, and other demographic factors, but was not an exhaustive recapsulization of the case and not a discussion of all possible legal errors or issues. Paragraph 85*b* of the MANUAL FOR COURTS-MARTIAL 1969 (Rev.), which required summarization of the evidence and review for legal error, was deleted in the 1984 revision. *See generally* United States v. Diaz, 40 M.J. 335, 340-42 (C.M.A. 1994). One pair of commentators noted that "[I]mperfections in the post-trial review, as distinguished from the underlying trial, required reversal of countless cases." FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 81 (1991). Observers of contemporary post-trial practice could be forgiven from drawing a similar conclusion. Though outright reversal is relatively rare for post-trial error, remand for new reviews and actions are extremely common for post-trial errors that do not go to the core of the matter at issue in trial.

7. 45 M.J. 142 (1996).

8. The defense has the opportunity to submit materials under R.C.M. 1105 and R.C.M. 1106 within ten days of receiving the PTR and authenticated record of trial. Each of the two R.C.M. provisions carries a separate ten day timetable, and each is extendible by another twenty days. Because the triggering events are different for each (R.C.M. 1105 requires service of the PTR and record of trial on the accused, while R.C.M. 1106 also requires service of the record on the accused, but separate service of the PTR on counsel), and because different individuals have authority to approve the twenty day delays (convening authority may delegate delay-granting authority to the SJA under R.C.M. 1105 but not R.C.M. 1106), litigants on both sides of the process, as well as SJAs, must be sure not automatically to collapse both provisions into one coextensive timetable.

9. As part of a routine "PCS," or Permanent Change of Station.

10. *Hickok*, 45 M.J. at 144.

11. R.C.M. 1105 essentially permits the accused (typically through counsel, but it is a right personal to the accused) to seek clemency by raising virtually any information or arguments he thinks might persuade the convening authority. R.C.M. 1106(f)(4) is the counsel's right, rooted in *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), to comment on the PTR. The Army Court of Criminal Appeals emphasized this distinction in one of the first cases construing *Hickok*. In *United States v. Liggan*, No. 9501523 (Army Ct. Crim. App. Jan. 8, 1997) (the court found that failure to serve the record and PTR on substitute counsel, after the detailed counsel had left the service (preparing an undated submission before he left), was prejudicial error because it deprived the accused of "an opportunity to review the record of trial or respond to the SJA's recommendation." *Id*., slip op. at 2. The Army Court reminded practitioners that an accused soldier's right to submit matters under R.C.M. 1105 "is separate and distinct from his right to respond to the SJA's recommendation under R.C.M. 1106 . . . . There is no logical or lawful way to view the clemency petition in this case [submitted before the PTR was served] as fulfilling the appellant's right to respond to the SJA's recommendation." *Id*.

12. 35 M.J. 481 (C.M.A. 1992).

13. *Id.* at 484.

14. *Id.* at 485 (emphasis in original).

15. "Unique facts" is, to some degree, the lot of most post-trial cases. Still, *Moseley*'s facts do not make for compelling precedent: the accused received the PTR, though his counsel did not; he pleaded guilty (making clemency generally less likely); and counsel did submit clemency matters, though *before* the triggering events of service of the record of trial and PTR. Premature submissions frequently plague counsel in post-trial cases, because they give appellate courts grounds to speculate that the convening authority at least saw *something*, although, importantly, that cannot have included a response to the PTR itself. Defense counsel should think hard about ever submitting post-trial submissions before they and their clients are properly served with both the PTR and authenticated record. Such premature zeal can play into the hands of a sloppy or calculating government (more commonly the former).

standard is not at all clear, and the cases are extremely fact-specific.

In one of the first post-trial cases of the new term, a unanimous CAAF seemed to bite its tongue and uphold the Navy-Marine Court's finding of prejudicial error in a case involving failure to serve proper counsel with the record of trial and PTR. In *United States v. Washington*,[16] the government failed to comply with the accused's request that the PTR and record be served on detailed military counsel. The government served it on civilian counsel only. The two counsel apparently did not communicate, nothing was submitted on behalf of the accused and the convening authority approved the sentence adjudged by the court.[17] On appeal, the accused said he would have submitted a letter from his fiancee, detailing the hardships the sentence would work on her and their baby daughter, and pointing out a portion of the PTR he believed to be misleading.[18] The CAAF upheld the Navy-Marine Court's remand for a new review and action, because it could not say that the Navy-Marine Court erred as a matter of law in finding that the procedural error was prejudicial.[19] It did, however, disagree with the reasoning of the lower court and take a strong step toward asserting a clear and consistent voice in assessing post-trial error.

The CAAF said there was no *actual* denial of counsel in the case, because both counsel remained under obligation to represent the accused.[20] Had there been an actual denial, the CAAF would have presumed prejudice.[21] If the accused were "effectively" denied counsel, the CAAF would examine whether later-provided counsel made up for the deprivation.[22] Having found that the accused was not *effectively* deprived in this case, the CAAF then applied its most recent and consequential post-trial precedent, *United States v. Hickok*.[23] The court said that *Hickok* applies when the accused has counsel, "but that counsel's ability to perform is adversely affected by a procedural error . . . [permitting the CAAF to] test the procedural error for prejudice."[24] In this sense, it reached the same point of analysis as the Navy-Marine Court--assessing prejudice--but by a different path, as the Navy-Marine Court applied a *per se* test, and only found prejudice after weighing the seriousness of the offenses against matters the accused said he would have submitted.[25] The lower court did find prejudice, however; a finding that the CAAF--which strongly implied (but did not state) that it would not have found prejudice--felt obliged to follow, given a line of cases that holds that the CAAF should "give the accused the benefit of the doubt rather than speculate about what the convening authority might have done absent a procedural error."[26]

In *United States v. Miller*,[27] substitute military defense counsel failed to formally establish an attorney-client relationship with the accused after the original counsel, who was about to leave active duty, submitted clemency materials before the government served the PTR. The CAAF found the government's failure to serve the substitute counsel with the PTR to be harmless, despite substitute counsel's failure to consult the accused or submit a clemency package, because the government was not on any reasonable notice that the substitute counsel and the accused failed to enter an attorney-client relationship. Citing the recently released *Hickok*, the CAAF held that it is proper to test for prejudice in such circumstances. Here, the CAAF ruled, the government failed to comply with the R.C.M. 1106(f)(1) requirement for service of the PTR "on counsel for the accused," but "had no way of knowing" that the attorney-client relationship had not been formalized. The opinion, written by Senior Judge Everett, distinguished cases such as *United States*

16. No. 96-5005 (CAAF Feb. 7, 1997) (to appear at 45 M.J. ___).

17. The court adjudged a sentence of three years, less than the pretrial agreement, which capped confinement at four years, considerably less than the maximum punishment of 355 years. *Id*. slip op. at 5. The accused was convicted of eighteen illegal distributions of drugs, eleven of them to fellow sailors aboard his aircraft carrier. *Id*.

18. *Id.* at 4-5.

19. The divided lower court held that it had "no basis to conclude that the clemency petition from [EM2 Washington's] fiancee would have had no effect on the convening authority's action." *Id*. at 5-6.

20. Notwithstanding the accused's expressed preference that the PTR and record be served on his detailed military counsel, *Id*. at 4, the CAAF found that neither counsel's representation "was terminated by competent authority. Thus, both . . . had a duty to actively represent EM2 Washington during the post-trial proceedings." *Id*. at 6; *See* United States v. Palenius, 2 M.J. 86, 93 (C.M.A. 1977).

21. *Washington*, slip op. at 6.

22. *Id.*

23. *Id; see also* United States v. Hickok, 45 M.J. 142 (1996).

24. *Washington*, slip op. at 6.

25. *Id.* at 7.

26. *Id.* (citations omitted).

27. 45 M.J. 149 (1996).

v. Cornelious,[28] in which counsel continued to take action on behalf of the accused after the accused had tried to fire the lawyer or had acted to clearly call into question their relationship.

Again in dissent, Judge Crawford emphasized in *Miller* that a later clemency submission would not have made any difference in light of the comprehensiveness of the initial submission and the offenses to which the accused pled guilty.[29] Such consideration "would elevate form over substance and be a useless act,"[30] according to Judge Crawford. At the other end of the spectrum, Judge Gierke also dissented, writing that the accused in fact "had no counsel within the meaning of R.C.M. 1106(f)(2)"[31] and that therefore "[p]rejudice should be presumed."[32] Judge Gierke stressed that the focus should be on the accused, who did not receive, in his view, the post-trial assistance he should have received. "It is immaterial who was at fault," Judge Gierke wrote, characterizing the substitute counsel as "a mere staff officer" who never entered into a proper attorney-client relationship with the accused.[33] "I cannot join in the majority's holding that Captain Stanton's appointment and actions . . . were 'close enough for government work.'"[34]

The issue of substitute service is most relevant for appellate practitioners, because counsel and SJA's should strive in every instance to comply with the *Manual* and to ensure proper and timely service of both the PTR and record of trial. It is shortsighted in the extreme to choose not to serve either document on *some* defense counsel, even when the defense appears to be disorganized or indifferent, and even when the defense may have submitted matters before service of the PTR and record.

Other PTR Pitfalls

There still is no better case for explaining the theory and importance of the SJA Recommendation than *United States v. Diaz*,[35] in which the Court of Military Appeals[36] emphasized that the PTR is a foundational document from which the convening authority's action stems. Therefore, mistakes in the PTR have enormous consequences, because it is the PTR on which the convening authority relies when making decisions on findings and sentences. If the PTR is in error--and the convening authority is thereby misinformed--the convening authority's action cannot be said to be an informed (and therefore valid) decision. That being said, courts have come to recognize, without wanting to ratify undue sloppiness, that not all PTR errors are created equal, and a degree of tolerance is necessary in weighing the significance of PTR errors.

