Pyrrhic Victories[1] and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility

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Introduction

Sometimes, in winning a battle you may lose the war. This has certainly been the case in the past year in the areas of mental responsibility and discovery. Though there have been few cases in these areas, the themes that arise are ones trial counsel ignore at their peril. The first theme speaks of trial counsel's duty to seek justice, not to oppose automatically defense motions at all costs. The second addresses trial counsel's duty to seek out and to disclose favorable, material evidence to the defense.

Notwithstanding the appellate costs of pyrrhic trial victories in mental responsibility and discovery, trial counsel in the Sixth Amendment arena have enjoyed the ever-broadening hearsay rule exceptions in child sex abuse cases. The Sixth Amendment is an area which encompasses crucial trial rights for a criminal accused. The trifold rights of the Confrontation Clause, the Compulsory Process Clause, and the Counsel Clause define the basic elements of a fair trial.[2] This year, as in years past, the Confrontation Clause in child sex abuse cases transmogrifies what are normally simple hearsay evidentiary issues into weighty Constitutional arguments. The courts also have looked at issues involving the Compulsory Process Clause and, in so doing, have reminded defense counsel that the right to present a defense is not absolute. In the effective assistance of counsel area, the Court of Appeals for the Armed Forces (CAAF) has returned to *closely* scrutinizing defense counsel's performance in the post-trial arena and has created new standards in the process.

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."[3]

The Confrontation Clause, Hearsay, and Child Sex Abuse

When the trial counsel attempts to introduce an out-of-court statement of a witness under a hearsay exception, and the witness does not testify at trial, the Confrontation Clause is implicated. Beginning with *Ohio v. Roberts*[4] and its progeny,[5] the Supreme Court has fashioned a methodology for analyzing the constitutionality of such out-of-court statements. When the Confrontation Clause is not at issue, military courts deviate from this methodology and consider additional factors, such as corroborating evidence. This article reviews the military jurisprudence in this area and several new cases in the Sixth Amendment areas of residual hearsay and child sex abuse.

Unfortunately, counsel find themselves involved in child abuse cases with increasing frequency. These cases present not only painfully human issues in the pretrial and trial stages, but also constitutional issues when the child witness either is not available to testify at trial or is reluctant to face the accused in the courtroom. It is important for military practitioners to understand that there are two analyses. One analysis applies when the Confrontation Clause is implicated, and a different evidentiary analysis applies when the Confrontation Clause is *not* implicated.

Child victim cases often involve extensive hearsay testimony because the child and the perpetrator are often the only witnesses to the crime. At trial, the child frequently claims not to remember, recants, or is simply too young to provide an articulate statement under oath. In such situations, the prosecution may seek to admit videotaped interviews of the child or statements the child made to a babysitter, caregiver, or other person.

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1. From the victory of Pyrrhus, King of Epirus (319-272 B.C.), over the Romans at Asculum in 279 B.C. "A victory won at a staggering cost." WEBSTER'S II, NEW RIVERSIDE UNIVERSITY DICTIONARY (1994).

2. The Supreme Court wrote in *Strickland v. Washington*, "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment including the Counsel Clause . . . ." 466 U.S. 668, 684 (1984).

3. U.S. CONST. amend. VI.

4. 448 U.S. 56 (1980).

5. *See* White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986).

Such out-of-court statements that do not fall within a firmly rooted hearsay exception are presumptively unreliable.[6]

Confrontation Clause issues arise when the child witness *does not testify at trial*, and thus, the defense has no opportunity to cross-examine the witness. Simply put, the "main and essential purpose of confrontation is to secure the opponent the opportunity of cross-examination."[7] Notwithstanding an absent child witness, however, the Confrontation Clause is satisfied when the out-of-court statement falls within a firmly rooted hearsay exception.[8] The Supreme Court has recognized that excited utterances (Military Rule of Evidence 803(2)[9]) and statements made for the purpose of medical diagnosis and treatment (Military Rule of Evidence 803(4)[10]) are firmly rooted.[11] These two oft-used exceptions have been substantially broadened in child sex abuse cases.[12]

If the statement is not a firmly rooted hearsay exception, the Supreme Court methodology dictates that the prosecution must produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.[13] Even if the prosecution demonstrates that the declarant is unavailable, the statement is inadmissible for Confrontation Clause purposes unless there are adequate indicia of reliability evidenced by a showing of particularized guarantees of trustworthiness.[14] The particularized guarantees of trustworthiness must be shown from the totality of the "circumstances surrounding the making of the out-of-court statement and not from subsequent corroboration of the criminal act."[15]

Residual Hearsay and Statements to the Police

Another hearsay exception frequently used in child sex abuse cases is the residual hearsay exception.[16] This exception is *not* firmly rooted.[17] This exception was created to provide flexibility in new and unanticipated situations. Because it is not firmly rooted, however, it is presumptively unreliable,[18] and the

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6. *Wright*, 497 U.S. at 818.

7. Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting WIGMORE, EVIDENCE § 1395 (3d Ed. 1940)).

8. *White*, 502 U.S. at 356-57 (stating, "[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the integrity of the factfinding process."). *See id*. at 355-56 (observing that statements "made in contexts that provide substantial guarantees of their trustworthiness" are firmly rooted, because their "reliability cannot be recaptured even by later in-court testimony"). Though the Supreme Court has not spoken explicitly on *each* hearsay exception, it has specifically listed a few as firmly rooted hearsay exceptions. *See id*. at 356-57 (listing as firmly rooted spontaneous declarations and statements made in the course of securing medical treatment); *Bourjaily*, 483 U.S. at 182 (listing as firmly rooted statements of a co-conspirator made in the course and in furtherance of the conspiracy). Professors Saltzburg, Schinasi, and Schlueter posit that Military Rules of Evidence 803(1) through 803(23) are all firmly rooted hearsay exceptions. STEPHEN A. SALTZBURG ET. AL., MILITARY RULES OF EVIDENCE MANUAL 972 (4th ed. 1997).

9. MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 803(2) (1995) [hereinafter MCM].

10. *See id*. MIL. R. EVID. 803(4).

11. *White*, 502 U.S. at 356-57.

12. In regard to excited utterances in child abuse cases, courts have noted that time delay alone is not as dispositive in determining whether the statement is an excited utterance. Military courts and federal courts are willing to consider a longer delay in child sex abuse cases. *See* United States v. Arnold, 25 M.J. 129 (C.M.A. 1987); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (holding that the lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of 803(2)). *But see* United States v. Grant, 42 M.J. 340 (1995).

The medical diagnosis and treatment exception has been broadened for children as well. *See* United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (observing that the identity of the defendant as the sexual abuser was necessary to therapeutic treatment of the victim, because effective treatment may require that the victim avoid contact with the abuser and because the psychological effects of sexual molestation by a father or other relative may require different treatment than those resulting from abuse by a stranger, so that the victim's statements to a psychologist concerning the identity of the abuser were admissible under exception to the hearsay rule). *See* State v. Robinson, 735 P.2d 801, 809 (Az. 1987) (asserting that identity and "fault usually are not relevant to diagnosis or treatment . . . . This general rule, however, is inapplicable in many child sexual abuse cases because the abuser's identity is critical to effective diagnosis and treatment").

13. Ohio v. Roberts, 448 U.S. 56 (1980).

14. Idaho v. Wright, 497 U.S. at 805 (1990).

15. *Id.* at 821 (identifying five non-exclusive factors to consider when determining whether the circumstances surrounding the making of the statement are reliable: spontaneity, consistent repetition, mental status of the declarant, terminology atypical of a child that age, and motive to lie).

16. *See* MCM, *supra* note 9, MIL. R. EVID. 803(24), 804(b)(5). These exceptions are known as the "catch-all" exceptions. Note that Federal Rules of Evidence 803(24) and 804(b)(5) have been combined and transferred to a new Rule 807, effective 1 December 1997. *See* FED. R. EVID. 807. Military Rule of Evidence 1102 directs that "[a]mendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendment unless action to the contrary is taken by the President." MCM, *supra* note 9, MIL. R. EVID. 1102.

17. *Wright*, 497 U.S. at 818.

proponent must "demonstrate a trustworthiness consistent with that required under other specifically stated exceptions."[19] Prosecutors often resort to this exception because it may be the only avenue of admission in a child sex abuse case.

The CAAF has been cautious about admitting statements made to law enforcement officers.[20] In *United States v. Cabral*,[21] however, the court upheld the admission of a videotaped statement made to a law enforcement agent. *Cabral* involved the introduction of a videotaped interview of a four-year-old girl to an Office of Special Investigations (OSI) agent; the videotape was made nine days after the abuse occurred. The young girl was unable to testify at trial, and the military judge deemed her unavailable.[22] The judge also found that the videotaped interview bore the requisite particularized guarantees of trustworthiness.

The CAAF agreed that the young girl was unavailable and also upheld the use of the videotaped statement. In evaluating the trustworthiness of the statement, the court noted that there were several factors that lent "abundant" indicia of reliability to the videotaped statement: it was spontaneously made (non-leading questions were used), there was consistent repetition (the child's story did not change throughout the interview), the four-year-old victim used child-like terminology in explaining events, and there was a lack of motive to fabricate.[23] In addition, the court looked to the videotape itself for further indicia of reliability and found that the videotape "provided the members with the opportunity to view the child's demeanor, her confusion on occasion, and her communication skills."[24]

Practice Tips for Counsel—Videotapes

When attempting to introduce videotaped statements, counsel for both sides should be mindful of Judge Effron's instructive concurrence in *Cabral.* He was concerned about the "particular susceptibility of young children to suggestion and manipulation in the interview process, an issue which has been noted by a number of commentators."[25] Specifically, law enforcement personnel may often employ interview techniques which undermine the reliability of the entire process to such an extent that the child's memory of the event may be distorted or tainted.[26]

In *Cabral*, the OSI agent failed to videotape a twenty-minute "rapport session" that took place immediately before the taped interview. This "rapport session" was especially troublesome because "it is essential that any contact with a child, including a 'rapport' session, not taint a subsequent interview."[27] In this case, the defense did not raise the issue of the "rapport session." Had it done so, it may have been able to infuse "serious questions about the guarantees of trustworthiness of this interview."[28]

18. *See id*. at 817. The military's "catch-all" exceptions are essentially identical to the Idaho statute and are thus *not* firmly rooted exceptions for Confrontation Clause purposes. *See* MCM, *supra* note 9, R.C.M. 803(24) (availability of declarant immaterial), 804(b)(5) (declarant unavailable).

19. State v. Sorenson, 421 N.W.2d 77, 83 (Wis. 1988).

20. *See, e.g.*, United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (observing that police officers have a unique outlook because they are seeking to build a case to prove guilt).

21. 47 M.J. 268 (1997).