In *United States v. Barnes*,[37] the Navy-Marine Court observed that "[t]here is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Barnes, a Marine staff sergeant with fourteen years' active duty service and no record of disciplinary problems, was convicted of a single use of marijuana. He had been awarded the Navy Commendation Medal related to service in Somalia less than a year before his trial. The PTR failed to mention the award. The court called the medal a "significant and worthy personal achievement."[38] It said the "failure to include these matters in the [PTR] deprives the convening authority of important information concerning the appellant's prior service and may well have affected the outcome of his sentence review."[39]

The Navy-Marine Court stated explicitly the concern that underlies the opinions of many courts in the post-trial area: an unwillingness to assume that the process is irrelevant or that the convening authority would not have taken some form of clemency action. "It is difficult to determine how a convening authority would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action."[40] Here, failure to include the

28. 41 M.J. 397 (C.M.A. 1995).

29. *Miller*, 45 M.J. at 151-52 (Crawford, J., dissenting).

30. *Id.* at 152.

31. *Id.* (Gierke, J., dissenting).

32. *Id.*

33. *Id.*

34. *Id.*

35. 40 M.J. 335 (C.M.A. 1994).

36. On 5 October 1994, Congress changed the name of the Court of Military Appeals to the Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941(n) (1995)).

37. 44 M.J. 680 (N.M.Ct.Crim.App. 1996).

38. *Id.* at 682.

39. *Id.*

citation for the Navy Commendation Medal was prejudicial error, requiring a new review and action. Practitioners should pay special attention to one of the court's footnotes which cites a Secretary of the Navy Instruction that lists the laudatory criteria for the medal including "'[o]utstanding and worthy of special recognition . . . . The performance should be well above that usually expected of an individual commensurate with his grade or rate . . . .'"[41] The Navy-Marine Court fell in line with the emerging CAAF majority in holding, oddly in a footnote, that it could "not assume that the convening authority . . . was aware of" the combat medal or Somalia service "merely because these matters were reflected in his personnel records or evidence of them was admitted at trial."[42] Again this points up the difference between items that the convening authority must consider (result of trial, PTR and defense submissions)[43] and those he *may* consider (other personnel records, relevant extra-record material, the record of trial).[44]

At the other end of the mistake spectrum is *United States v. Ross*.[45] The PTR in this case inaccurately stated that Ross was found guilty of drug use on 28 September when the real date was 22 July. Ross, an Air Force E-5, who was sentenced to reduction to E-1 and a bad-conduct discharge, waived post-trial submissions and the convening authority action reflected the correct July date. Notwithstanding the principle in *Diaz*[46] that a convening authority implicitly approves findings as reflected in the PTR unless he acts explicitly to the contrary, the conviction in this case was upheld on the grounds that "[*t*]*he essence of appellant's crime was drug use*--a date in July versus a date in September was inconsequential in the big picture of this trial."[47] *Diaz*, the court said, applies "to major errors" in the PTR, such as omission of offenses and incorrect maximum punishments.[48] The court said it was "reluctant to elevate 'typos' in dates to 'plain error' or grounds for setting aside a convening authority's action when an appellant expressly waives the right to complain."[49] Still, a published opinion of a military appellate court was devoted to whether an obviously typographical mistake should redound to the benefit of a servicemember. It illustrates both the governmental sloppiness that has meant a full post-trial docket for the appellate courts, and the heavy wheezing undertaken by many of the appellate courts before coming to a common sense conclusion.

Improper Authors

While courts have indulged a certain amount of clerical error in PTRs, they are less lenient regarding who writes and signs them. Both the CAAF and the service courts have used cases involving "nontraditional" authors of PTRs to reemphasize the significance of the PTR, the fact that it is an important piece of legal advice that is provided to a convening authority, and that a lawyer should write it.[50]

In *United States v. Edwards*,[51] a divided CAAF held that a naval legal officer (non-judge advocate) was disqualified from preparing the PTR in a case in which he had preferred the

40. *Id.*

41. *Id.* n.2. On appeal, the defense did a good job of building a case for the fact that omission of the award was consequential. The court appears implicitly to have balanced the gravity of the offense (one-time drug offense) against the strength of the accused's record (fourteen year NCO who was a strong performer with no prior record of disciplinary action), in determining that the omission may well have been consequential under these circumstances. Such characterization avoids the issue present in *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993), and some of its progeny, regarding how significant an award or decoration must have been before its omission is considered sufficiently consequential to warrant a new review and action. As in *Demerse*, there was no suggestion in *Barnes* of ineffective assistance of counsel for failing to highlight the service or point to the government's omissions in the PTR, presumably on the theory that the government is obliged to include the information in the PTR and the defense is not expected to be the editor of documents that the government has an independent obligation to generate accurately.

42. *Barnes*, 44 M.J. at 682 n.3.

43. *See* MCM, *supra* note 2, R.C.M. 1107(b)(3)(A).

44. *Id.* at 1107(b)(3)(B).

45. 44 M.J. 534 (A.F. Ct. Crim. App. 1996).

46. 40 M.J. 335 (C.M.A. 1994).

47. *Ross*, 44 M.J. at 537 (emphasis added).

48. *Id.*

49. *Id*. This kind of typo is different from a substantial omission of an element of the sentence, as occurred in *United States v. Schiaffo*, 43 M.J. 835 (Army Ct. Crim. App. 1996). In this case, the convening authority's action did not expressly approve the BCD, though it referred to it in "except for" executing language. *See, e.g.*, MCM, *supra* note 2, app. 16, for sample forms of actions. In a typical action, the convening authority approves the sentence "except for" the punitive discharge, because on initial review the convening authority is not empowered to approve a punitive discharge; sentences that include dismissal or punitive discharge must first undergo review by the service courts of criminal appeals. *See* UCMJ, arts. 66(b), 67 (1988). The Army Court returned it to the convening authority for a new action.

50. Before a convening authority takes action on a case his "staff judge advocate or legal officer shall . . . forward to the convening authority a recommendation under this rule." MCM, *supra* note 2, R.C.M. 1106(a).

51. 45 M.J. 114 (1996).

charges, interrogated the accused, and acted as evidence custodian.[52] Mere prior participation does not disqualify an author, the majority held, in an opinion written by Judge Sullivan, but involvement "far beyond that of a nominal accuser" did so here, and waiver did not apply because the defense did not know about the extent of the author's involvement at the time it submitted post-trial matters.[53] The majority called the authorship "plain error" and "obvious error . . . impacting on a substantial right of appellant."[54] Judge Cox wrote a short dissent in which he said the author's involvement in the case was "a bit too much,"(not a terribly objective legal standard, but not utterly cloudy either) but harmless.[55] In a longer dissent, Judge Crawford said she was not persuaded that the author was disqualified, and even if he were, waiver applied because the defense failed to raise the issue initially at trial.[56] Regardless, Judge Crawford tried to hold the court to the Code and precedent, asserting that mere prior involvement in a case does not necessarily disqualify a legal officer unless that officer has a "personal interest" or strong feelings or biases about the case.[57]

While other members of a staff, such as enlisted paralegals under the supervision of chiefs of justice, commonly draft PTRs, it clearly is unduly risky for someone other than a lawyer to sign a PTR. In *United States v. Cunningham*,[58] the Navy-Marine Court found that it was plain error and nearly always reversible error for an enlisted sailor (in this instance an E-6 legalman first class) to sign a PTR. The court remanded the case for a new review and action because of lack of complaint by the defense.[59]

The court emphasized that the PTR is an "enormously important" document, because "the better the convening authority is advised, the more fairly and justly will that authority exercise command discretion in acting on a case."[60] The court continued: "Complete and accurate advice in each case provides a convening authority with the guidance necessary" to act on a case, and the PTR "is much more than a ministerial action or mechanical recitation of facts concerning the trial. Its heart and soul exist in the judgment of the drafter as to whether the adjudged sentence is appropriate and whether clemency is warranted."[61] Because of this burden, "Congress mandated that the recommendation be done by a staff judge advocate or commissioned legal officer."[62] In addition, the CAAF "has held that an accused has a military due process right" to a PTR prepared by a statutorily qualified officer.[63] "Judge advocates and commissioned officers will almost always have more formal education than most sailors, and by virtue of their status as commissioned officers, they are charged with unique responsibility and stricter accountability, and hold the special trust and confidence of the President."[64]

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52. The *Manual* provides that "[n]o person who has acted as member, military judge, trial counsel . . . or investigating officer in any case may later act as a staff judge advocate or legal officer . . . in the same case." R.C.M. 1106(b). This non-binding discussion to the rule also suggests that the SJA or legal officer "may also be ineligible when . . . [he or she] testified as to a contested matter (unless the testimony is clearly uncontroverted) . . . [or] when the sufficiency or correctness of the earlier action has been placed in issue." R.C.M. 1106(b) Discussion.

53. *Edwards*, 45 M.J. at 116.

54. *Id.*

55. *Id.* at 117 (Cox, C.J., dissenting).

56. Even the majority opinion assumes that the issue could have been raised at trial, suggesting that the legal officer must also have prepared the pretrial advice. *Id*.

57. *Id.* (Crawford, J., dissenting).

58. 44 M.J. 758 (N.M.Ct.Crim.App. 1996) (en banc).

59. The accused, found guilty of a 110 minute AWOL and violating an order to shave, was sentenced to 60 days' confinement, reduction to E-1, and a bad-conduct discharge. *Id*. at 759.

60. *Id.* at 763.

61. *Id.*

62. *Id.*

63. *Id.* (citing United States v. Hill, 27 M.J. 293 (C.M.A. 1988)).

64. *Id*. (citations omitted). The majority seems to make the unremarkable point that lawyers can perform legal work better than non-lawyers. Certainly, commissioned officers are formally charged with the "special trust and confidence" of the President but there is no distinction among officers and no different standard for lawyers. In addition, the majority does not address a reality of which it surely is aware: non-lawyers routinely draft PTRs that lawyers or legal officers typically review and sign. The majority also took the occasion to express its frustration with Naval post-trial problems, though the Army in particular seems to have as many post-trial cases as the Navy. "The fact that this keeps recurring in the Navy detracts from the reputation of post-trial case processing in our service." *Id*. at 764. "Over the past few years, this Court has returned several other cases because of this error." *Id.* at n.11. The Clerk of Court of the United States Army Court of Criminal Appeals also sounded an early warning in 1996, writing that "[n]otwithstanding the fewer number of general and special courts-martial, post-processing times remain high." Information Paper, Clerk of Court (JALS-CCZ), U.S. Army Court of Criminal Appeals (11 Aug. 1996). A chart appended to the information paper showed that the time to process an Army general court-martial from end of trial to convening authority action has increased from 60 days in 1991 to 79 days in 1996. *Id*.

There was not much reasonable dispute about the existence of error in *Cunningham*, but it is significant that the court found the need to remand the case even after applying the three-part test *of United States v. Olano*.[65] In dissent, Judge Keating argued that the majority elevated form over substance by focusing on the military status of the preparer rather than, as in most cases involving PTR errors, the substance of the mistakes in the PTR (there were three).[66]

Even when the PTR is signed by a lawyer, that person should be the staff judge advocate or acting SJA. If the SJA is not available, others (most typically the deputy) should sign in the capacity of acting SJA, not in their ordinary capacities.[67] More importantly, if the SJA is disqualified, the deputy should not normally sign the PTR or addendum in any circumstance in which the conduct of the SJA, his superior, is reasonably called into question.[68]

Moving Toward a Standard

Lurking but not explicit in most of the opinions that resist harmless error tests in the post-trial area is a concern that it will turn the process into a *pro forma* drill, ratifying the sense of some defense counsel and their clients that it provides only a theoretical opportunity for relief. Still, a mature system of military justice should be able to distinguish between errors of true consequence--erring on the side of remand when a case is not clear--and those in which a reasonable person can say (*e.g.*, in a guilty plea with a pretrial agreement) that the outcome likely would not have been affected by the post-trial error. The tougher road for the court should not be in defining whether there can be harmless error in the PTR-addendum process, but in providing a reliable method of analysis for it. It involves, of course, balancing the nature of the error or omission (*e.g.*, ranging from the functional equivalent of a dotted "i"[69] to serious government negligence or outright misconduct) against the result of trial, determining whether there was a guilty plea, and comparing the sentence adjudged to that contained in the pretrial agreement. Should Judge Crawford find an ally in Judge Effron, the newest member of the court, for her harmless error analysis, the CAAF will remain closely divided in the post-trial area with Judge Cox providing the likely swing vote in cases where remand to convening authorities for new reviews and actions is an issue. Should Judge Effron side with the fairly predictable recent majority, then Judge Crawford will remain an eloquent, consistent, but clearly minority voice for the viewpoint that post-trial errors must be tested against the likelihood that they would have affected the outcome.

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65. *See supra* note 4.

66. *Cunningham*, 44 M.J. at 765-66 (Keating, Senior J., dissenting).

67. *See* United States v. Crenshaw, No. 9501222 (Army Ct. Crim. App. Sept. 25, 1996). (Fact that deputy SJA (DSJA) improperly signed PTR as "Deputy SJA," rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.)

68. *See* United States v. Havers, No. 9500015 (Army Ct. Crim. App. Nov. 6, 1996). The SJA was attacked for manipulating court membership in his exercise of delegated authority to approve excusals. After two days of post-trial testimony, he was cleared. The addendum, which addressed the post-trial session and the SJA's testimony, was signed by the DSJA as "acting Staff Judge Advocate." In it, he disagreed with the defense assertions and adhered to the original recommendation. Clearly the SJA was disqualified from signing the addendum, but so was his deputy, the court held. "[W]hen the staff judge advocate is disqualified because of possible bias or personal interest, so are the staff judge advocate's subordinates, because of the reluctance they may naturally feel to find fault with their supervisor." *Id*. slip op. at 3 (citations omitted). This is especially true where, as here, "the deputy necessarily had to consider the actions and credibility of his immediate supervisor." *Id*. "[T]he addendum was prepared by someone whose independent judgment could reasonably be questioned." *Id.* at 4. This case also reinforced the point, strongly made by CAAF in 1995 that staff judge advocates have an independent obligation to look at a case and cannot rely on (or critics might say, hide behind) findings and rulings by military judges. In *United States v. Knight*, 41 M.J. 867 (A.C.M.R. 1995), after extensive post-trial sessions, the military judge found no improper conduct by court members, a decision supported by the SJA in the PTR. When the Army Court found error, it chided the SJA for failing to independently analyze the case and to advise the convening authority to act contrary to the judge's ruling. *Id*. at 871. In *Havers*, the judge found that the SJA's behavior was not improper. Still, the court acknowledged, the hearing "reasonably called into question the staff judge advocate's actions . . . . The fact that the military judge found no error did not relieve the deputy of this duty [to independently assess his boss's actions]; although the rulings of a military judge may be entitled to some deference, they do not relieve the staff judge advocate from the obligation to independently weigh issues raised by the defense in its post-trial submissions." *Id*. Just as in *Knight*, when the court found that the SJA improperly relied on the military judge's ruling, the fact that a judge may have found no error that warranted altering any of his trial rulings does not relieve the SJA, often operating under a different standard and different mandates or regulatory guidance, of his obligation to make independent decisions. This is both because the SJA has his own obligations and because the SJA must analyze the case from his perspective as the one required by statute or regulation to independently advise the convening authority. In a *Havers* scenario, the problem is solved by transferring post-trial responsibility to another staff judge advocate.

69. As an example of the trivial end of the spectrum, see *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994) in which the Navy-Marine Court wrestled with whether a PTR was defective when it inadvertently listed an accused's Art. 15 as having the date of 21 Jan. 1989 when it really was 21 June 1989 (looking at the lateness of the defense complaint and the trivial nature of the error, the court concluded that it was harmless).

Begin with the End in Mind: Keep the Addendum Clean

The courts' overwhelming and least controversial concern in post-trial processing is simple fairness: ensuring the defense sees what the convening authority sees. This is especially important when the convening authority is about to take action. The defense must be permitted to see whatever the government, who has the ear of the convening authority, communicates to the convening authority before action. The addendum is the optional document, prepared after receipt of defense post-trial submissions, in which the SJA gives final advice to the convening authority regarding findings and sentence.[70] To the extent that the addendum merely reiterates the judgment in the post-trial review (which the defense will have seen),[71] it need not be served on the defense. If, however, it includes any "new matter"--consequential information or opinions not previously communicated during the post-trial phase in this case--it must be served on the defense which must be given ten days to comment.[72] We seem to be in a period in which the appellate courts are being forced to bludgeon practitioners with this elemental couplet: construe "new matter" expansively (*i.e.*, when in doubt, consider it new), and when new, ensure it is served on the defense with opportunity to comment.

Look "between the blue covers"

In *United States v. Leal*,[73] a divided CAAF held that if the additional information supplied in the addendum is not part of the record (*i.e.*, the trial transcript), it must be treated as new matter. In this case, the addendum referred to a letter of reprimand that was offered by the government, but not admitted at trial. It was, therefore, part of the "record of trial," in that all exhibits, including those not admitted, are part of the record.[74] The court emphasized, however, that it is insufficient that the item was "between the blue covers,"[75] because that would permit the government to highlight and smuggle to the convening authority evidence offered but not admitted. Presumably, this would encourage a forward-thinking if calculating government to salt the record with obviously inadmissible material simply to preserve the right to slip it before the convening authority. The court ordered a new review and action by a new convening authority.

The majority opinion, written by Judge Gierke, skirts a central issue: so long as the *Manual* permits a convening authority to *consider* the record of trial when making his decision regarding a case,[76] how can consideration of an item in that record--albeit one that refers to drug use eight years prior to trial and does not carry any substantiating evidence with it--violate another codal provision, such as the one prohibiting consideration of "new matter" of which the defense is not on notice? Judge Crawford comes close to this question in her dissent, in which she writes that an SJA "comment on an inadmissible reprimand . . . would be entirely consistent with the plain meaning of RCM 1106(d)(3)(B) . . . [and] RCM 1107(b)(3)(B)(iii)."[77] Here, the SJA added the reprimand in response to defense materials that characterized the accused, an Air Force staff sergeant convicted of attempted use of LSD, as an "exceptional NCO."[78]

Judge Crawford found this characterization to be offensive, misleading, and possibly unethical, bolstering her argument that "the SJA may use reliable evidence within the 'blue covers' of the record to rebut it."[79] Still, the issue is not so much whether the convening authority can be exposed to that information (even the majority does not contest this), but whether the information must first pass through the defense before the majority sees it. In that vein, Chief Judge Cox, who dissented

70. "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel . . . have been served with the recommendation and given an opportunity to comment." MCM, *supra* note 2, R.C.M. 1106(f)(7).

71. "Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused." MCM, *supra* note 2, R.C.M. 1106(f)(1).

72. "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days . . . in which to submit comments." MCM, *supra* note 2, R.C.M. 1106(f)(7).

73. 44 M.J. 235 (1996).

74. The *Manual for Courts-Martial* requires that "any exhibits which were marked for or referred to on the record but not received in evidence" be "attached to the record." MCM, *supra* note 2, R.C.M. 1103(b)(3)(B).

75. *Leal*, 44 M.J. at 236 (citation omitted).

76. "Before taking action, the convening authority may consider 'The record of trial . . .' " MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(i).

77. *Leal*, 44 M.J. at 237 (Crawford, J., concurring in part and dissenting in part). The *Manual* permits the convening authority to consider "[s]uch other matters as the convening authority deems appropriate," but if they are "adverse" and "outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii). Unresolved is the hyper-technical question of whether the items that the MCM requires to be "attached to the record" in R.C.M. 1103(b)(3)(B) are in fact *part of* the record; is a U-Haul attached to the Chevy that is pulling it part of the Chevy or a functional attachment?