22. *Id*. at 270. *See* MCM, *supra* note 9, MIL. R. EVID. 804(a). *See also* United States v. Ureta, 44 M.J. 290 (1996). In *Ureta*, the child recanted and was unavailable to testify at trial. The CAAF upheld the admissibility of a videotaped interview of the child witness under the residual hearsay exception. *Id*. at 296. An OSI agent conducted the interview two days after the last act of abuse. *See generally* Lieutenant Colonel Donna M. Wright, *"An Old Fashioned Crazy Quilt": New Developments in the Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment*, ARMY LAW., Apr. 1997, at 75-76.

23. *Cabral*, 47 M.J. at 273 (observing that the child spoke of the appellant "spanking" his "ding-dong").

24. *Id.*

25. *Id.* (Effron, J., concurring).

26. *See* United States v. Cabral, 43 M.J. 808, 811 (A.F. Ct. Crim. App. 1996). In such a case, a "taint hearing" may be appropriate. The Air Force Court of Criminal Appeals stated in its decision that in "a closer case, an investigator's failure to tape an initial 'rapport' session could be the scale-tipper." *Id*. at 811. *See also* United States v. Kibler, 43 M.J. 725 (Army Ct. Crim. App. 1995) (holding that, unless a "taint hearing" is raised before trial, the issue is waived on appeal); United States v. Geiss, 30 M.J. 678 (A.F.C.M.R. 1990); Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117 (1996) ("[T]he defendant has the initial burden of triggering the pretrial hearing by making a showing of 'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques."); Stephen J. Ceci et al., *Repeatedly Thinking About a Non-Event: Source Misattributions Among Preschoolers*, 3 CONSCIOUSNESS & COGNITION 388 (1994). *But see, e.g.*, John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 1 (1996).

27. *Cabral*, 47 M.J. at 275.

28. *Id.*

Both defense counsel and trial counsel have a lot to gain by applying Judge Effron's analysis. It can be advantageous to videotape child witness interviews. Ideally, such interviews should take place immediately after the report of abuse. Videotapes that do not contain the complete interchange between the interviewer and the victim should be viewed suspiciously, especially if a law enforcement official is involved in the interview. Defense counsel should seek a taint hearing if it appears that law enforcement or other investigators have distorted the child's recollection of events. Additionally, the greater the delay between the initial report of abuse and the videotaped interview, the greater the likelihood that the videotape will be found untrustworthy.

Confrontation Clause Satisfied When Witness Testifies

The sole "Confrontation Clause inquiry is whether the trial provided an opportunity for effective cross-examination."[29] In most situations, even when the witness cannot remember the details of the event during testimony, the Confrontation Clause is satisfied. A "witness's inability to recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or [to] recollect the circumstances under which [the] statement was given, does not have Sixth Amendment consequences."[30] The test is whether there is an "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[31]

The Confrontation Clause methodology of *Idaho v. Wright*[32] does not apply when the witness is available and testifies at trial.[33] Where the witness testifies at trial and the defense has an opportunity for cross-examination, the government need only meet the evidentiary requirements.[34] Similarly, if the defense expressly waives the right to confront the hearsay declarant, the CAAF has held that *Wright* does not apply.[35]

Why is there a hearsay issue at all if the declarant actually testifies at trial? Why is the witness' in-court testimony not enough for the prosecution? Even if the child is a well-spoken, unflappable witness, the prosecutor often finds it desirable to use the firmly rooted hearsay exceptions to buttress the child's in-court testimony with excited utterances and statements made to health care providers or social workers. Hearsay statements may, however, become the primary engine by which the prosecution proves its case when the witness takes the stand and recants, cannot remember or articulately relate what occurred, or is reluctant to speak.

When the declarant actually testifies, the military judge may look beyond the circumstances surrounding the making of the statement and, in her discretion, may consider corroborating evidence when determining the trustworthiness of the statement. Corroborating evidence can include physical evidence of the abuse, consistency between or among other witness' state-

29. Dolny v. Erickson, 32 F.3d 381, 385 (8th Cir. 1994).

30. United States v. Owen, 484 U.S. 554, 558 (1988).

31. *Id.* Confrontation Clause concerns may still arise, for instance, if the child is so young or disabled that he or she is unable to testify. The fact that a declarant is physically present in the witness chair "should not, in and of itself, satisfy the demands of the Confrontation Clause." United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991).

32. 497 U.S. 805 (1990).

33. Judge Sullivan disagrees and believes that *Idaho v. Wright* applies. *See* United States v. Kelley, 45 M.J. 275 (1996); United States v. Martindale, 40 M.J. 348 (C.M.A. 1994); United States v. McGrath, 39 M.J. 158 (C.M.A. 1994). Judge Sullivan also believes that independent corroborative circumstances should not be considered in admitting evidence under the residual hearsay rule. The U.S. Court of Appeals for the Tenth Circuit agrees with this approach. *See* United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (holding that "other evidence that corroborates the truth of a hearsay statement is not a circumstantial guarantee of the declarant's trustworthiness"). The court also noted that:

> [E]ach of the cases cited by the [Supreme] Court [in *Idaho v. Wright*] addressed the admissibility of such statements under exceptions to the hearsay rule—not the Confrontation Clause. Indeed, two of the cases involved the reliability requirement of the residual hearsay exception . . . . In essence, the Court saw no meaningful distinction between Rule 803(24)'s requirement that a statement have "circumstantial guarantees of trustworthiness" and the Confrontation Clause requirement that it "bear adequate indicia of reliability." Thus, even though Wright is technically a Confrontation Clause case, its discussion of the reliability of hearsay statements by child victims of sexual abuse is equally pertinent to both Confrontation Clause and Rule 803(24) cases.

Id. at 1452 n.5. The CAAF, however, follows an analysis similar to the Eighth Circuit. *See* Johnson v. Lockhart, 71 F.3d 319 (8th Cir. 1995); *Dolny*, 32 F.3d 381; United States v. Grooms, 36 F.3d 425 (8th Cir. 1992); *Spotted War Bonnet*, 933 F.2d 1471.

34. *See Kelley*, 45 M.J. at 275.

35. *See Martindale*, 40 M.J. at 349; *McGrath*, 39 M.J. at 163 (holding that the appellant waived his right to cross-examination and thus could not argue a violation of his confrontation rights). Because no constitutional issue is involved, the judge's purely evidentiary decision is reviewed for an abuse of discretion, as opposed to a harmless beyond a reasonable doubt standard when constitutional error is found. *See* United States v. Casteel, 45 M.J. 379, 382 (1996). Contrast this with a Confrontation Clause issue. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

ments, the accused's confession, and behavioral changes in the child.[36]

The military judge must still find that the stringent requirements of the residual hearsay rule are met when analyzing the evidence. Provided that the notice requirement is met, the proponent must first show that the out-of-court statement has circumstantial guarantees of trustworthiness *equivalent* to the other enumerated hearsay exceptions. Then, the rule sets out three additional requirements for admissibility: (1) materiality, (2) necessity, and (3) that the statement is in the interests of justice.[37] As the U.S. Court of Appeals for the Tenth Circuit stated:

> Courts must use caution when admitting evidence under [the residual hearsay exception], for an expansive interpretation . . . would threaten to swallow the entirety of the hearsay rule . . . . [The catch-all exceptions] should be used only "in extraordinary circumstances" where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative, and necessary in the interest of justice.[38]

Residual Hearsay and Statements to Police . . . Again

In *United States v. Casteel*,[39] the six-and-one-half-year-old victim testified via closed circuit television from a remote location. Her testimony on direct examination consisted of "I don't know" and very few other details. Defense counsel chose not to cross-examine the victim. Using an abuse of discretion standard of review, the CAAF found that the trial judge did not err in admitting a statement which the child made to a sheriff's detective shortly after the allegations against Casteel arose. The court noted that "statements given ex parte to law enforcement officials must always be viewed with suspicion," but the court was satisfied that the judge "adequately assessed that factor."[40]

The military judge cited factors which indicated that the statement was reliable, but he did not refer to corroborating evidence, though he could have. He considered first that the victim's statement against the appellant was like a declaration against interest, because she "perceived that her situation would be made worse by telling the police what appellant did."[41] Additionally, the child appeared to speak from memory, she contradicted her interrogator on several occasions, and the questioning was not suggestive.[42]

Corroborating Evidence—Noncontemporaneous Defense Evidence

In a recent case, the defense argued against the admission of a residual hearsay statement by alleging that the trial judge's failure to refer to evidence outside of the circumstances surrounding the making of the statement was error. This argument essentially turned the government's argument for consideration of corroborating evidence on its head.

In *United States v. Kelley*,[43] the appellant argued that it was judicial error *not* to consider outside evidence which showed that the statement was *unreliable.* At trial, the defense pointed to evidence that the victim's "parents 'left pornography laying [sic] about the house' and that she and her siblings 'had inadvertently seen their parents having intercourse.'"[44] The CAAF rejected this argument and held that the military judge has discretion "to consider other evidence but is not required to do so."[45]

In *United States v. Johnson*,[46] the Army Court of Criminal Appeals followed the CAAF's logic in *Kelley* and held that, when the witness testifies at trial and is subject to cross-examination, the military judge may consider not only corroborating

36. *See, e.g.*, *Martindale*, 40 M.J. at 349; *McGrath*, 39 M.J. at 166.

37. *See* MCM, *supra* note 9, MIL. R. EVID. 803(24), 804(b)(5).

38. United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995), *quoting* United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993).

39. 45 M.J. 379 (1996).

40. *Id.* at 383 (citing United States v. Pollard, 38 M.J. 41, 49 (C.M.A. 1993); United States v. Barror, 23 M.J. 370, 372 (C.M.A. 1987)).

41. *Id.* at 382. The victim was the daughter of Casteel's girlfriend.

42. *Id.*

43. 45 M.J. 275, 281 (1996).

44. *Id.*

45. *Id.*

46. 45 M.J. 666 (Army Ct. Crim. App. 1997).

evidence but also "any relevant non-contemporaneous evidence, including impeaching evidence."[47] The military judge erred when he *incorrectly* found that it was "not permissible to look at subsequent events in evaluating the trustworthiness of those circumstances at the time the statement was taken."[48] The Army court found, however, that this error was not prejudicial.

In *Johnson*, the thirteen-year-old daughter of the accused testified at trial and recanted her original statement that her father sexually abused her. The trial counsel sought admission of the daughter's sworn statement to a CID agent and only relied on the circumstances surrounding the making of the statement to argue trustworthiness. Defense counsel presented, but the military judge did not consider, "non-contemporaneous events to demonstrate that [the girl's] original statement lacked trustworthiness."[49] Specifically, the defense offered evidence that the daughter: was sexually precocious and thus her extensive sexual knowledge was independent of her father; inaccurately described her father's penis;[50] was diagnosed with a sexually transmitted disease (chlamydia), which her father was not shown to have; recanted her complaint to a military officer the same night she made her sworn statement to CID; filed a false sexual abuse allegation against one of the child protective service specialists who was working on her case; and testified that her sexual abuse allegation was a lie.[51] Additionally, "her sister S made and recanted a similar complaint approximately six years before," and "her initial attempts to recant her statement to [the CID agent] were rebuffed because of [the agent's] personal sexual abuse experience."[52]

The Army Court of Criminal Appeals affirmed the trial judge's decision after it painstakingly balanced the noncontemporaneous evidence—which it found material to the trustworthiness of the statement—against the corroborating evidence upon which the government did not rely at trial.[53] The court concluded that "the overwhelming weight of the evidence supported the statement's reliability."[54]

Residual Hearsay—Practice Tips for Defense Counsel

Defense counsel should vigilantly contest the admission of residual hearsay statements at trial. This is especially true for statements made to law enforcement officials, as in *Johnson*, *Casteel*, and *Cabral*. Even if the witness testifies, defense counsel should remind the judge that the *hearsay* rules require the out-of-court statement to be equally as reliable as a firmly rooted hearsay exception. The entirety of the hearsay rule will be swallowed if this equivalency concept is not strictly followed.