78. *Leal*, 44 M.J. at 238.

79. *Id.*

in part, came closer to the core concern. "[T]here is absolutely nothing new about this matter,"[80] Judge Cox wrote, noting that all parties were aware of it because it was in the record of trial, as well as constructively aware of it because it was in the accused's personnel records. Therefore, "there is nothing unfair about sharing [it] with the convening authority. . . . What was unfair, however, was the Acting SJA's ambush" [81] in presenting the letter to the convening authority without notifying the defense. Judge Cox's dissent and concurrence is the most likely of the three *Leal* opinions to presage the direction of the court in this area. It is written with the Chief Judge's characteristic judiciousness, coupled with an accurate sense of the concerns of working counsel (especially SJA's),[82] not to mentioned the gentle cudgel of his status as chief judge. Still, the CAAF or the President need to contribute additional clarity to this area. Is there a "plain meaning" for a seemingly straightforward term such as "record of trial"--i.e., is it acknowledged to include all of the material inside the blue covers, or should it be read as "transcript," such that anything not spoken in court or admitted in court is beyond the record, barring the convening authority from considering it without the defense's being placed on explicit notice and given opportunity to respond?[83] And is the Chief Judge himself disingenuous to a degree in suggesting on the one hand that the item is not new but still suggesting that the defense was the victim of an ambush with "not new" matter? The new matter rule exists to prevent such an ambush. No patrol was ever ambushed in broad daylight by another patrol standing in front of it on the trail. At some point the CAAF has to conclude that the rules are designed to ensure a fair fight but that it cannot control or finely calibrate the results of the fight so long as it is satisfied that the rules of engagement were followed.

Answering Defense Claims of Error

The often prosaic work of drafting an addendum involves packaging all of the material for the convening authority and providing a response to defense allegations of legal error. The CAAF made it clearer than ever this past year that SJA's must address defense claims of error, but that these responses can hardly be too terse. In *United States v. Welker,*[84] a split CAAF reiterated the long-standing rule that SJA's must respond to defense assertions of legal errors made in post-trial submissions, but it also made clear that the response may merely consist of a statement of agreement or disagreement, without statement of rationale. The court will test for prejudice, and when (as here), the court finds no actual trial error, it will find no prejudice.[85] In one of the two dissents in the case, Senior Judge Everett argued that efficiency should permit appellate courts to grant relief in clearly warranted cases and to deny it in clearly meritless cases. He suggested that when "the *merit or lack of merit is not so clear-cut*," the accused "is entitled to make his case to the convening authority."[86] Judge Everett thought this was one of those unclear cases that should have gone to the convening authority. He emphasized even more strongly than the majority that preparation of an accurate addendum is the SJA's duty and that failure to address legal errors is normally prejudicial and will require remand.[87]

The government's obligations were further fleshed out in *United States v. Green*,[88] a case released simultaneously with

80. *Id.* at 241 (Cox, C.J., dissenting).

81. *Id.*

82. In a footnote, the Chief Judge said his "personal preference would be for staff judge advocates to serve everything upon the accused" but to "give the accused very limited time to respond to supplemental recommendations." *Id*. at 244. The key concern, Judge Cox wrote, is fundamental fairness, notice, and opportunity to respond. "That is all this case is about: The right to be heard." *Id.* Judge Cox gives no further content to his suggestion about "very limited time," so it is unclear whether he envisions a *Manual* change that would reduce the time from ten days or, for example, bar the defense from requesting an additional twenty days for addendum responses. While processing time always seems to be a concern, especially in the Army, it is not obvious that time was the central factor motivating the government in the recent addendum cases.

83. There is no end to the real-life difficulties posed by the state of the law after *Leal*. The convening authority retains his power, under R.C.M. 1107(b)(3)(B)(i), to *consider* the record of trial. *Leal* has constricted the definition of record of trial. SJA's commonly provide the convening authorities with a copy of the record to consult if they choose to do so (most of course do not, and the streamlined 1984 *Manual* is designed to reduce the *need* to do so but to preserve the *opportunity* to do so). SJA's now must determine whether they can or should provide the "raw" record to convening authorities for their perusal, which could include *Leal*-like information. Strictly, the defense will not be on notice (which is satisfactory to Chief Judge Cox) that the convening authority is considering that information, but the defense (as Judge Crawford hints) should be on perpetual constructive notice that the convening authority might consider it. As the law stands now, SJA's are probably on shaky ground if they annotate or "tab" portions of the record without notice to the defense, or orally brief the convening authority on such matters.

84. 44 M.J. 85 (1996).

85. *Id*. at 89. The dispute in this case concerned a defense claim, in its R.C.M. 1105 submission, that the military judge had permitted improper government cross-examination of the accused. *Id*. at 87-88 The asserted errors (questioning "beyond the scope" of direct, "berat[ing] and harass[ing] the accused," and eliciting uncharged misconduct, *id*.) are areas within the distinct province of the trial judge and extremely unlikely to yield relief at the post-trial or appellate stages.

86. *Id.* at 91 (Everett, Senior J., dissenting) (emphasis in original).

87. *Id.*

88. 44 M.J. 93 (1996).

Welker. Here, the CAAF held that, although SJAs are not required to examine records of trial for errors, they "must nonetheless respond to any allegations of legal error submitted by the defense . . . even if the errors are submitted after service of the [PTR], as long as that is done within the time prescribed by RCM 1105(c)(1)."[89] When it is unclear whether the accused made a timely submission "the bottom line is determining whether we are satisfied that appellant has not been prejudiced."[90]

Some of the service courts also addressed the addendum this past year, again emphasizing SJA responsibility, but also suggesting a band of tolerance for SJA failure to comment in open-and-shut cases. If brevity is the soul of wit,[91] then the author of the addendum in *United States v. Sofjer*[92] is Thomas More.[93] The seven-page addendum in this case recited defense-alleged errors and then concluded, "My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged." The SJA made no other comment regarding the assigned errors. According to the Navy-Marine Court, the government argued that the "only inference . . . is that the staff judge advocate disagreed with all of the errors that were raised. We agree with this assessment."[94] Staff Judge Advocates should accept direction from the court in this area and satisfy themselves with brief treatments of such defense claims. There is no need to analyze the defense's claims (and considerable risk associated with doing so). Acknowledging the claims, disagreeing, and then recommending no corrective action should be sufficient.

A final wrinkle on the "new matter" issue is when the SJA adds not so much new information (as in the letter of reprimand in *Leal*), but new analysis. This analysis, because it may affect the convening authority's judgment (why else would an SJA offer it?), also must be shared with the defense. In *United States v. Cook*,[95] the SJA wrote two post-trial memos in which he advised the convening authority about the military judge's qualifications and experience, addressed the likelihood of the accused's waiving an administrative separation board, and minimized the effects of a bad-conduct discharge (BCD). The Air Force Court of Criminal Appeals disapproved the BCD, because all of this analysis was obviously new discussion that was outside the record and should have been served on the accused with opportunity to comment.[96]

That same court expressed its displeasure with similar conduct by an SJA that yielded a different result only because of the accused's prior statements. In *United States v. Gonyea*,[97] the SJA bolstered his addendum with the statement that the accused was sentenced "by an extremely qualified and experienced military judge."[98] This clearly was new matter--analysis of extra-record material of which the defense would not reasonably be aware--that was not shared with the defense. The court found that this new matter was "a serious matter" because it violated the notion of "fair play."[99] It did not, however, grant relief, because "we can say with certainty that the error did not affect the outcome."[100]

It is important for critics and practitioners to remember that in *Cook* and *Gonyea*, as in most addendum cases, there is nothing inherently objectionable about the *material* contained in the SJA's memorandum.[101] He is always free to add virtually anything he deems relevant for the convening authority's decision. The danger comes when the SJA chooses to communicate unilaterally with the convening authority, contrary to the *Manual's*

89. *Id.* at 95.

90. In this case, where the accused claimed to have had delivery of his clemency package thwarted by prison authorities, the CAAF looked at the claims of legal error, concluded they were without merit, and affirmed rather than returning the case for a new review and action.

91. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2.

92. 44 M.J. 603 (N.M.Ct.Crim.App. 1996).

93. Sixteenth century Lord Chancellor of England known for his great wit, as well as the ardent faith that resulted in his losing his head when he refused to take an oath of theological loyalty to King Henry VIII. *See* RICHARD MARIUS, THOMAS MORE (1985).

94. *Id.*

95. 43 M.J. 829 (A.F. Ct. Crim. App. 1996).

96. *Id.* at 831.

97. 44 M.J. 811 (A.F. Ct. Crim. App. 1996).

98. *Id.* at 812.

99. *Id.* (citation omitted).

100. *Id*. In this case, the accused's clemency package discussed his alcoholism and the likely loss of veteran's benefits if his BCD remained in place. The addendum did not, *inter alia*, point out that the accused asked for a BCD in lieu of confinement at trial or address his weak performance record.

101. The *Gonyea* court at least implies that bolstering an addendum with an appeal "to the qualifications and experience of the military judge to support his recommendation, rather than simply referring to matters in the record of trial" is not necessarily effective staff work by an SJA. *Id*.

mandate that he provide the defense the opportunity to read and comment. Such practice is objectionable and almost inevitably requires a new post-trial review and action, often by a new SJA and convening authority, a chain of events that serves neither the SJA's client nor the interests of justice.