Next, defense counsel should not let the court forget that residual hearsay statements must meet three additional requirements in the evidentiary rule: (1) it must evidence a material fact; (2) it must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and (3) it must be in the interests of justice to admit it.[55] Defense counsel should also argue that, if the victim actually testifies at trial (especially if the testimony is straightforward), the witness' in-court statement is the most probative evidence of abuse and that the out-of-court statement must be precluded because it is not necessary.[56]

Defense counsel should also argue that *in all cases*, whether the witness testifies or not, the court should consider "non-contemporaneous" evidence which shows that the statement is untrustworthy. Residual hearsay statements are presumptively unreliable. The defense should not be precluded from presenting evidence which details the untrustworthiness of the statement. Despite these arguments, however, it appears that the military judge can, in her discretion, choose not to consider such evidence. On the other hand, should she opt to consider *corroborating* evidence, it seems clear that she *must* consider the defense's noncontemporaneous evidence as well.

Alternative Forms of Testimony

47. *Id.*

48. *Id.* at 667.

49. *Id.* at 667.

50. "[I]n her statement, [A] describes SSG Johnson's penis as having 'some dark patchy area.'" Defense Appellate Brief, Supplement to Petition for Grant of Review at 12, United States v. Johnson, 45 M.J. 666 (Army Ct. Crim. App. 1997) (citing Prosecution Exhibit 4). A government "search" revealed that SSG Johnson's penis was not "discolored" and that his scrotum was of similar "uniform appearance." *Id.*

51. *Johnson*, 45 M.J. at 668.

52. *Id.*

53. *Id.* at 669.

54. *Id.*

55. *See* MCM, *supra* note 9, MIL. R. EVID. 803(24), 804(b)(5).

56. *See* United States v. Knox, 46 M.J. 688, 695 (N.M. Ct. Crim. App. 1997); United States v. Kelley, 45 M.J. 275, 282-83 (1996) (Everett, S.J., concurring in part and dissenting in part).

An accused's right to confront witnesses, physically, is also a core protection of the Confrontation Clause; however, it is not an absolute right.[57] When the alleged victim is available to testify but is reluctant to face the accused, the court may employ alternative forms of testimony, such as one-way or two-way closed circuit television. The Supreme Court held in *Maryland v. Craig*[58] that the critical inquiry is "whether use of the procedure is necessary to further an important state interest."[59] Face-to-face confrontation is required with an available witness unless the prosecutor can make a "case-specific showing of necessity."[60] This necessity is shown when the alternative procedure is required to protect the particular child; the child will be traumatized by the accused; and the emotional distress the child will suffer will be more than de minimis.[61] The accused's Sixth Amendment confrontation rights are addressed if the prosecutor successfully makes a case-specific showing of necessity.

In response to *Craig*, Congress enacted 18 U.S.C. § 3509, which provides that the attorney for the government or the child's representative may apply for an order that the child's testimony be taken in a room outside of the courtroom and be televised by *two-way* closed circuit television.[62] The court *may* order the testimony of the child to be taken by closed circuit television if the court makes a necessity finding on the record.[63] The CAAF has not determined whether 18 U.S.C. § 3509 applies in courts-martial, but it has relied upon the federal statute's permissive term "may" to uphold the use of one-way closed circuit television in *United States v. Longstreath*.[64]

Proposed changes to the military rules will codify existing case law and bring the military practice in line, to some extent, with the federal statute. Proposed Military Rule of Evidence (MRE) 611(d) details the requirements under which the military judge can allow a child to testify from an area outside of the courtroom.[65] Proposed Rule for Courts-Martial (R.C.M.) 914A follows the federal statute in part and states that *two-way* closed circuit television *normally* will be used.[66] The witness, counsel for each side, equipment operators, and other persons deemed necessary (such as a child attendant) will be at the remote location.[67] Finally, proposed R.C.M. 804(c) gives the accused the option to absent himself voluntarily from the courtroom in order to preclude the use of the procedures described in proposed R.C.M. 914A.[68] Involuntary removal of the accused from the courtroom under these circumstances is unconstitutional.[69]

Limits on Cross-Examination

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57. *See* Maryland v. Craig, 497 U.S. 836, 849 (1990) (stating that "our precedents establish that 'the Confrontation Clause reflects a preference for face-to-face confrontation at trial' . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case'") (quoting Ohio v. Roberts, 448 U.S. 56 (1980); Mattox v. United States, 156 U.S. 237, 244 (1895)). Justice Scalia dissented in *Craig* and wrote:

> The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.

Craig, 497 U.S. at 860-61 (Scalia, J., dissenting). Justice Scalia believes that the explicit text in the Sixth Amendment is clear and that the right to physically confront is absolute. He also wrote that the "Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here . . . ." *Id.* at 863.

58. *Craig*, 497 U.S. at 857.

59. *Id.* at 856.

60. *Id.*

61. *See id.*

62. 18 U.S.C. § 3509 (1994).

63. *Id.* §§ 3509(B), (C).

64. 45 M.J. 366 (1996).

65. Joint Service Committee on Military Justice (JSC), Notice of Proposed Amendments to the Manual for Courts-Martial, Proposed MIL. R. EVID. 611(d) (1997).

66. *Id.* "[S]uch testimony should normally be taken via a two-way closed circuit television system." *Id*. Proposed R.C.M. 914A.

67. *Id.* Proposed R.C.M. 914A(1)-(6).

68. *Id.* Proposed R.C.M. 804(c). This rule is proposed because the CAAF has rejected the *involuntary expulsion* of the accused from the courtroom. *See* United States v. Daulton, 45 M.J. 212 (1996); United States v. Rembert, 43 M.J. 837 (Army Ct. Crim. App. 1996). *See also* Wright, *supra* note 22, at 78.

69. *Daulton*, 45 M.J. at 212. However, the right to be present at trial is not violated where the accused engages in disruptive behavior. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51-54 (1987) (plurality opinion).

Implicit in the Confrontation Clause is, arguably, the most important trial right of an accused—the right of cross-examination. In fact, the main purpose of confrontation is to allow the accused the right of cross-examination. As the Supreme Court wrote in *Davis v. Alaska*:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., [to] discredit, the witness.[70]

Constitutional issues arise when the trial judge does not permit the defense counsel to cross-examine the witness on a relevant issue, such as the witness' biases, prejudices, or ulterior motives.

Limitations on Cross-Examination—Rule 412

Evidence must be relevant to be admissible; however, even if evidence meets "the threshold for relevance, it may be excluded unless its importance outweighs the policies which support exclusion."[71] Military Rule of Evidence 412 generally excludes evidence of a victim's prior sexual behavior to show consent in sex offense cases.[72] This rule protects the privacy of the victim, though not absolutely. When the exclusion of the evidence would violate the accused's constitutional rights, subdivision (b)(1)(C) allows the trial judge to admit the evidence.[73]

In *United States v. Lauture*,[74] the Army Court of Criminal Appeals held that the accused's right to introduce relevant evidence did not overcome the Rule 412 prohibition.[75] The defense argued that the judge's restriction of cross-examination of the rape victim violated the accused's Sixth Amendment right to confrontation. At trial, the defense sought to cross-examine the rape victim about a single prior act of adultery committed two years earlier. The act of adultery was offered to show a motive to lie. The victim, a devout Mormon, went through an extensive "cleansing" process after the adulterous act. The defense argued that this process would make it difficult for her to admit her second transgression. The defense also argued that the prior adultery supported a mistake of fact defense because the accused knew about the adultery at the time of the offense and, therefore, did not believe "no" *really* meant "no."

The Army Court of Criminal Appeals held that it was not error for the military judge to prohibit the defense from cross-examining the rape victim about her previous act of adultery.[76] The court declined to adopt the defense's argument that the evidence was relevant to support a mistake of fact defense as to consent because, absent unusual circumstances, such evidence does not render the mistake reasonable.[77] The court also found that, though the defense's assertion concerning the victim's motive to fabricate "met the minimum standard of relevance under [MRE] 401," it was "speculative and remote."[78] The defense theory at trial was that the accused was reasonably mistaken concerning the victim's consent, not that the victim *actu-*

70. Davis v. Alaska, 415 U.S. 308, 316 (1974). *See also* Pointer v. Texas, 380 U.S. 400, 404 (1965).

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. Even more recently we have repeated that a denial of cross-examination without waiver would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

Id.

71. United States v. Lauture, 46 M.J. 794, 798 (Army Ct. Crim. App. 1997), *citing* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

72. MCM, *supra* note 9, MIL. R. EVID. 412.

73. *Id.* MIL. R. EVID. 412(b)(1)(C).

74. 46 M.J. 794 (Army Ct. Crim. App. 1997).

75. *Id.* at 800.

76. *Id.* at 796. Before raising the issue, the defense did not give timely notice, but the judge did not exclude the evidence on this basis.

> Defense counsel raised this issue when SPC F was called to testify as the first prosecution witness on the merits, by asking that SPC F be advised of her rights against self-incrimination under Article 31, UCMJ. Defense counsel indicated he intended to cross-examine SPC F about the prior act of adultery.

Id. n.1.

77. *Id.* at 799 (citing United States v. Greaves, 40 M.J. 432 (C.M.A. 1994)). *But see* United States v. Jensen, 25 M.J. 284 (C.M.A. 1987) (holding that evidence of prior consensual sex between the victim and co-defendant was admissible).

ally consented. Therefore, the defense's "marginal showing of relevance was insufficient to overcome the policies protecting privacy and preventing prejudice inherent in [MRE] 412."[79]

The defense, as the moving party in an MRE 412 motion, bears the burden of establishing that sexual evidence is relevant to an issue in the case. The defense may do this through the context in which the questions are asked or by making it known through an offer of proof.[80]

Limitations on Cross-Examination—Nexus Requirement

In *United States v. Shaffer,*[81] the accused was charged with indecent exposure. Of the five government eyewitnesses who testified, three came from the same family—a mother and her two daughters. The other two witnesses were also a mother and daughter and were friends with the first group. The judge would not allow the defense to cross-examine the daughter from the first family about her father's recent conviction for child sexual abuse. The military judge sua sponte called an Article 39(a) session and asked the defense to articulate a relevance theory. Defense counsel did not offer any theory of relevance and "did not object or otherwise protest."[82]

The CAAF found that the defense counsel did not establish the relevance of the evidence within the meaning of MRE 401.[83] The court held that it would not "hold the military judge to a standard of prescience."[84] "Without a timely proffer, appellant cannot now fairly complain that the judge improperly precluded the questioning."[85]

Practice Tips for Counsel

Both *Lauture* and *Shaffer* stand for the proposition that merely invoking the denial of the right to confrontation does not peremptorily shift scrutiny away from the defense and onto the government. The defense still bears the burden of establishing relevance. Defense counsel cannot assume that the military judge will admit evidence simply because the defense desires its introduction.

Before trial, defense counsel must anticipate objections and formulate a theory of relevance. This means succinctly articulating a defense theory of the case and *linking* the evidence to the theory.[86] It may also mean that the defense must make an offer of proof to ensure that the issues are preserved for appeal. Such an offer may involve the testimony of witnesses out of the hearing of the members. Defense counsel must be persistent, even in the face of seemingly hostile judicial reception, in making offers of proof. Construction of the trial record is critical for appeal. Failure to make such an offer will result in waiver of the issue at the appellate level, unless the appellate court finds that the trial judge's exclusion materially prejudiced substantial rights of the accused.

Compulsory Process

The Compulsory Process Clause of the Sixth Amendment is the alter ego of the Confrontation Clause. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[87] The Compulsory Process Clause is, in essence, the right to present a defense. In addition to this constitutional right, a military accused can also invoke Article 46 of the Uniform Code of Military Justice and R.C.M. 703(a), which state that the prosecution *and defense* shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.[88] Under R.C.M. 703(b)(1), the defense is entitled to the production of any witness whose testimony is relevant and necessary.[89]

78. *Lauture*, 46 M.J. at 800.

79. *Id.*

80. MCM, *supra* note 9, MIL. R. EVID. 103 (a)(2).

81. 46 M.J. 94 (1997), *cert. denied,* 118 S. Ct. 181 (1997).

82. *Id.* at 99.

83. *See* MCM, *supra* note 9, MIL. R. EVID. 401.

84. *Shaffer*, 46 M.J. at 100.

85. *Id.* (Sullivan, J., dissenting). Judge Sullivan strongly dissented in this case and believed that the defense strategy at trial was clear—the defense wanted to show that the victim's family was motivated to testify falsely because of an intense hatred and jealousy of the accused's "All-American" family. He wrote that the defense theory was "clearly articulated in the defense voir dire questions of the members, in defense counsel's opening statement, and in defense counsel's argument to the military judge (it tends to show motivation of bias toward Chief Shaffer)." *Id.* at 102.

86. *See generally* SALTZBURG, *supra* note 8, at 606.

87. Washington v. Texas, 388 U.S. 14, 19 (1967).

The CAAF has not established a bright-line rule for when to require the production of a defense witness, but the court has provided, over time, the following specific factors to be considered:

> the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories, or previous testimony.[90]

Production of Expert Witnesses

The right to Compulsory Process and the equal opportunity to obtain witnesses includes the right to the production of experts. The defense must show the convening authority or the court why the expert is "relevant and necessary."[91] The defense requests an expert from the convening authority, and the defense can renew its request in a motion for production of a witness before trial. The military judge may preliminarily deny the motion before trial, but remain open to reconsideration of the request during trial. When the judge makes such an open-ended ruling, defense counsel must be vigilant in renewing the motion at trial or may find themselves losing the issue on appeal.

In *United States v. Ruth*,[92] the military judge denied the defense's request for a named expert to impeach handwriting analysis, but he "specifically stated that he would be open to reconsideration of the request during trial, if circumstances supported so doing after the [g]overnment's expert had testified."[93] The CAAF found that the defense counsel's failure to renew the motion was relevant in its determination that the military judge had properly denied production of the witness.[94]

Defense Counsel Must Follow the Rules

Even if the defense shows that the witness is relevant, the right to Compulsory Process is not unfettered. An accused does not have a right to "offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly."[95] If used irresponsibly, the military judge may preclude the witness' testimony.[96]

Rule for Courts-Martial 703(c)(2)(A) dictates that, if the defense requires the government to obtain its witnesses for trial, the defense must submit a written witness list to the trial counsel. This list must include "a synopsis of the expected testimony sufficient to show its relevance and necessity."[97] Rule for Courts-Martial 703(d) provides for employment of defense expert witnesses if the defense submits a request to the convening authority detailing why the witness is necessary and the estimated cost of the expert.[98] If the convening authority denies the request, the defense may renew the request before a military judge, who will determine whether the witness is "relevant and

88. UCMJ art. 46 (West 1995). Article 46 states:

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

Id. *See* MCM, *supra* note 9, R.C.M. 703(a). Rule 703(a) states that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." *Id*.

89. MCM, *supra* note 9, R.C.M. 703(b)(1) discussion.

90. United States v. Ruth, 46 M.J. 1, 4 (1997).

91. MCM, *supra* note 9, R.C.M. 703(d) discussion.

92. 46 M.J. 1 (1997).

93. *Id.* at 3.

94. *Id*. at 5. The court also relied in part on defense counsel's failure to heed the military judge's suggestion to attempt to employ alternatives to the production of their named expert, Professor Denbeaux, "such as use of his article as a learned treatise (Mil. R. Evid. 803(18)) and use of the article for cross-examination (Mil. R. Evid. 705) . . . ." *Id.*

95. Taylor v. Illinois, 484 U.S. 400, 410 (1988).

96. *See id. See also* Michigan v. Lucas, 500 U.S. 145 (1991); United States v. Nobles, 422 U.S. 225 (1975).

97. MCM, *supra* note 9, R.C.M. 703(c)(2)(B)(i).

necessary, and, if so, whether the [g]overnment has provided or will provide an adequate substitute."[99]

In *United States v. Ndanyi*,[100] the defense requested the production of a named civilian DNA expert at trial, but failed to provide before trial a synopsis of testimony or explain why the testimony was relevant and necessary. The military judge made a factual finding that the defense had engaged in deliberate delay and denied the defense request for the expert.[101] The CAAF held that the military judge did not err when he found that the defense request for funding of an expert was "not properly filed with the convening authority (no synopsis of testimony) nor with the court (not expeditiously filed with the judge)."[102] The court found that there was no constitutional error in the case because material and vital evidence was not denied the defense since the government's DNA evidence pertained to a peripheral matter in the case.[103]

Distinguish a Request for Expert Assistance

Ndanyi also addressed the related but distinct issue of a defense request for expert *assistance* in preparation for trial. The request for expert assistance to prepare for trial is an issue of fundamental fairness and due process; however, it does not entitle the accused to name an expert of his choice.[104] In *Ndanyi*, the defense requested a named civilian expert to assist in the preparation of its case. The court used a three-step test in determining whether the witness was necessary. "First, why is the expert assistance needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and [to] present the evidence that the expert assistant would be able to develop."[105] The court essentially found that the first two requirements were met in *Ndanyi*, but found that the third requirement was not met—there was no showing of unavailability or inadequacy of assistance from other sources.[106] The government had previously offered to provide a DNA expert from CID, but the defense rejected the offer because the g*overnment* had a civilian expert. The court held that this argument did not justify a civilian expert for the defense. In the usual case, the services available in the military are adequate.[107] Absent a showing that the expert offered by the government will be "unqualified, incompetent, partial, or unavailable," the defense request should be denied.[108]

Preclusion of Expert Testimony

The judge's preclusion of defense testimony can also raise Confrontation Clause concerns. In *United States v. Costello*,[109] the military judge precluded the testimony of a defense expert who would have challenged the suggestive interview techniques in a child sex abuse case. Doctor Ralph Underwager was not allowed to testify in the defense case about children's susceptibility to suggestion, the various forms of suggestion that could be employed, and the particular interview techniques in the case. The judge found that the probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the members. The Army Court of Criminal Appeals held that the exclusion was reversible error[110] and that:

> [T]here was no basis in fact for the judge's finding. Such expert evidence is widely recognized as relevant, reliable evidence that is "helpful" to juries in evaluating the coercive-

98. *Id.* R.C.M. 703(d).

99. *Id.*

100. 45 M.J. 315 (1996). Another issue in this case involved a defense request for the same named civilian expert to assist in preparation for trial. It appears that there was "some confusion as to whether the request submitted to the convening authority involved a request for expert assistance prior to trial or a witness at trial . . . ." *Id.* at 317. Because of the apparent confusion, the military judge addressed both issues on the record.

101. *Id.* at 321.

102. *Id.*

103. *Id.* at 321-22.

104. *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

105. *Ndanyi*, 45 M.J. at 319, *quoting* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (citing United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), a*ff'd*, 33 M.J. 209 (CMA 1991)).

106. *Ndanyi*, 45 M.J. at 319.

107. *See id.* at 320 (citing United States v. Garries, 22 M.J. 288 (CMA 1988)).

108. *Id.*

109. No. 9500014 (Army Ct. Crim. App. Apr. 21 1997).

110. *Id.* at slip op. 4.

> ness of factors to which children had been subjected. Such information is generally beyond the knowledge of nonprofessionals. This is similar in scientific validity to "syndrome" testimony associated with rape and sex abuse trauma, which enjoys wide judicial acceptance.[111]

The government argued that Doctor Underwager harbored personal biases against child victims.[112] The court, however, held that any attack on Doctor Underwager's personal views was a matter to be addressed on cross-examination.[113]

Assistance of Counsel

Though the idea is anathema to some, lawyers are the brains and backbone of our criminal adversarial system. Criminal defense attorneys must not only be physically present alongside the accused, but also play "the role necessary to ensure the trial is a fair one."[114] A lawyer's failure to render adequate legal assistance can deprive the accused of the effective assistance of counsel to which he is entitled.

To obtain a reversal of a conviction or a sentence on a claim of ineffective assistance of counsel, the accused must meet the two-part test established by the U.S. Supreme Court in *Strickland v. Washington*.[115]

> This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.[116]

The *Strickland* standard establishes a high hurdle for an accused. To meet the first prong, deficiency, an appellant must demonstrate how counsel's performance fell below an objective standard of reasonableness *under prevailing professional norms*.[117] Defense attorneys are given wide latitude in making tactical decisions, because trial practice, in large part, is an art. The accused must overcome the *presumption* that the action might be considered cogent trial strategy. The "deficiency" prong prohibits 20/20 hindsight, but evaluates "counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*"[118]

The reasonableness of the attorney's actions often *cannot* be assessed without knowing what information the accused provided to his defense counsel. For example, an attorney may decide to forego a line of investigation because of facts the accused provided to him. In such a situation, inquiry into the communications between the accused and counsel are critical to a proper determination of reasonableness.[119]

Even if an error is determined to be professionally unreasonable, however, setting aside the conviction or sentence is not warranted unless the accused affirmatively proves prejudice (the second prong of *Strickland*).[120] Proving prejudice is more than focusing on outcome determination.[121] The test for prejudice is identical to the test for a *Brady*[122] discovery violation; "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[123]

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111. *Id.* (citing United States v. Banks, 36 M.J. 150 (C.M.A. 1992)).