Philosophical Division: Moving Toward Harmless Error

The extent to which the dispute over the addendum is unresolved and hard to parse is highlighted in an opinion of the Air Force Court of Criminal Appeals released several months after *Welker*. Reflecting but not citing *United States v. Welker*,[102] the Air Force Court of Criminal Appeals held in *United States v. Mark*[103] that an SJA's failure to comment in the addendum on defense allegations of error made in R.C.M. 1105 matters does not entitle the accused to relief when the ignored allegation clearly has no merit. A failure to comment--that is, essentially choosing not to further advise the convening authority--falls on a lesser plain than providing analysis or guidance of which the defense is not made aware. The court relied on *United States v. Hill*,[104] a 1988 CMA opinion. It is instructive to consider the authors of the *Hill* and *Welker* opinions in discerning the guidance to take from the case and the likely direction of the CAAF.

Senior Judge Everett uses his dissent in *Welker* essentially to tell the majority that it has stretched *Hill* beyond its limits. *Hill* involved an SJA's decision not to address the defense's clemency package in the addendum, a case in which the court held that the service courts should be free to affirm (rather than remand) "when a defense allegation of legal error would not forseeably have led to a favorable recommendation"[105] by the SJA in the addendum. In his *Welker* dissent, Judge Everett argues that "I read the opinion in *Hill* most logically to say . . . that [when] an accused's post-trial assertion of error *clearly is without merit*, the accused is not entitled to the hollow gesture of a remand," but that in the close case he should be permitted to make his case to the convening authority.[106] Judge Everett should know how to read "the opinion in *Hill*," because he wrote the unanimous majority opinion in that case. Judge Crawford, author of the *Welker* majority opinion, liberally quotes from *Hill*, but seeks to extend it in a more blanket fashion.

Another 1996 addendum case showed that the CAAF can agree in at least some circumstances that some addendum material is either not new matter or is new but truly inconsequential, so that failure to serve it does not necessarily warrant a new review and action. In *United States v. Jones*,[107] the CAAF showed some inclination to consider the nature of the additional information in deciding whether the failure to serve an addendum containing such "new matter" is harmless error. Here the SJA commented on the slow record production process that precluded the accused from being eligible for an Air Force return to duty program cited by the defense counsel in his clemency submission. The court found that the SJA's citation of key dates regarding record production were "new" but harmless, because the information was "neutral, neither derogatory nor adverse."[108] Citing the regulation was not "new" because the defense counsel had referred to the regulation in substance, though not by name, and the SJA agreed with the defense counsel's interpretation of its effect. Judge Crawford's concurrence was pithier: she agreed that the citation to the regulation was not new matter and considered the other information to be "so trivial as to be harmless."[109]

Welker and *Jones* are symptomatic of more than the mere issue of what kind of SJA addendum error will warrant a remand. They reflect the division on the court regarding how to treat most errors in the post-trial area. The majority of the CAAF opinions continue to interpret government post-trial error strictly, insisting on keeping that part of the process vital.[110] Judge Crawford generally has been in the minority,

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102. 44 M.J. 85 (1996). The *Welker* opinion is dated 29 May 1996, and *Mark* is dated 8 Oct. 1996.

103. 44 M.J. 792 (A.F. Ct. Crim. App. 1996). In this case the defense counsel claimed in R.C.M. 1106 matters that the trial counsel made two errors in his sentencing argument. The SJA failed to address the assertions (both highly dubious) in the addendum, though he did, importantly, advise the convening authority to consider all matters submitted by the defense.

104. 27 M.J. 293 (C.M.A. 1988).

105. *Id*. at 297.

106. *Welker*, 44 M.J. at 91. In fact, Judge Everett's *Hill* opinion does not expressly set out such a middle ground, and such a posture is hard to discern from a reading of the opinion.

107. 44 M.J. 242 (1996).

108. *Id*. at 244.

109. *Id*. (Crawford, J., concurring in the result).

110. Such concern about the true significance of many long-standing procedures is not limited to the post-trial arena. *See, e.g., United States v. Nix*, 40 M.J. 6, in which the CMA found that the a disqualified special court-martial convening authority (because of personal interest in the case) meant that the general court-martial was improperly convened, because "we cannot assume Captain Finta's recommendation had no bearing on the ultimate decision to refer the charges against appellant to court-martial . . . Accordingly, we must assume the recommendation influenced the GCM convening authority's decision to refer the charges to a general court-martial." *Id*. at 8.

insisting that the defense show what it would have presented and how the convening authority's actions would have been different if the convening authority had considered the disputed information or if the defense had the opportunity to respond. *Welker* is the only majority opinion that Judge Crawford has written in the post-trial area in the past two years. In the past year, she dissented several times, each time expressing variations of the theme that won the rare and thin majority reflected in *Welker*.

The Navy-Marine Court was the first to attempt to reconcile the divergent strands in the 1996 addendum opinions with prior case law in the area. In *United States v. Jordon*,[111] the court held that the government's failure to serve the defense with an addendum that included a letter calling the accused a high recidivism risk was improper.[112] The court determined that *Jones* "effectively overruled the *per se* rule in *Narine*,"[113] a 1982 CMA decision that held that the accused must always have the chance to comment on an addendum that contains new matter.[114] The Navy-Marine Court interprets *Jones* to require the appellate courts to "apply a harmless-error analysis in resolving" addendum issues.[115] The court found that the defense likely would have submitted rebuttal material, and because "there is a reasonable possibility that the convening authority might have granted the appellant clemency after considering all the information he *should have had before him*,"[116] it set aside the action and required a new review and action. *Jordon* is an egregious case that begins the process of applying *Jones*, *Leal*, and other recent addendum cases, and it formally retreats from *Narine* in suggesting the "reasonable possibility" test. The court made clear, however, that it still considered the issue to be "a mere violation of a Rule for Courts-Martial."[117] Because of this--*i.e.*, the fact that it is not error of constitutional dimension--the government need not prove the error to be harmless beyond a reasonable doubt; the defense merely must show prejudice "beyond the merely speculative or trivial," and then it carries no further burden of proving harm, but "the Government has the entire burden of rebutting the presumption."[118]

The case also shows that strong defense counsel often will receive the benefit of the doubt when a court is struggling to determine, as Judge Crawford frequently propounds in her post-trial opinions, whether a submission might have made any difference. Here the court pointed in part to the "defense counsel's track record for zealous advocacy," prompting the conclusion that "we have little doubt that he would have objected" to the SJA's failure to serve him with the addendum and "would have provided comments and, perhaps, additional evidence, if given the opportunity."[119] As in most addendum disputes, the government generated the "bad facts" that underlie this decision: sentence was announced July 1994; the PTR was served in October, 1994; and defense matters were received on 1 and 16 December, 1994.[120] Then, more than seven months elapse until the fifteen-page addendum, which included the disputed letter as an attachment, is served on July 25, 1995; the convening authority approved the findings and sentence the following day.[121]

Jordon also is noteworthy for its rejection of the government plea that it apply the *Olano* plain error test, which would require the defense to establish prejudice. The court said that "reliance on *Olano*'s plain-error analysis is inapposite" in a situation in which the defense never had an opportunity to object to the addendum or to make comments.[122]

Clearly the days of the *per se* test for addendum error are gone. Just as clearly, however, the government will not be permitted to blithely ignore the requirement to serve the defense

111. 44 M.J. 847 (N.M.Ct.Crim.App. 1996).

112. The letter, written by a social worker at the United States Disciplinary Barracks, was particularly important because it contradicted trial testimony from a doctor (not clear from the opinion whether a physician or Ph.D.) that the accused was not a danger and helped defeat the military judge's "strongest possible recommendation" that the convening authority suspend the dismissal and one of the two years confinement. *Id.* at 848.

113. *Id.* at 850 (referring to United States v. Narine, 14 M.J. 55 (C.M.A. 1982)).

114. The court noted that the recent change to R.C.M. 1106(f)(7), requiring service of an addendum that contains new matter, derives directly from *Narine*. *Id*. at 848. *Narine*, frequently cited in the past, had required a new review and action any time the government failed to serve an addendum containing new matter, regardless of the nature of the addendum error.

115. *Id.* at 850.

116. *Id.* (emphasis added).

117. *Id.*

118. *Id.*

119. *Id.* at 849.

120. *Id*. at 848.

121. *Id*.

122. *Id.* at 849.

with opinions or documents that substantially undercut a significant part of the defense's case or its plea for clemency.

Minimal Due Process: Serve the Defense

There is no area of post-trial practice in which the equities are more obvious and where misconduct or error by the government is less excusable. Criminal procedure is wedded to the concept of due process: notice and opportunity to be heard. The addendum is the final formal communication between the SJA and the convening authority. When it performs its minimalist function--packaging the defense submissions, and reminding the convening authority of his obligations--there is no requirement to serve the addendum on the defense in advance, because it does not change the picture of the case. When, however, the addendum contains information to which the defense has not had an opportunity to respond, the defense must have that opportunity, or else the government is improperly smuggling information to the convening authority.

As strict as the courts have become regarding defense waiver--requiring timely and precise objections to government misconduct, even in the post-trial area--they tend to be indulgent regarding the addendum, because the defense cannot have known about its contents if it was not served on them. Therefore, the government's risk is greatest here (and easiest to reduce to nothing). The clear message of the past several years, punctuated in 1996 by *Leal* and other cases is this: if the SJA wants to communicate anything to the convening authority, after having received the defense materials, it should be served on the defense unless it is (1) a mere reiteration of the convening authority's rights and obligations in the case (e.g., "you must consider all written matters submitted by the defense"), or (2) a conclusory characterization of or response to the defense materials (e.g., "I have considered the defense allegations regarding trial error and find them to be without merit"). An SJA also owes a convening authority his legal and prudential judgments, when asked for them. He does not, however, have license to orally communicate information or judgments that he would be forbidden from communicating in writing.