112. *Id.*

113. *Id.*

114. Strickland v. Washington, 466 U.S. 668, 685 (1984).

115. *Id.*

116. *Id.* at 687.

117. *See id.* at 688.

118. *Id.* at 690 (emphasis added).

119. *See id.* at 691.

120. *See id.* at 693.

121. *See* Lockhart v. Fretwell, 506 U.S. 364 (1993).

122. Brady v. Maryland, 373 U.S. 83 (1963).

Death is Different—At Least in the Military

Earlier this year, in a surprising turn of events, the CAAF reversed its previous decisions in the death penalty case of *United States v. Curtis*[124] and set aside the sentence based on ineffective assistance of counsel.[125] The court summarily concluded, with strong dissents from Judges Sullivan and Crawford, that counsel's performance during the "sentencing hearing was deficient and that there is a reasonable probability that there would have been a different *result if all available mitigating evidence had been exploited by the defense.*"[126] The court's opinion is so brief[127] that it provides no other insight into its decision-making process.

Coincidentally, *Strickland* was a death penalty case.[128] The standard in a death penalty case, therefore, is no different than in any other case. The CAAF, however, in its brief per curiam opinion in *Curtis*, sets a competency standard that is far beyond what the Supreme Court described in *Strickland*. The CAAF essentially held that failure to *exploit all available mitigating evidence* is professionally unreasonable. Specifically, the CAAF was referring to counsel's failure to exploit the issue of voluntary intoxication.[129]

Trial attorneys *must* have broad latitude in making tactical decisions at trial. One of those important tactical decisions involves weighing and assessing all available evidence and defense theories and carefully selecting the manner and the method in which they will be presented. For the court to find fault with counsel for failure to exploit *all* available mitigating evidence, especially when it is apparent from the record that defense counsel was well aware of the evidence,[130] essentially strips the attorney of his discretion to engage in classically tactical legal decision-making. Were the CAAF to apply the *Curtis* standard to *all* courts-martial, the flood of reversals would be diluvian.

This being said, the CAAF certainly has not created a new standard for all courts-martial, but *has* created a higher standard for defense counsel in death penalty sentencing cases. Chief Judge Cox believes that counsel in death penalty cases need special training beyond that involved for ordinary trials—they must receive the unique training and develop the skills necessary "to know how to defend a death-penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed."[131] *Curtis* should be a lesson for government counsel even more than defense counsel—considerably more resources must be expended not only in training counsel, but also in funding defense experts, such as mitigation specialists, background investigators, psychiatrists, and psychologists.

The CAAF will likely get another chance to more fully explain its position on ineffective assistance of counsel and capital litigation when it reviews *United States v. Simoy.*[132]

123. *Strickland*, 466 U.S. at 694 (citing United States v. Agurs, 427 U.S. 97, 104, 112-13 (1976)). This test was further described in *United States v. Bagley*, 473 U.S. 667 (1985). The Court also refers to the test for materiality of testimony made unavailable to the defense by government deportation of a witness, citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982).

124. 46 M.J. 129 (1997). This reversal occurred because of the new composition of the court (the addition of Judge Effron) and because Chief Judge Cox changed his original position.

125. *Id*. at 130. The decisions leading up to the CAAF's setting aside of the sentence are found at 44 M.J. 106 (1996); 33 M.J. 101 (C.M.A. 1991); 32 M.J. 252 (C.M.A. 1991); 38 M.J. 530 (N.M.C.M.R. 1993); and 28 M.J. 1074 (N.M.C.M.R. 1989). The court's earlier opinion on the issue of voluntary intoxication, authored by Judge Crawford, stated that "there [was] sufficient information in the record and allied papers on which to form an opinion as to trial defense counsel's effectiveness in dealing with the issue of intoxication." United States v. Curtis, 44 M.J. 106, 122 (1996). The court held that "counsel made a strategic decision not to present intoxication as a key factor in the killings but, rather, to refer to it in argument." *Id*. Additionally, the defense team may have been aware that juries often react with hostility to such a defense. *Id.* at 123.

126. *Curtis*, 46 M.J. at 130 (emphasis added).

127. The opinion is one page in length.

128. *See* Strickland v. Washington, 466 U.S. 668 (1984).

129. *See* United States v. Curtis, No. 94-7001/MC, slip op. at 3 (C.A.A.F. Sept. 11, 1997). This is gleaned from the dissenting opinions of Judges Sullivan and Crawford, as well as from Chief Judge Cox's concurring opinion to deny the government's request for reconsideration of the sentence reversal. *See Curtis*, 46 M.J. at 130-32. In Chief Judge Cox's view, trial defense counsel in a death penalty case need special training and skills to know how to defend a capital case. He wrote, "A quick look at this case reveals that the defense team, although experienced in courts-martial, lacked any experience in the trial of a death penalty case." *Curtis*, No. 94-7001/MC, slip op. at 3.

130. *See Curtis*, 46 M.J. at 130. Judge Sullivan and Judge Crawford both indicate that the evidence the court refers to is evidence of the appellant's voluntary intoxication. Judge Sullivan avers in his dissent that defense counsel "expressly referred to appellant's intoxication in his findings argument" and that he opted to stress the appellant's "positive character traits and the aberrational nature of his conduct on the night in question . . . ." *Id*. at 130. Judge Sullivan wrote that counsel's decision to "obliquely reference appellant's voluntary intoxication also cannot now be legally questioned." *Id*.

131. *Curtis*, No. 94-7001/MC, slip op. at 3.

132. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

Contrary to the holding in *Curtis*, the Air Force Court of Criminal Appeals concluded that "[a] defense counsel may tactically choose not to put on any mitigation evidence whatsoever in a capital case and still meet the standard of competence set out in *Strickland*."[133] In *Simoy*, the defense counsel called no witnesses and put on no evidence in mitigation during the sentencing phase of the trial. The CAAF may well reverse this case based on its decision in *Curtis*, hopefully with a more detailed explanation.[134]

Ineffective Assistance During Post-Trial

Post-trial ineffective assistance of counsel is a fecund area for appellate defense counsel, not only in cases where defense counsel fail to submit matters,[135] but also in cases involving substitute counsel and cases where clemency matters are actually submitted. Though the CAAF professes a Sixth Amendment *Strickland* standard in evaluating counsel's post-trial performance, recent cases have broadened defense counsel's duties, found counsel deficient, and second-guessed tactical decisions.

Meaningful Discussions

In *United States v. Hicks*,[136] the contents of defense counsel's clemency package were in issue. The defense counsel primarily sought to minimize confinement and wished to portray "a viable picture" of the appellant.[137] Two letters authored by the accused's supervisors contained some unfavorable information about Hicks but requested that he be released early from his four-month sentence to confinement. One letter also ambiguously requested "revocation" of appellant's punitive discharge.[138] The staff judge advocate erroneously reported in the addendum to the post-trial recommendation that the supervisor requested a "suspension of the bad conduct discharge."[139]

Hicks claimed in his post-trial affidavit that "he did not remember seeing these unfavorable letters."[140] The trial defense counsel responded in his affidavit that he discussed the letters with Hicks and that Hicks agreed to their submission. Apparently, Hick's defense counsel concluded that discussing the *substance* of the letters with his client was professionally reasonable. The Air Force Court of Criminal Appeals agreed and held that "[t]he fact that a tactic fails to achieve its intended objective does not reflect on the competence of the attorney who attempts it."[141]

The CAAF held otherwise and found that counsel's failure to "*adequately* explain the letters to his client" and his failure to notify the convening authority that one of the letters recommended that Hicks receive an administrative discharge instead of a bad conduct discharge was "deficient" performance within the meaning of *Strickland*.[142] It further observed that:

> Defense counsel should have served as more than a robot or a clearing house, and should have discussed with appellant the two letters, as well as their pros and cons . . . . Additionally, CPT C should have urged the convening authority, *who was a fighter pilot, to consider that clemency would assist the servicemembers on the maintenance line by giving them additional help*.[143]

Despite its conclusion that counsel was deficient, the court ultimately held that counsel's performance did not prejudice the outcome of the case.[144]

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133. *Id.* at 603.

134. Numerous other issues exist in the case for the CAAF to scrutinize. *See generally id.*

135. In *United States v. Sylvester*, 47 M.J. 390 (1998), the civilian defense counsel met with the convening authority post-trial to discuss his client's clemency matters. He then failed to submit R.C.M. 1105 or 1106 matters. *See* MCM, *supra* note 9, R.C.M. 1105, 1106. The CAAF held that this omission was not deficient under the circumstances of the case. *Sylvester*, 47 M.J. at 393. While it may have been the preferred "matter of practice for counsel to have supplemented or memorialized this personal presentation to the convening authority with a written submission under R.C.M. 1105 or 1106, there [was] no statutory or regulatory requirement for counsel to do so." *Id.*

136. 47 M.J. 90 (1997).

137. *Id.* at 93.

138. *Id.* at 91-92.

139. *Id.* at 92.

140. *Id.*

141. *Id*.

142. *Id.* at 93 (holding that the tactical decision to submit the letters was not "deficient") (emphasis added).

143. *Id.* (emphasis added).

The CAAF abruptly concluded that counsel did not engage in *sufficiently meaningful* discussions with his client. Other than observing that counsel needed to discuss the "pros and cons," the court gave little supplementary guidance. The CAAF also faulted counsel's decision not to make a more direct appeal to the convening authority and, in so doing, ignored the first prong of *Strickland* and the accompanying strong presumption of competence afforded counsel in tactical decision-making. The CAAF metes out these judgments of professional incompetence in a peremptory fashion.

Contacts with the Accused

A similar scenario arose in *United States v. Hood*.[145] The accused was convicted of two specifications of false swearing and larceny. Since trial defense counsel was leaving the military, a substitute defense counsel was appointed to represent the accused post-trial. The substitute counsel properly established an attorney-client relationship with the accused on the day of trial. Substitute counsel then received service of the post-trial recommendation and submitted a timely and thorough clemency package, which underscored the poor health of the accused's mother and the accused's problem-filled background.[146]

On appeal, Hood claimed in his sworn affidavit that his substitute defense counsel never contacted him and never discussed the contents of the clemency package with him.[147] Hood specifically complained that his counsel submitted a letter from his mother, which criticized some of the military members involved in the trial.[148] He also complained that his counsel submitted a "rough draft" of his unsworn statement, which contained typographical errors.

The Army Court of Criminal Appeals found that Hood had not overcome the presumption of competent counsel (the first prong of *Strickland*), observing that substitute counsel submitted a "detailed, well-articulated, and persuasive summary of clemency matters most favorable to the appellant. He enclosed several letters, to include the rough draft of a detailed personal statement by the appellant, and a handwritten letter from the appellant's mother."[149] Because the appellant provided nothing for the court to review, "his claim [was] decided against him without inquiry of the trial defense counsel."[150]

In the absence of an affidavit from substitute counsel to the contrary, the CAAF chose to accept as true the appellant's version concerning his lack of contacts with his counsel.[151] Thus, the CAAF disagreed with the Army court and held that this "failure to consult with appellant and submission of clemency materials to which appellant objected was deficient performance within the meaning of *Strickland v. Washington*."[152] The court held, however, that there was no prejudice because the appellant did not identify any additional matters he would have otherwise submitted and did not show a "reasonable probability" of more favorable action by the convening authority if the letter had not been submitted.

Practice Tips for Counsel

Before the release of *Hicks* and *Hood*, most defense counsel understood that failure to submit clemency matters, absent a signed, written waiver from the accused, constituted solid grounds for a new review and action based on post-trial ineffective assistance of counsel. Defense counsel were cognizant of few legal minefields, however, when they submitted well-articulated clemency matters, as in *Hicks* and *Hood*.

Defense counsel in both *Hicks* and *Hood* were found "deficient" in communications with their clients,[153] despite the fact that counsel in both cases presented well-focused clemency packages with unitary themes. The counsel in *Hicks* focused on a reduction in confinement, and the counsel in *Hood* focused on the accused's troubled family background. In each case, coun-

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144. *Id.*

145. 47 M.J. 95 (1997).

146. *Id*. at 96-98.

147. *Id*. at 97.

148. *Id.* at 96-97. Substitute counsel submitted three letters from Hood's mother; however, Hood only complained that *one* of the letters from his mother was harmful to his case. The named letter thanked the trial defense counsel, her son's two escorts, and two other NCOs. "She then complained of the 'rudeness and lack of respect' shown by two captains, a first sergeant, a sergeant, and a 'chief.' Appellant's mother complained that they snickered, laughed, and made snide remarks in her presence during the trial and photographed her son while he was handcuffed." *Id*. at 96.

149. United States v. Hood, No. 95000624, slip op. at 2 (Army Ct. Crim. App. Dec. 22, 1995).

150. *Id.*

151. *Hood*, 47 M.J. at 97. The CAAF made no effort to obtain an affidavit from defense counsel, though it knew that the lower court did not order an affidavit. The CAAF's cavalier finding of "deficiency" in such a scenario ignores the professional and ethical repercussions for counsel in the field.

152. *Id.*

sel made professionally reasonable tactical decisions to submit items that were not entirely favorable, but which supported their respective themes.

Strickland dictates that counsel's performance be viewed, not in hindsight, but at the *time* of counsel's conduct.[154] The defense counsel in these cases were not aware of any procedural rule, policy, or case law which dictated the standard of "meaningful discussions," which the CAAF set forth for the first time in its decision.[155] In essence, contrary to *Strickland*, the CAAF has created a higher standard for military defense counsel in post-trial matters. The CAAF has also eased the way for accuseds to allege a new error—failure to conduct meaningful discussions. To combat this, the Army court should order an affidavit from defense counsel before finding that counsel was deficient.

How much contact with an accused is "meaningful" contact? What duties do defense trial practitioners now have toward their clients when submitting post-trial matters? Until recently, the accused made five decisions concerning his court-martial: what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal.[156] Now, it appears that the specific contents of post-trial clemency matters can be added to this list of decisions for the accused. Counsel should advise that "the final decision as to what, if anything, to submit rests with the accused."[157]

Since the client has the final word on what to submit, the defense counsel's best approach is to develop a clemency plan with the client. Counsel should confer with the accused as the packet develops and document the process. Counsel should show, mail, or fax the accused a copy of every document to be submitted to the convening authority. If "eyes on" is not feasible, counsel should ensure that she thoroughly explains the "pros and cons" of the information and should make a memorandum for record of the events. Counsel should document all post-trial communications in the case file. Should an allegation arise that counsel did not make required communication, counsel will then be able to provide a detailed response.

Ineffective Assistance of Counsel and the Staff Judge Advocate's Post-Trial Recommendation

Another area fraught with peril for both defense counsel and staff judge advocates (SJAs) is post-trial recommendations. In *United States v. Wiley*,[158] the CAAF declined to determine whether defense counsel was deficient for failing to note an error in the SJA's addendum, but held that there was no prejudice.[159] Although a defense counsel's failure to respond to errors in a PTR can constitute deficiency in some cases, the *Wiley* court decided not to make a deficiency determination and moved directly to the prejudice prong of *Strickland*. The CAAF determined that Wiley suffered no prejudice because he received a two-year sentence reduction under his pretrial agreement, and the same convening authority who approved the pretrial agreement also acted on the sentence.

Judge Effron dissented, concluding that both prongs of *Strickland* were met. His dissent focused on the fact that both the appellant and the convening authority relied on their respective lawyers to provide them with competent, accurate legal counsel. Neither received such counsel. The existence of a pretrial agreement in the case, and the fact that the accused "beat the deal," had no bearing on the issue. "A pretrial agreement does not nullify clemency proceedings."[160] In this case, the errors substantially exaggerated the evidence actually pre-

153. The court summarily determined that the substitute defense counsel in *Hood* did not contact his client. Had the court found that contact actually occurred, however, the outcome may have been the same, considering the *Hicks* opinion.

154. Strickland v. Washington, 466 U.S. 668, 690 (1984).

155. *See* United States v. Lewis, 42 M.J. 1, 4. (1995). The CAAF cited *Lewis* in both opinions; however, *Lewis* dealt with counsel's unilateral *refusal* to submit the accused's handwritten clemency letter. *See id*. The CAAF also cited *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994), in both cases. *MacCulloch* dealt with a civilian defense counsel who submitted a letter that the accused apparently provided to his counsel. The letter, ironically authored by defense counsel to the accused's mother on a prior occasion, undercut the accused's plea for clemency because it clearly implicated the accused in more crimes than he was charged. *Id*.

156. *MacCulloch*, 40 M.J. at 239 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2(a) (3d ed. 1993)).

157. *Lewis*, 42 M.J. at 4.

158. 47 M.J. 158 (1997). The accused was charged with rape, sodomy, indecent acts, and indecent liberties with his seven-year-old stepdaughter. He pleaded guilty, with a pretrial agreement, to indecent acts and indecent liberties, but not guilty to rape and sodomy. The rape and sodomy charges were withdrawn after the military judge accepted the plea. The post-trial recommendation erroneously summarized the evidence supporting the original charges of rape and sodomy.

159. *Id.* at 160. In United States v. Strickland, the Supreme Court said:

> [A] court need not determine her counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure the ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. 668, 697 (1984).

sented at trial. The SJA's "summary was inaccurate and unfocused" and the withdrawn charges were "untried and untested."[161] In essence, Judge Effron noted, the convening authority was misled.

Counsel should *never* presume that the PTR and addendum contain accurate information and afford them only a cursory reading. Counsel should directly address and clarify errors and misleading information about the accused. In addition, defense counsel should avoid the temptation to "overlook" error in the hopes that the appellate courts will correct it and attribute the deficiency to the government. For officers of the court, this maneuver is unacceptable and ultimately may harm the appellant. Errors that mislead the convening authority can potentially result in a new review and action and could also result in a finding that trial defense counsel was ineffective.

Substitute Defense Counsel and 1106 Matters

An accused has a right to submit clemency matters under R.C.M. 1105;[162] however, this right is separate from the accused's right to submit matters in response to the SJA's PTR.[163] Though distinct, these rights are usually "exercised simultaneously under the time-limit provisions of these rules."[164] When the trial defense counsel has been relieved or is not reasonably available, R.C.M. 1106(f)(2) provides that "substitute counsel to represent the accused shall be detailed by an appropriate authority."[165] When R.C.M. 1105 and 1106 matters are not submitted simultaneously, problems may arise, particularly when the trial defense counsel leaves the service and the PTR has not yet been served. The CAAF has closely scrutinized the substitute counsel arena because accuseds in some recent cases have been left with virtually *no* counsel to represent them post-trial. [166]

When substitute counsel is not appointed or does not establish an attorney-client relationship with the accused, the accused need not meet *Strickland's* cumbrous test. In *United States v. Howard*, [167] defense counsel left active duty before Howard's post-trial matters were submitted. Substitute counsel was appointed for representation, but the substitute counsel never contacted Howard or entered into an attorney-client relationship, as R.C.M. 1106(f)(2) requires.[168] Substitute counsel accepted service of the record of trial and indicated that he would submit clemency matters. Counsel then submitted a form (which contained two check marks) and a short handwritten note Howard had provided to his original defense counsel.[169] Six months later, substitute counsel received the post-trial recommendation and did not comment.

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160. *Wiley*, 47 M.J. at 161.

161. *Id.*

162. MCM, *supra* note 9, R.C.M. 1105. These matters can consist of allegations of legal error, portions of evidence offered at trial, matters in mitigation, and clemency recommendations by any person. *Id*.

163. *See id*. R.C.M. 1106(f)(4). Rule 1106(f)(4) states: "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter." *Id*. The SJA's PTR must be served on defense counsel, who has the opportunity to respond. *See also* United States v. Hickock, 45 M.J. 142, 145 (1996) (citing United States v. Goode, 1 M.J. 3 (C.M.A. 1975)).

164. *Hickock*, 45 M.J. at 145 (referring to R.C.M. 1106(f)(5) and R.C.M. 1105(c)(1)). *See* MCM, *supra* note 9, R.C.M. 1105(c)(1), 1106(f)(5).

165. MCM, *supra* note 9, R.C.M. 1106(f)(2).

166. *See Hickock*, 45 M.J. at 143-44. In *Hickock*, the CAAF agreed that a new review and action were required. The appellant's trial defense counsel left active duty, and no substitute counsel was appointed. "[T]here was no indication anywhere in the record that substitute defense counsel was appointed to pursue the accused's post-trial interests . . . and no indication, either, that the SJA's recommendation was served on any counsel representing the accused, as was required by R.C.M. 1106(f)(1) and (2)." *Id* at 143. The court observed that:

> Unfortunately, because of apparent omissions of several persons—the detailed defense counsel, to ensure continuity of representation; the supervisory defense counsel, to provide substitute counsel; and the SJA, to serve his recommendation on defense counsel—the accused was entirely unrepresented post-trial except for the clemency petition his counsel had filed in August.

Id. at 144.

Contrast *Hickock* with *Hood*, where the CAAF found that substitute counsel established an attorney-client relationship on the record. United States v. Hood, 47 M.J. 95, 96 (1997). *See* United States v. Miller, 45 M.J. 149 (1996). In *Miller*, substitute counsel was appointed, but he never formally entered into an attorney-client relationship with the appellant. The court held that the error can be tested for prejudice. *Id*. at 150. No error occurred, since the original trial defense counsel submitted "a rather substantial clemency package to the convening authority . . . ." *Id*.