In one of the first cases of the new term, the CAAF reinforced this point in a case in which the government generated two huge addendums--and served neither on the defense.[123] In *United States v. Haney*, the SJA generated an addendum that included more than 120 pages of defense submissions that included suggestions of ineffective assistance of counsel.[124] In the addendum, the SJA summarized the defense submission, raised the possibility of ineffective assistance, and concluded that the accused "received a vigorous defense and was competently represented."[125] This document was not served on the defense. A second addendum, centering mainly on a claim that one of the members slept during part of the trial, was generated after a post-trial hearing on the issue; it, too, was not served on the defense.[126]

The CAAF opinion, written by Senior Judge Everett, treated it as a straight "new matter" case, finding that the first addendum, which characterized the defense case, and the second, which dismissed the sleeping member allegations, both contained new matter and should have been served on the defense.[127] All of this led the majority back to *Hickok*, testing the errors for prejudice. Though *Hickok* addressed errors in the PTRs,[128] the majority reiterated one of its favorite post-trial themes, that it "should not speculate that the convening authority would have granted no relief if he had been able to consider appellant's significant and substantive response to the two addenda."[129] It found itself unable to overcome the presumptive prejudice of failure to serve an addendum containing new matter.[130]

In a critical concurrence, Judge Gierke suggested that the sleeping member addendum was not an addendum at all, but akin to a second PTR--either, he acknowledged, would have to have been served, but he said the presumption of prejudice for lack of service, stemming from *Leal* and *Jones* would not apply because the second addendum only responded to a defense claim of legal error, not a traditional clemency petition.[131] In her now-traditional dissent, Judge Crawford ignored the first addendum (the clearer call in this case) and focused only on the second, which addressed the sleeping member claim. While

123. United States v. Haney, No. 93-0157 (CAAF Dec. 17, 1996).

124. Haney's submission said there "were many problems with the evidence that was presented by my attorney and the manner in which he presented what was submitted and what was withheld." *Id*. slip op. at 8. Haney also suggested that his attorney, who had started out as a prosecutor in the case before Haney individually requested him, might not have been fully independent. *Id*.

125. *Id*.

126. *Id*. at 10-11.

127. *Id*. at 12, 13.

128. *See generally* text accompanying notes 7-26.

129. *Haney*, slip. op at 15.

130. *Id*. (citations omitted).

131. *Id*. at 21 (Gierke, J., concurring).

agreeing that the failure to serve this addendum was error, Judge Crawford pointed out that "both the prosecutor and the defense counsel agreed with the military judge that such an allegation was untrue. Thus, service of the second addendum for a defense response would now be a futile exercise."[132] Judge Cox's short, witty but unilluminating concurrence suggests that an addendum "is either redundant and not necessary, or is always new matter."[133] In this case he found it was "clearly significant, and thus . . . should have been served,"[134] suggesting, with no further detail, a "significance" overlay to the "new matter" definition in the *Manual* and case law.

Haney is still another example of the recent travails of the post-trial process: government sloppiness, a splintered CAAF, and the appearance that no real relief ultimately will go to the accused. Major Haney was tried in November, 1989. The CAAF opinion came more than seven years later. The case will receive a new review and action sometime this year and, in all likelihood, the original findings and sentence will be affirmed by CAAF late in 1997, about eight years after a court of mainly awake Air Force officers sentenced him to confinement and a dismissal. Form is not unimportant, and it is glib to characterize the post-trial process as form over substance--relief *should be* relatively infrequent, given all the checks in the process--so it is important to the integrity of the system that the government scrupulously follow the rules, even when relief is relatively rare. Still, neither justice nor the appearance of justice is served by such a labyrinthine path. The PTR (which should not have taken eleven months to generate) explained the offenses of which Major Haney was convicted. The addendum appears to have been a well-assembled, comprehensive product. It simply should have been served on the defense. Now, the five-person CAAF generated four opinions: a three-man majority found that the government committed prejudicial error in failing to serve two separate addendums, each of which contained new matter, on the defense; one concurrence found that one addendum contained new matter for different reasons than the majority, and was reluctant to call the second document an addendum at all; another judge found the second document to be an addendum that should have been served, but found harmless error; another judge pulled out the dictionary to suggest that addendums inherently contain new matter, but then obliquely inserted another standard--"clear significance"--for measuring the significance of new matter that requires service on the defense. Small wonder practitioners feel bereft of guidance from the appellate courts in this area.

Practitioners must keep in mind three essentials regarding the addendum: (1) new matter will be strictly construed against the government, erring in close cases on the side of characterizing disputed information as new matter; (2) new matter must always be served on the defense, which must have time to comment; (3) the government must address defense claims of legal error, but it may dismiss them with virtually no analysis. The CAAF already has heard arguments in three addendum-related cases for this term, so practitioners can look forward to additional reinforcement of the message.[135]

Convening Authority Action

After considering the defense submissions and the SJA's addendum, the convening authority takes initial action on a case, approving or altering the findings and sentence.[136] In no area is the distinct nature of the military justice system more clearly on display than in the convening authority's action. Some areas of military practice have at least some loose parallels to the civilian world (e.g., the frequently cited and abused equivalence between an Article 32 investigation and a grand jury), but it is hard to find anything quite like the plenary and unreviewable right of the officer who convened the court to do anything regarding the findings and sentence except make them harsher.[137] In a case in which the Navy-Marine Court again contributed a decision of noteworthy clarity, the court wrote that the "convening authority's action on the results of a court-martial is a substantive exercise of power over the results of a court-martial."[138] The convening authority has "unique and absolute control over the fate and future of convicted servicemembers," empowering him to "disapprove the guilty findings and the sentence, or any part thereof, for any or no reason, legal or otherwise."[139]

The biggest change regarding the convening authority's action this past year came about as a result of a legislative change, designed to bring the UCMJ in line with the *Manual*. The *Manual* always has required defense submissions to be in writing, but the UCMJ simply spoke of "matters" submitted by the accused,[140] raising the perennial question about whether non-written matters, most typically videotapes, must be consid-

132. *Id.* at 23.

133. *Id*. at 18 (Cox, J., concurring).

134. *Id*.

135. On 4 February 1997, the Court heard argument in *United States v. Chatman*, No. 96-0306/AF, *petition granted*, 44 M.J. 63 (1996), in which the issue is whether the staff judge advocate erred, in violation of RCM 1106(f)(7) and to the prejudice of the accused, by including new matter in the addendum and failing to serve the accused with new matter so that he was deprived of the opportunity to respond. On 5 February 1997, the CAAF heard argument in *United States v. Buller*, No. 96-0232 (A.F. Ct. Crim. App. 1996) on the same issue as in another Air Force general court-martial: whether the SJA erred by including new matters in the addendum without serving it on the accused. The issue in *United States v. Catalani*, No. 96-0875 (A.F. Ct. Crim. App. 1996), an Air Force special court-martial, is whether the addendum was defective in (1) failing to direct the convening authority to consider the accused's clemency matters, and (2) injecting "new matter" not provided to the defense counsel for comment.

136. *See* UCMJ art. 60 (1988); MCM, *supra* note 2, R.C.M. 1107.

ered by the convening authority. Last February's amendments to the UCMJ removed the ambiguity by adding a sentence to the UCMJ, to make it consistent with the *Manual*. Article 60, UCMJ, now reads, in part: "The accused may submit to the convening authority matters for consideration . . . with respect to the findings and the sentence. *Any such submission shall be in writing.*"[141]

Because the convening authority's action is so important, the documents on which the action hinges, especially the post-trial review and addendum, are of great consequence. Many of the recent decisions challenge the courts to gauge the gravity of an error involving one of these documents, measuring the error against the document's inherent significance. While the courts have found harmless error from time to time, this should not embolden government practitioners to try to "work the system" to exploit these possibilities; the harmless error analysis is not sufficiently consistent, and the government should willingly shoulder the responsibilities of the post-trial phase in the interests of serving convening authorities and the system of justice.

Coast Guard Court Sees Many Actions

The Coast Guard Court issued several rulings regarding convening authority action that, while not binding on the other services, offer instructive scenarios and sensible resolutions, along with helpful analysis.

One common concern is creating a paper trail that makes clear that the convening authority considered all matters properly presented before taking action. In *United States v. Garcia*,[142] the government presented an affidavit from the SJA swearing that the defense clemency package was delivered to and considered by the convening authority before he took action. The court found this was adequate to comply with the requirement of Article 60 that the convening authority consider defense submissions.[143] The court, in guidance that all services would do well to follow, said it was ideal that convening authorities write "considered" on the matters and initial and date them. It made clear, however, that such a practice is not required to enable the court to apply a presumption of regularity, which it did in this case.[144]

In *United States v. Bright*,[145] the court found that the convening authority's right to consider "[s]uch other matters as the convening authority deems appropriate"[146] includes, in this instance, a letter from the accused's estranged wife, when the defense was given a copy and time to reply.[147] The defense did not respond to this letter. The SJA advised the convening authority that he was submitting the mother's letter "in the spirit" of the DOD Victim and Witness Assistance Program.[148] The defense asserted that she was not really a victim of the accused's larcenies and that the letter alleged unrelated misconduct.[149] The court skirted the victim-witness argument, emphasizing that the UCMJ and *Manual* place no limitation on what the convening authority may consider, as long as the informa-

137. "The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." MCM, *supra* note 2, R.C.M. 1107(d)(1). In his concurring opinion in a recent case, Chief Judge Cooke of the Army Court reinforced the plenary power of a convening authority to take any action he pleased regarding findings and sentence. "Under such circumstances," he wrote, "the convening authority is free to approve, in his discretion, whatever sentence he deems appropriate . . . limited only by the maximum punishments authorized by the Manual . . . ." *United States v. Carroll*, No. 9501522, slip op. at 9 (Army Ct. Crim. App. Jan. 27, 1997) (per curiam) (Cooke, C.J., concurring). Chief Judge Cooke also suggested that when the convening authority is not acting in his unchecked realm as convening authority but in a quasi-appellate role of adjusting a sentence after correcting a legal error, he should follow the dictate of *United States v. Sales*, 22 M.J. 305, 307 n.3 (C.M.A. 1986) and only approve a sentence that a court reasonably would have adjudged (based on the altered findings). *Id.* In such circumstances, Chief Judge Cooke wrote that the service courts have a clearer obligation to review that decision and to adjust the sentence under the court's mandate, under Art. 66(c) to "only affirm such sentence which we find 'correct in law and fact . . . .'" *Carroll*, slip op. at 10.