167. 47 M.J. 104 (1997).

168. *See* MCM, *supra* note 9, R.C.M. 1106(f).

169. *Howard*, 47 M.J. at 105.

The CAAF held that Howard essentially had no post-trial attorney and that he did not have to meet *Strickland's* two-prong test. The court found that, since counsel made no contact and submitted nothing on behalf of his client, there was a "colorable showing of possible prejudice" that warranted a new review and action. "The appropriate test for prejudice . . . is set forth in Article 59(a), UCMJ as follows: a finding or sentence of a court-martial may not be held incorrect on the grounds of an error of law unless the error materially prejudices the substantial rights of the accused."[170]

Practice Tips for Counsel

Considering the facts in the case, the court's holding in *Howard* was none too surprising. In general, this area is fraught with potential legal errors. Substitute counsel are often unfamiliar with individual cases and have not met their clients when they are appointed. In addition, the clients are often in jail or on excess leave. Senior defense counsel not only must ensure that substitute counsel are appointed, but also must confirm that defense counsel are forging attorney-client relationships. A lawyer's failure to form an attorney-client relationship with his client violates R.C.M. 1106(f)(2) and breaches his legal and ethical duty to his client.[171]

Staff judge advocates, chiefs of justice, and trial counsel must also be aware that when an accused alleges ineffective assistance of counsel in a post-trial submission, it is incumbent on the government to "inform defense counsel and [to] resolve the matter."[172] In *United States v. Rickey,*[173] the accused complained, in a letter attached to the clemency petition, that his two detailed defense counsel were unprepared to assume the case and lacked the time and energy it required. The SJA, in his addendum, noted the accused's comments but "penned 'I disagree' and submitted the record to the convening authority for action that day."[174] The Army court held that the hurried flourish of the SJA was insufficient. The SJA's personal disagreement with the accused's assertions did not resolve the dilemma.

The SJA bears the responsibility to ensure that the accused is afforded conflict-free counsel. This means that the SJA must ensure that defense counsel discuss and resolve issues with their clients before continuing in their representation. After investigation of the matter, if the SJA determines that a conflict exists, she should advise the senior defense counsel, who must in turn ensure that substitute defense counsel is appointed to represent the accused post-trial.

Discovery

An accused in the military enjoys broad discovery rights under Article 46, R.C.M. 701, and military and Supreme Court case law.[175] These broad discovery rights exist because they prevent "trial by ambush" and further military efficiency and because an inherent imbalance exists between the prosecution and the defense in their abilities to obtain evidence. The trial counsel, as an agent of the commander, has ready access to materials and relevant facts; the defense often does not. Defense counsel's reliance on the prosecution for such evidence places the accused in a vulnerable position and concomitantly imposes a special obligation on trial counsel to transcend the adversarial role and to ensure that justice is served.

Last year, in *United States v. Sebring,*[176] the Navy-Marine Corps Court of Criminal Appeals acknowledged this inherent imbalance and recognized the Navy drug-testing laboratory as an arm of the prosecution.[177] The court held that the trial counsel's lack of actual knowledge of evidence favorable to the defense did not excuse him from his obligation[178] under *Brady v. Maryland.*[179] The court observed that, though the defense made a specific request for all quality control reports and records prior to trial, the trial counsel was unaware of the report

170. *Id.* at 106.

171. *See Miller,* 45 M.J. at 151.

172. United States v. Rickey, No. 9501597 (Army Ct. Crim. App. Sept. 8, 1997).

173. *Id.*

174. *Id.* at slip op. 2.

175. *See* UCMJ art. 46 (West 1995); MCM, *supra* note 9, R.C.M. 701.

176. 44 M.J. 805 (N.M. Ct. Crim. App. 1996).

177. *Id.* at 808.

178. *Id*.

179. 373 U.S. 83, 85 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution"). Essentially, *Brady* requires the prosecution to disclose only evidence that is both favorable to the accused and "material either to guilt or to punishment;" the decision is based on a requirement of due process. *Id.* at 87. *See* United States v. Bagley, 473 U.S. 667 (1985) (holding that the *Brady* rule covers impeachment evidence as well as exculpatory evidence and formulating a new test for materiality); United States v. Agurs, 427 U.S. 97, 102 (1972) (extending the *Brady* rule to cover instances where the defense had made no request for evidence).

and, thus, did not disclose it. The court held that the trial counsel had an obligation to search for favorable evidence known to others who act on the government's behalf. The court imposed this duty of due diligence on the trial counsel because the laboratory was clearly "acting on the government's behalf" in conducting tests "to determine the presence of controlled substances."[180] The court held that this affirmative duty exists,[181] notwithstanding the language in R.C.M. 701(a)(6),[182] which appears to limit the duty of disclosure to evidence actually "known" to the trial counsel.

Trial counsel also have an affirmative obligation to provide exculpatory information in related cases. Such discovery can be problematic for trial counsel, as failure to turn over exculpatory information from a related case could result in reversal on appeal. *United States v. Romano*[183] involved three companion cases arising out of the same incident. An officer (First Lieutenant Romano) and an enlisted member (Airman Mucci) were alleged to have engaged in an improper relationship. They were also charged with conspiring with the third accused (Sergeant Mitchell) to cover up the incident. At Sergeant Mitchell's Article 32 investigation, two individuals (Major Northup and Master Sergeant Uloth) testified that Airman Mucci admitted to them that she lied when she professed to have dated the accused. Airman Mucci testified at the accused's trial that she dated the accused.[184]

The government representative in Sergeant Mitchell's Article 32 investigation was also the assistant trial counsel in *Romano*.[185] Notwithstanding a defense discovery request for exculpatory evidence and "[a]ny handwritten, typed, or recorded statements by . . . any potential witnesses" and "[a]ny known evidence tending to diminish [the] credibility of witnesses," the trial counsel did not provide the defense with the statements from either witness at Sergeant Mitchell's Article 32 hearing.[186]

The CAAF reversed the case and held that the undisclosed testimony of one of the witnesses at Sergeant Mitchell's Article 32 hearing was critical to the defense.[187] "The central issue in the case was the credibility of the witnesses."[188] The witness did not know either the accused or Mucci and apparently had no reason to lie during testimony. The CAAF held that because the defense was denied such a critical witness, the verdict was not "worthy of confidence," and there was a "reasonable probability of a different verdict had this evidence been made available."[189]

The Army Court of Criminal Appeals recently held that a trial counsel's duty to disclose evidence does not extend to evidence in "other government files unrelated to the investigation of that particular accused's misconduct."[190] In *United States v. Williams*,[191] Private First Class (PFC) F was driving the accused somewhere, and they got into a verbal altercation with the people in another car. The cars stopped, and the passenger from the other car, Mr. B, got into a fistfight with the accused. Mr. B and the accused fell to the ground and struggled. As they faced each other, with Mr. B on top, Mr. B felt several blows on his back. When he got up, he realized that he had been stabbed eight times. The accused was charged with aggravated assault. Mr. B testified at trial that he thought the accused stabbed him; however, on three occasions before trial, he told police and medical personnel that he thought the female (PFC F) stabbed him.

One month after the stabbing, trial counsel had not been able to discover the identity of the other person (PFC F) who was in the car with the accused. At the same time, in an unrelated tire-

180. *Sebring*, 44 M.J. at 805, 808.

181. *Id*.

182. *See* MCM, *supra* note 9, R.C.M. 701(a)(6). This is the military's version of the *Brady* rule. This rule imposes a duty on the trial counsel to disclose favorable information known to the trial counsel "as soon as practicable," irrespective of a defense request. *Id*. The favorable evidence must "reasonably tend to negate the guilt of the accused . . . [r]educe the degree of guilt . . . or [r]educe the punishment." *Id*.

183. 46 M.J. 269 (1997).

184. *Id*. at 272.

185. United States v. Romano, 43 M.J. 523, 526 (A.F. Ct. Crim. App. 1995).

186. *Id*. at 526. "The assistant trial counsel made extensive responses to these discovery requests, but he did not supplement his disclosures to include the Northup and Uloth testimony. Appellant did not learn about this testimony until after trial." *Id*.

187. *Romano*, 46 M.J. at 273.

188. *Id.*

189. *Id.*

190. United States v. Williams, 47 M.J. 621 (Army Ct. Crim. App. 1997).

191. *Id*.

slashing investigation, Specialist C reported to the military police that he thought PFC F slashed his tires because she "always carries a knife."[192] Private First Class F denied involvement, but the police seized a knife in a consent search of her room. Two weeks later, trial counsel opined that there was insufficient evidence to title PFC F for damage to SPC C's property. One month later, at the conclusion of the accused's Article 32 hearing, the government still had not identified PFC F as the other person in the car with the accused. The defense did not call PFC F as a witness at the Article 32 investigation.

The defense submitted a discovery request just before the Article 32 investigating officer completed his report. The government listed PFC F as a witness, but the trial counsel did not remember the tire slashing investigation and did not list it in the discovery response.[193] The defense's theory at trial was that PFC F stabbed Mr. B.

The Army court held that the trial counsel had no duty to locate and to search an unrelated military police file "in which PFC F was listed as a witness, and not a suspect."[194] The duty to disclose favorable defense evidence "only includes information which the trial counsel has personal knowledge of or is known to criminal investigators or others [who] are working on *the case* being investigated and prosecuted."[195] The court noted, however, assuming the trial counsel did have such a duty, the evidence in this case was not "material."[196]

The accused has due process rights, but these rights do not impose an unrealistic duty on trial counsel to do the defense's job. Trial counsel are not omniscient and are not responsible for finding and turning over every shred of possibly favorable defense evidence. The government's only obligation is to disclose evidence that is material to either guilt or punishment. Defense counsel cannot rely on trial counsel to ferret out exculpatory information. When signals are triggered, the defense counsel must follow through. Following through means making specific discovery requests for any other information that may logically follow.

Mental Responsibility

Sanity boards took center stage in the area of mental responsibility this year. *United States v. James*[197] is a reminder to trial counsel that it may be wise to join the defense in a request for a sanity board; otherwise, the government might face reversible error. In *James*, the defense requested a sanity board based on the accused's peculiar behavior with her defense counsel.[198] Trial counsel, instead of joining in the motion, arranged for the accused to undergo a mental status evaluation. The counselor who performed the evaluation was not a physician, psychiatrist, or psychologist. The evaluation took thirty minutes and consisted of a one-page "check the block" form.

A good faith request for a sanity board, which is not frivolous, should be granted.[199] The Army appellate court held that the defense request met this requirement.[200] Using the analytical framework set forth in *United States v. Collins*,[201] the court then determined that the mental status evaluation was not in any way the equivalent of a sanity board under R.C.M. 706.[202] The court observed that the person who conducted the mental status evaluation did not even meet the requisite professional qualifications. Rule 706(c)(1) requires that all members of a sanity board be either physicians or clinical psychologists.[203] Additionally, the Army court identified four other conditions (listed in *Collins*) that also were not met: (1) the government did not provide the examiner with a copy of the defense motion, and the

192. *Id.* at 624.