138. United States v. Cunningham, 44 M.J. 758 (N.M.Ct.Crim.App. 1996) (en banc).

139. *Id.* at 762 (citations omitted).

140. *See* MCM, *supra* note 2, R.C.M. 1106(f)(4) ("Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation . . ."); R.C.M. 1105(b) ("The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision . . .").

141. 10 U.S.C. § 860(b)(1), as amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) (emphasis added).

142. 44 M.J. 748 (C.G.Ct.Crim.App. 1996).

143. *Id.* at 749.

144. *Id.*

145. 44 M.J. 749 (C.G.Ct.Crim.App. 1996).

146. MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii).

147. *Bright*, 44 M.J. at 751.

148. *Id.*

tion is served on the accused and counsel, who receive a chance to reply. "[W]hile appellant may be correct that the letter from his wife does not qualify as one from a victim, consideration by the convening authority was not dependent on that rationale."[150]

As in so many post-trial cases, the defense complaint also was tardy. The court said the defense "should have made that challenge known at the time the letter was served on him, not for the first time on appeal."[151] The *Bright* scenario is not an uncommon one. Especially in this time of increasingly high stakes or highly publicized cases, convening authorities and SJAs receive "over the transom" submissions from time to time. It is clear that convening authorities must not consider these items without disclosing them to the defense, but they are free to consider them--falling broadly under the R.C.M. 1107(b)(3)(B) rubric of "additional matters"[152]--so long as the defense gets the chance to read them and respond. The Coast Guard Court suggested that "there may be limitations on what the convening authority may consider" beyond those stated in the *Manual* or UCMJ.[153] Because it based its decision on waiver, the court did not expressly find that the letter from Bright's wife was properly considered by the convening authority. The court observed that "no particular standards for what may or may not be considered are set forth in the" UCMJ or *Manual*,[154] though it later suggested that the letter was properly "within the discretion of the convening authority whether he considered" it under the victim-witness rubric "or some other."[155]

The case contained an additional instructive wrinkle. After the convening authority took action, but before notice or publication, the convening authority received a letter sent to him directly from the accused's mother. The mother's letter contradicting the letter from Bright's wife. The SJA did not provide the letter from the accused's mother to the defense, but did give it to the convening authority, telling him of his right to recall and modify his action[156] (he chose not to do so). The mother's letter was somewhat atypical in its timing, as such matters rarely arrive in the relatively short time between taking action and publishing it or giving notice to the accused. It is only in that narrow time window that the convening authority retains the right to recall and modify his decisions with no limitations;[157] after publication or notice he may only make modifications that are not "less favorable to the accused than the earlier action."[158]

Finally, in *United States v. Haire*,[159] the court stated what has since become indisputable: that a convening authority is not required to give a personal appearance to an accused. In *Davis*, the court had held that a convening authority must consider a videotape, a viewpoint clarified by the February 1996 change to the UCMJ that makes clear that convening authorities are only required to consider "written" materials submitted by the defense.[160] In *Haire*, the court said that the obligation only extends to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority."[161]

To Err is Human, To Fix it Must Be Done Early

The *Manual* drafters long have recognized that not all actions come out right the first time. Sometimes there are mere clerical errors such as inaccurate personal data, and sometimes

149. *Id.*

150. *Id.*

151. *Id.*

152. Before action, the convening authority may consider "[s]uch other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." MCM, *supra* note 2, R.C.M. 1107(b)(3)(B)(iii).

153. *Bright*, 44 M.J. at 751. The court gave no indication of what those limitations might be or the source for them.

154. *Id.* at 750.

155. *Id.* at 751.

156. MCM, *supra* note 2, R.C.M. 1107(f)(2) (permitting a convening authority to "recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action.").

157. *Bright*, 44 M.J. at 751.

158. *Id.*

159. 44 M.J. 520 (C.G.Ct.Crim.App. 1996).

160. *See supra* note 107.

161. *Haire*, 44 M.J. at 526.

important matters such as discharge or confinement are misstated. The *Manual* permits convening authorities to call back erroneous actions and fix them.[162] A recent Navy case illustrates the limitations of the correction provisions. The convening authority action in *United States v. Smith*,[163] which included accused and defense counsel on the distribution list, contained numerous errors.[164] Later, the government purported to correct the action with a document entitled "corrected copy." It is unclear when or how this document, generated "long after the record had been forwarded . . . for review,"[165] was promulgated. The *Manual* clearly restricts the convening authority's plenary right to make any changes to the action to the time "before it has been published or before the accused has been officially notified."[166] Because of the *Manual*'s clear prohibition, the attempt in *Smith* to alter the action long after forwarding it meant that "the attempted correction was a nullity."[167]

The Navy-Marine Court continues to chide practitioners about the consequences of their actions in the post-trial arena. The *Smith* opinion was written by Judge Dombrowski and joined by Judge Lucas, both of whom were in the *Cunningham* majority. In this case the opinion concludes with the reminder that "words very often have rather precise meanings and consequences,"[168] and "processing and review of courts-martial could quickly become chaotic"[169] without respecting clear rules on who has authority to act on a case at what time and the extent of that authority. The court continued: "The failure to carefully craft the appropriate language and to proofread legal documents does an enormous disservice to the client being served and wastes scarce resources in the rework required to correct defects."[170]

Practitioners simply must follow R.C.M. 1107 as scrupulously as possible. The Drafters could significantly improve this provision by defining the terms "publication" and "notice." In the meantime, cases such as *Smith* are easy; after an action has left the installation, the convening authority has forfeited his right to act on it, and that cannot be skirted by republishing an altered action under the guise of its being a "corrected copy."

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162. *See* MCM, *supra* note 2, R.C.M. 1107(f)(2).

163. 44 M.J. 788 (N.M.Ct.Crim.App. 1996).

164. The most significant errors were that the action reflected a BCD, instead of the adjudged dishonorable discharge, and it said "SPECIAL" court-martial instead of general court-martial. *Id*. at 789.

165. *Id*. at 790 (footnote omitted).

166. MCM, *supra* note 2, R.C.M. 1107(f)(2).

167. *Smith*, 44 M.J. at 791.

168. *Id*.

169. *Id*.

170. *Id*.

Conversion, Suspensions and Vacations

The seemingly contrary trends toward fewer courts-martial[171] but harsher sentences[172] has renewed emphasis and attention on the convening authority's power to convert and suspend sentences.[173]

It is important to remember that there is no rigid equation for converting sentences.[174] While no part of a sentence may be converted to a punitive discharge if a punitive discharge is not adjudged,[175] there is no precise formula for converting punitive discharges to confinement, especially when the conversion comes pursuant to an open-ended request by the defense. In *United States v. Carter*,[176] the convening authority lawfully converted a sentence that included a bad-conduct discharge and 12 months' confinement to 24 *additional* months' confinement (and equivalent but uncollectable forfeitures) in response to a defense request that the accused be permitted to retire. The CAAF reinforced the convening authority's virtually plenary power to grant clemency, while reminding practitioners that the commutation must be truly clement, "not 'merely a substitution'" of sentences.[177] There was no issue in this case, the unanimous court held, because the BCD was disapproved, giving the accused his stated wish to be permitted to retire, saving the $750,000 he had cited as a potential loss of retirement income.

Most important for practitioners is the fact that the defense neither set any conditions on the commutation (e.g., setting a cap on confinement he was willing to endure),[178] nor protested the commutation in the post-trial submission to the convening authority.[179] It was, in all likelihood, a conscious and intelligent decision by the defense. If, in fact, it was most important to the accused, a retirement-eligible Air Force master sergeant, that he remain eligible to retire,[180] it was wise bargaining not to set a condition--e.g., I will accept a conversion of no more than 12 additional months' confinement. Obviously, the court had little sympathy for Carter's getting the benefit of his request and then later complaining that the benefit was too taxing.[181]

The issue of fines is likely to gain added attention in coming years, because there is no longer much flexibility in the realm of traditional forfeitures, and accused soldiers will seek some way to accept a finite, quantifiable portion of a sentence that leaves little stigma and least affects their future earnings potential. In *United States v. Lee*,[182] the Navy-Marine Court held that it was permissible to include a fine as part of a converted sentence. The court held that a sentence that includes a fine is not

171. The rate of general courts-martial per 1000 soldiers was 1.60 per thousand in FY 1996, almost exactly the same as it has been for the past four years. The rate of general courts-martial remains relatively high by historical standards (about double the rate of the 1970s and 1980s), but the reduction in court-martial load is better reflected by the dramatic drop in BCD special and "straight" special courts-martial, which have dropped by more than two-thirds from the rate in the 1970s and 1980s. All figures are from the United States Army Clerk of Court's Office, Falls Church, Virginia.

172. The average sentence for Army prisoners entering the United States Disciplinary Barracks at Fort Leavenworth, according to the Director of Inmate Administration, was 2.2 years in 1982; and in 1996 it was 14.7 years. This reflects, *inter alia*, that two trends have converged: dramatically fewer trials and lower overall court-martial rate with an increase (and later cresting) of the general court-martial rate. In short, the military is trying fewer cases, but of greater gravity, more "felonies" and many fewer "misdemeanors."

173. Convening authorities have the power, under UCMJ, art. 64(c)(1)(B) and R.C.M. 1107(d)(1), to commute sentences so long as the severity of the sentence is not increased.