193. *Id*.

194. *Id.* at 626.

195. *Id.* (emphasis in original).

196. *Id*. Evidence is material if there is a "reasonable probability" that the result would have been different. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether, in its absence he received a fair trial, understood as resulting in a verdict worthy of confidence." United States v. Romano, 46 M.J. 269, 272 (1997), *quoting* Kyles v. Whitley, 514 U.S. 419, 434-38 (1995).

197. 47 M.J. 641 (Army Ct. Crim. App. 1997).

198. *Id*. at 642. The defense counsel felt that the accused was incoherent in responding to questions and that she was unable to make the necessary decisions regarding the defense of her case.

199. *See* United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985).

200. *James*, 47 M.J. at 643.

201. 41 M.J. 610, 612 (Army Ct. Crim. App. 1994).

202. *James*, 47 M.J. at 643. *See* MCM, *supra* note 9, R.C.M. 706.

203. MCM, *supra* note 9, R.C.M. 706(c)(1).

examiner, therefore, was not apprised of the reasons for doubting the mental capacity of the accused; (2) the examiner made no attempt to perform any "in-depth forensic evaluations of the sort contemplated by R.C.M. 706;"[204] (3) the examiner had no familiarity with forensic evaluation or participation in previous sanity boards; and (4) there was no "specific psychiatric testimony concerning the appellant's capacity to understand the nature of criminal proceedings and to cooperate in her defense at a court-martial."[205] The court returned the case for a sanity board and a *DuBay*[206] hearing to resolve the issue of the appellant's mental capacity to stand trial.

It is hard to imagine a case in which defense counsel might ever willingly agree to such a mental status evaluation instead of a sanity board without litigating the issue on the record. The military judge must grant a good faith, non-frivolous request for a sanity board, and no defense counsel should settle for less. The comments of the accused in a mental status evaluation are not privileged, as they are in a sanity board inquiry. Defense counsel take a great risk in placing the accused in such a precarious position.[207] Any imprudent or ambiguous comment the accused makes could come back to haunt the defense at trial.[208]

It is less complicated and less costly for a sanity board to determine the competency of an accused to stand trial *before* trial, rather than *after* trial. Trial counsel should consult with their chiefs of justice and determine whether the circumstances warrant joining the defense counsel in the motion. Cleverness and cutting corners will, in the long run, not be rewarded in the area of sanity boards.

When an Article 32 investigating officer recommends that the accused undergo a psychiatric examination, the government and the defense counsel should pay close attention. In *United States v. Breese*,[209] a case tried in 1991, the investigating officer noted in the report that the accused "appear[ed] to have a problem with his ability to control his actions."[210] Neither the defense counsel nor the trial counsel pursued the issue. The seemingly benign comment precipitated the "tortured appellate history of the case."[211] As a result of the comment, the Court of Military Appeals found that, "[a]bsent any indication in the record that any such examination was conducted or any further action was taken on this recommendation, we believe further inquiry concerning this allegation must be undertaken before we can continue our review of this case."[212] A much belated sanity board was conducted, resulting in the board opinion that the appellant had alcohol problems. The CAAF noted that this was "a fact painfully obvious from a reading of the record of trial."[213]

Though the CAAF ultimately held that it was "persuaded beyond a reasonable doubt that [the] evidence would not have persuaded the trier of fact to reach a different result as to appellant's guilt,"[214] the government can hardly be said to have won the case. Rule 706 allows not only defense counsel, but also trial counsel, commanders, and investigating officers who believe that the accused lacks mental capacity or mental responsibility, to raise the issue so that a sanity board may be ordered.[215] Trial counsel should clarify ambiguous issues concerning capacity or mental responsibility on the record with the military judge and defense counsel. Defense counsel need not be the party to raise the issue, but he is often in the best position to know whether an accused's behavior warrants further examination. Exposing and resolving a capacity issue on the record *before trial*, even when initiated by trial counsel, is generally the best avenue of approach.

204. *James*, 47 M.J. at 643.

205. *Id*.

206. United States v. Dubay, 37 C.M.R. 411 (1967).

207. *See* MCM, *supra* note 9, MIL. R. EVID. 302. The general rule is that anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him. *See id*. The accused may claim this privilege notwithstanding the fact that he may have been warned of the rights provided by MRE 305. *See* MCM, *supra* note 9, MIL. R. EVID. 305. The accused can waive this privilege when he first introduces into evidence such statements or derivative evidence.

208. *See* United States v. Toledo, 25 M.J. 270 (C.M.A. 1987) (indicating that the defense may request a physician, psychotherapist, or psychologist be made part of the "defense team" under MRE 502, to be covered by the attorney-client privilege). Comments not covered under the attorney-client privilege can come back to haunt the accused.

209. 47 M.J. 5 (1997).

210. *Id*. at 6.

211. *Id.* The rest of the "tortured appellate history" can be found at 41 M.J. 108 (C.M.A. 1994) and 41 M.J. 213 (A.C.M.R. 1994).

212. United States v. Breese, 41 M.J. 108, 109 (C.M.A. 1994) (petition for grant of review-summary disposition).

213. *Breese*, 47 M.J. at 6.

214. *Id*.

215. *See* MCM, *supra* note 9, R.C.M. 706.

In *United States v. English*,[216] the government once again contested the need for a sanity board at trial, "won" at the trial level, but lost on appeal. In fact, the CAAF went so far as to call into question the very concept of an "adequate substitute" for a sanity board.

The accused was in the Marine Corps and apparently wanted out. He sought mental health treatment for feelings of depression and suicidal thoughts. Between his second and third visits to the mental health facility, he made a suicidal gesture.[217] The government thought of a quick way to get the accused out and charged him with malingering by feigning a mental illness, based on the diagnoses of his treating psychiatrist and psychologist. The government's theory of the case rested on the testimony of the Navy psychiatrist and psychologist who initially treated the accused for his feelings of depression.

Defense counsel requested a sanity board, and the government "argued that the equivalent of an R.C.M. 706 board already had been conducted by the combined efforts of two Navy doctors."[218] The military judge agreed with the trial counsel. Based on the judge's ruling, the defense counsel moved to preclude either witness from testifying, on the grounds that an accused's statements made during an R.C.M. 706 board were privileged and could not be disclosed over his objection.[219] The military judge denied the defense motion.

The CAAF held that the military judge erred in deeming the accused's previous mental health evaluations a sanity board substitute.[220] They distinguished *English* from *United States v. Jancarek*,[221] in which the Army Court of Military Review stated that, "in a proper case, there can be a substitute for a sanity board . . . ."[222] The doctors evaluating Private First Class English focused solely on treatment, not on "the judicial standards of mental capacity or responsibility."[223] The *Jancarek* court recognized the need to limit access to privileged information revealed during an R.C.M. 706 board. The CAAF noted in *English* that "the communications between appellant and the mental health professionals provided the foundation for the criminal charge against him."[224] A mental health examination can be compelled under a sanity board because the question is not whether the accused committed the crime, but whether the accused "possessed the requisite mental capacity to be criminally responsible therefore, *if other proof establishes that he did do them*."[225]

The CAAF ultimately left until another day the question of whether there can ever be an adequate substitute for a sanity board, considering the unambiguous language in R.C.M. 706. When trial counsel decide to argue that a mental health evaluation is an adequate substitute for a sanity board, defense counsel should cite *English* and posit that the trial counsel must show that the mental examination meets the purpose of both R.C.M. 706 *and* MRE 302. Defense counsel should also vigorously argue that no mental examination could ever substitute for a formal sanity board because R.C.M. 706 contains unambiguous requirements. Before litigating the motion at all, however, trial counsel would do well to consider the consequences of King Pyrrhus' victory.[226]

In addition to addressing sanity board issues, the CAAF also elucidated the standard of proof for the affirmative defense of lack of mental responsibility in *United States v. DuBose*.[227] Article 50a[228] and R.C.M. 916(k)[229] impose on the accused the burden of proving lack of mental responsibility at the time of the crime by clear and convincing evidence. In *DuBose*, the Air Force Court of Criminal Appeals attempted to place an even greater burden on the accused, however, when it erroneously

216. 47 M.J. 215 (1997).

217. *Id.* at 216. The accused took an overdose of non-prescription pain medication.

218. *Id.*

219. *Id.* at 217.

220. *Id*. at 218.

221. 22 M.J. 600 (A.C.M.R. 1986).

222. *Id*. at 603, *quoted in English*, 47 M.J. at 218.

223. *English*, 47 M.J. at 218.

224. *Id.*

225. *Id.* at 219, *citing* United States v. Babbidge, 40 C.M.R. 39 (1969) (quoting United States v. Albright, 388 F.2d 719, 725 (4th Cir. 1968)) (emphasis added).

226. *See supra* note 1.

227. 47 M.J. 386 (1998).

228. UCMJ art. 50a (West 1995).

229. MCM, *supra* note 9, R.C.M. 916(k).

held that the defense must present both subjective and *objective* evidence to meet this burden.[230]

In *DuBose*, the accused was charged with making a bomb, and he presented the affirmative defense of lack of mental responsibility.[231] In support of his case, the defense presented the testimony of three experts, as well as corroborating evidence from his squad leader concerning his irregular behavior on the day of the offense. Despite this evidence, DuBose was convicted. The Air Force Court of Criminal Appeals affirmed and held that, "in order for the defense to pertain, there must be *clear and convincing objective* evidence, not merely *subjective medical opinion*, that the appellant at the time of the offense either did not know what he was doing or did not know what he was doing was wrong."[232] The court concluded that, because DuBose had not met the objective prong, it was unnecessary to consider the subjective "severe mental disease" prong of the test.

The CAAF reversed this creative, yet unsupported, two-prong test because it improperly distinguished between types of evidence. The CAAF observed that "there is nothing in the UCMJ . . . that requires a different *mode* of proof for lack of mental responsibility than any other determinative fact."[233] "All relevant evidence, whether 'objective' or 'subjective,' must be considered by the lower court in its review of sufficiency. There is no premium placed on lay opinion as opposed to expert opinion, nor on 'objective' as opposed to 'subjective' evidence."[234]

Conclusion

The cases in the past year involving discovery and mental responsibility remind trial counsel to avoid pyrrhic victories. Trial counsel can do this by stepping back and thinking objectively about their cases. They must pursue tactical victories at trial, bearing in mind the strategic implications of these tactical decisions at the appellate level.

The decisions of the military appellate courts over the past year reflect permutations from previous case law in the area of post-trial ineffective assistance of counsel. Defense counsel must be aware of the implications of their actions. They must be cognizant of the permutations in recent decisions and reshoot their trial and post-trial azimuths. A thorough knowledge of the case law and zealous representation of the client should ensure that defense counsel will attain the best result.

230. *DuBose*, 47 M.J. at 388.

231. *Id*. at 387.

232. *Id.* at 388 (emphasis added).

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

234. *Id.* at 388-89.