174. R.C.M. 1103(b)(6), (7) provides guidance for converting certain restrictions on liberty.

175. A punitive discharge must be adjudged by a court. If it is not part of the adjudged sentence, it cannot arise as a result of a conversion. All other components of a sentence may be part of a conversion even if not part of the original sentence. *See* United States v. Barratt, 42 M.J. 734, 735 (Army Ct. Crim. App. 1995) ("a punitive discharge, as a matter of law, is not a lesser included punishment of confinement"). *See also* R.C.M. 1107(d)(1) Discussion.

176. 45 M.J. 168 (1996).

177. *Id*. at 170 (citation omitted).

178. The court noted that the accused "requested commutation of the bad-conduct discharge to confinement without setting any conditions as to the length of confinement to be substituted." *Id*.

179. In addition, the court wrote, the accused "entered no protest when the SJA recommended this action to the convening authority." *Id*. at 171. Presumably the SJA recommended the conversion in the PTR, which was served on the accused. The CAAF cites R.C.M. 1106(f)(4), the provision that permits the defense to respond to the PTR, following the above sentence, implying that the defense was on notice of the recommended conversion in the PTR.

180. In his submission to the convening authority the accused wrote: "Sir, if it means serving more confinement time in order that I may retain my retirement, then so be it. I will serve more confinement in exchange for the opportunity to retire from the Air Force." *Id*. at 170-71.

181. Judge Sullivan, who is not shy about suggesting changes to the justice system (*see, e.g.*, United States v. Boone, 42 M.J. 308, 314 (Sullivan, C.J., dissenting) in which he observed that the military's sentencing process was so stilted that "[p]erhaps it is time to have 'truth in sentencing'"), concluded the unanimous opinion with the suggestion that "a more formal notice procedure might be appropriate," but that is more a matter of comity than anything that would have affected this case in particular. *Id*. at 171.

182. 43 M.J. 794 (N.M.Ct.Crim.App. 1995).

necessarily more severe than one that includes forfeitures. In this instance, the convening authority reduced the accused's confinement from 18 months to 12 months, and total forfeitures (which the court calculated at about $5,800) was converted to a $5,000 fine. As in *Carter*, it was especially significant that the conversion came at the request of the accused.[183] This case predates the April 1996 change to the forfeiture provisions, which likely changes the analysis in cases that involve total forfeitures as a matter of law. Counsel need to think carefully when seeking to convert any part of a sentence to a fine, which is always a lawful punishment, because a fine becomes an immediate debt to the U.S. Treasury. Neither *Carter* nor *Lee* presumes to set out a formula, but in the context of these cases, the conversion was permissible.

A recent Navy case reinforces the indisputable point that convening authorities possess the power to suspend sentences, while making clear that a sentence cannot be suspended until it is approved by the convening authority in the initial action. As a general rule, misconduct *anytime during a period of suspension* may be a basis for vacating a suspension, though a hearing must be conducted by the special court-martial convening authority, who must then make a recommendation to the general court-martial convening authority, who makes the decision.[184] In *United States v. Perlman*,[185] the convening authority acted to vacate the suspension in the period between the trial and the initial action. While emphasizing that a convening authority cannot vacate a suspension until he acts on the sentence, the court also noted that parties to a pretrial agreement may agree that the suspension itself will begin on the date of sentence (or any other date).[186] Therefore, the dispute will not concern whether the subsequent misconduct fits into the proper time window, but only whether it constitutes a violation of the suspension provisions. "It is doubtful that such substantial due process rights [as the right to a hearing on vacating a suspension] may be waived in a pretrial agreement,"[187] the court held. "All of the procedural requirements for vacating a suspension [mainly a hearing held by the special court-martial convening authority] can be accomplished prior to the convening authority's action except for the order from the OEGCMJ[188] vacating the suspension . . [;] until that point there is no suspension to vacate."[189] The dissent argued that an accused should be able to waive this process as part of a pretrial agreement.[190]

Placing a Clemency Recommendation on the Record

While clemency remains the exclusive province of convening authorities, these officers are free to consider recommendations made by anyone. A 1995 change to the *Manual* obliges SJAs to include in the PTR any clemency recommendation "by the sentencing authority, made in conjunction with the announced sentence."[191] The right of the panel or individual members to make such a recommendation is not new. What is unresolved is the number or percentage of members who must concur in a clemency recommendation for it to qualify as a recommendation of "the sentencing authority." In *United States v. Weatherspoon*,[192] the CAAF pointed out that the *Manual* does not require a threshold minimum before a panel's clemency recommendation qualifies as "official." In this case, the court did not have to rule on the validity of the trial judge's instruction that three-fourths must concur in the clemency recommendation, because only three of nine members did so, meaning that under virtually any interpretation of the term, it would not qualify as the recommendation of a "court-martial."[193] Still, the court implored the drafters of the *Manual* "to consider recommending to the President an amendment to an appropriate [R.C.M.] that will address . . . [w]hat percentage of the members . . . must support a recommendation for clemency before it becomes the recommendation of 'the court-martial.'"[194]

Courts in a box: how to fashion "meaningful relief"

The futility of fashioning meaningful post-trial relief was highlighted in a recent decision by the Army Court of Criminal

183. "Even if we were not convinced that the approved sentence was not more severe than the adjudged sentence, it was the appellant himself who proposed the sentence that was finally approved. He is the one who brought up the fine as a possible punishment in exchange for a reduction of his confinement, elimination of the forfeitures and a mitigation of his discharge." *Id*. at 800.

184. *See* MCM, *supra* note 2, R.C.M. 1109(d).

185. 44 M.J. 615 (N.M.Ct.Crim.App. 1996).

186. *Id*. at 616.

187. *Id*. at 617.

188. Officer Exercising General Court-Martial Jurisdiction, the sea services' abbreviation for General Court-Martial Convening Authority or GCMCA.

189. *Perlman*, 44 M.J. at 617 (citation omitted).

190. *Id*. at 618 (Keating, Sr. J., dissenting).

191. MCM, *supra* note 2, R.C.M. 1106(d)(3)(B).

192. 44 M.J. 211 (1996).

193. *Id*. at 214.

Appeals. Most commonly, courts will grant relief in one of the areas that is unaffected by error or the passage of time. Courts have extended forfeiture relief, but their ability to craft meaningful relief in this area was curtailed in April 1996 when the statutory change to the forfeiture rules took effect, essentially barring convicted soldiers from receiving pay after the convening authority approves their sentences.[195] In *United States v. Collins*,[196] a special court-martial, the accused was sentenced to six months' confinement, forfeitures, reduction to E-1 and a BCD. The convening authority approved the BCD and reduction to E-1. Exercising his clemency power (not pursuant to a pretrial agreement), he approved only three months' confinement and disapproved the forfeitures. The accused's release date from a three month sentence, computed after giving credit for "good time" earned in jail, ended up being five days *before* the convening authority took action.[197] By the time the government figured out its error and notified the confinement facility, the accused served 22 extra days. The opinion provides an excellent, detailed discussion of the court's normal requirement to afford "meaningful relief." Such relief, however, must be "proportional to the error," and the court stressed that "[e]ven error of Constitutional dimension does not necessarily require disapproval of a punitive discharge when no other meaningful sentence relief is possible."[198]

The unanimous court, in an opinion written by Judge Cairns, acknowledged that in this instance disapproval of the BCD would be "the only meaningful relief . . . [but it] would be totally disproportionate to the harm suffered, would provide the appellant a major windfall, and would be too drastic a remedy in light of the seriousness of appellant's misconduct."[199] The court acknowledged the "serious harm" of loss of liberty, but said there was no "bad faith or intentional desire to punish" the accused.[200] In fashioning a remedy, the court started from the assumption that "[a] bad-conduct discharge is far more severe than twenty-two days of confinement," which "was relatively short and certainly more transient in nature."[201] In this case, the court also considered the irony that the accused was held beyond his release date "as a direct result of the convening authority's decision to grant clemency . . . compounded by the staff judge advocate's failure to appreciate the effect of the good time rules and to advise the confinement facility in a timely manner."[202] The court balanced all this against "the sordid details of appellant's misconduct and the significant impact on the victim" in concluding that "disapproving the BCD would be a grossly disproportionate remedy and would fail to vindicate society's interests."[203] Because the convening authority already had disapproved forfeitures, the court disapproved the adjudged confinement that already had been served.

Conclusion

The clearest message to practitioners is a dull but important one: the post-trial stage remains a vital one of great *potential* consequence. Government errors will trigger the ire of the courts but in some circumstances will not yield substantive corrective action when the courts find the error would not have affected the outcome. Future disputes are likely to center on the question of under what circumstances a reviewing court can find harmless error, while protecting the integrity and vitality of the post-trial process. Defense attorneys are expected to craft timely and unique submissions in which they object at the time closest to the making of an error. If a trial error is not raised in the R.C.M. 1105/1106 submissions and post-trial errors are not timely raised, courts are extremely unlikely to entertain protests later.

CAAF has the opportunity to resolve the tensions implicit in many of the recent post-trial opinions, which critics or cynics could characterize on one extreme as conflating an essential codal process into quasi-constitutional dimensions, and on the other extreme contributing to the evisceration of one of the unique procedures carefully created to give maximum protection to court-martialed soldiers.

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194. *Id.* n.2. The court also suggested that perhaps there need not be a recommendation "of the court-martial," so long as the members announced "the number who support the recommendation." *Id*.

195. As of 1 April 1996, Art. 58b, UCMJ, requires maximum forfeitures (*i.e.*, total forfeitures at a general court-martial, two-thirds at a special court-martial) for those receiving sentences of more than six months confinement or any confinement along with a punitive discharge or dismissal.

196. 44 M.J. 830 (Army Ct. Crim. App. 1996) (opinion of the court on remand).

197. *Id.* at 833.

198. *Id.*

199. *Id.* at 833-34.

200. *Id.* at 834.

201. *Id.*

202. "Had the convening authority not granted clemency, the appellant would not have been harmed." *Id.*

203. *Id.*