Recent Developments in Sentencing Under the Uniform Code of Military Justice

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Introduction

The sentencing phase of courts-martial continues to provide opportunities for trial and defense counsel to hone their advocacy skills. Although Rule for Courts-Martial (R.C.M.) 1001[1] sets forth the scheme for the types of evidence the prosecution and defense may offer at sentencing, a review of recent cases illustrates the role advocates play in shaping the categories of evidence. The military appellate courts also have indicated a desire to provide relevant information to the sentencing authority, whether members or a military judge, in order to enhance the decision-making process. Several areas of court-martial sentencing remain ripe for development by advocates.

Presentencing Evidence

R.C.M. 1001(b)(2): Personal Data and Character of Prior Service of the Accused

Letters of reprimand are one type of documentary evidence offered under R.C.M. 1001(b)(2).[2] During the past year, military appellate courts examined the propriety of such evidence in the presentencing phase of courts-martial.

In *United States v. Clemente*,[3] the accused was convicted by officer members of various larceny-related offenses.[4] As part of the government case in aggravation, the trial counsel offered two letters of reprimand which had previously been issued to the accused for child neglect and spouse abuse. Testing the proffered letters of reprimand against the requirements of R.C.M. 1001(b)(2),[5] the military judge held that the evidence from the accused's unfavorable information file[6] was properly maintained in accordance with departmental regulations and was offered to reflect the past military conduct and history of the accused.[7]

Defense counsel in *Clemente* objected to the admission of the letters of reprimand, citing Military Rule of Evidence (MRE) 403.[8] The defense stressed the extreme prejudicial effect of coloring the accused as a child and spouse abuser and asserted that the evidence had the potential "to unduly arouse the members' hostility or prejudice against him"[9] when the court was to sentence him only for larceny-related offenses.[10] In overruling the defense objection, the military judge noted that the letters of reprimand did not brand the accused. The military judge distinguished the "neglect" of leaving a child unattended in one letter and the apparent "simple assault" in the other as incidents which fell short of characterizing the accused as an abuser, a characterization which might subject him to an unduly harsh sentence for his larceny-related convictions.[11]

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (1995) [hereinafter MCM].

2. *Id.* R.C.M. 1001(b)(2).

3. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

4. *Id*. at 720. The accused was convicted of six specifications of attempted larceny, 13 specifications of larceny, and one specification of stealing and opening mail.

5. MCM, *supra* note 1, R.C.M. 1001(b)(2). "'Personnel records of the accused' includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused."

6. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM § 1.1 (May 1997). "The Unfavorable Information File (UIF) is an official record of unfavorable information about an individual. It documents . . . censures concerning the member's performance, responsibility, behavior, and so on." *Id.*

7. *Clemente*, 46 M.J. at 720.

8. MCM, *supra* note 1, MIL. R. EVID. 403. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

9. *Clemente*, 46 M.J. at 720.

10. *Id*. The defense sought also to bring *Clemente* within the ruling in *United States v. Zakaria*, 38 M.J. 280 (C.MA. 1993). In *Zakaria*, the accused was also convicted of several larceny-related offenses, and the prosecution introduced at sentencing letters of reprimand for indecent acts with minor children. 38 M.J. 280. In finding error for admitting the letters of reprimand in *Zakaria*, the court noted that the evidence branded the accused as a "sexual deviant or molester of teenage girls." *Id.*

In affirming *Clemente*, the Air Force Court of Criminal Appeals reminds defense counsel to include MRE 403 objections to presentencing evidence and to ensure that the sentencing authority focuses on the offenses of which an accused stands convicted. On the other hand, trial counsel who are offering letters of reprimand should be able to articulate how such evidence shows the service history of the accused, as opposed to coloring him as a repulsive or distasteful character.

The Court of Appeals for the Armed Forces (CAAF) addressed a letter of reprimand as presentencing evidence in *United States v. Williams*.[12] Airman Williams faced charges related to wrongful use of controlled substances on multiple occasions.[13] Pursuant to a pretrial agreement, the government withdrew an additional charge and specification for wrongful use of marijuana. Before the court-martial convened, however, the unit commander issued a letter of reprimand for the marijuana use.[14]

Defense counsel in *Williams* failed to object to the admission of the letter of reprimand, which the prosecution offered as part of its case in aggravation.[15] Thus, the CAAF easily resolved the issue on waiver by defense counsel, notwithstanding the appellant's contentions that the letter of reprimand was improperly filed and that it impermissibly commented on the accused's suitability for retention.[16] The court also rejected the appellant's challenge to the letter of reprimand as evidence of uncharged misconduct, holding that the misconduct in issue only became uncharged by mutual agreement of the parties, that is, by the pretrial agreement submitted by the accused.[17]

The absence of defense objection in *Williams* should deter trial counsel from trying to address withdrawn charges with letters of reprimand prior to trial. Defense counsel should consider including language in a pretrial agreement which not only secures withdrawal of a charge and specification, but also closes the door on any use at court-martial of such alleged misconduct.[18]

R.C.M. 1001(b)(3): Evidence of Prior Convictions of the Accused

One of the less frequently used forms of aggravation evidence is records of prior civilian convictions. When such prior convictions come from state courts, it is unclear what constitutes a conviction.[19] In *United States v. White*,[20] the CAAF issued a call for legislation to set forth specific requirements for proper evidence of civilian convictions under R.C.M. 1001(b)(3).[21] Without such guidance from the legislature or the President, military courts have allowed various forms of proof to show prior civilian convictions.

In *White*,[22] the trial counsel, in order to establish prior civilian convictions of the accused, offered in aggravation four criminal warrants for bad checks; the warrants had been issued by a state court in Georgia.[23] The warrants indicated the name of the accused, the amount of the bad check, and the notation "nolo"[24] to reflect the plea entered by the accused.[25] In presenting defense sentencing matters, the accused testified that she had paid restitution for each of the warrants.[26]

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11. *Clemente*, 46 M.J. at 720.

12. 47 M.J. 142 (1997).

13. *Id.*

14. *Id.* at 143.

15. *Id.* at 144.

16. *Id*. at 144. The letter of reprimand indicated that the command saw "no potential for rehabilitation and retention" of the accused. *Id*. The defense, however, also failed to object based on violation of R.C.M. 1001(b)(5) as improper evidence of rehabilitative potential. The court further noted, "It is far from clear that the letter of reprimand from appellant's personnel records would have been admissible had there been timely objection." *Id*.

17. *Id.*

18. Often, the pretrial agreement contains terms such as, "the government agrees to withdraw charge x and its specification" or "the government agrees to present no evidence on the merits as to charge x and its specification." To avoid the situation in *Williams*, defense counsel should consider language such as: "the government agrees to withdraw charge x and its specification, and further agrees to offer no evidence of this allegation during the accused's court-martial" or "the government agrees that any evidence of charge x and its specification is irrelevant to the accused's pending court-martial, and therefore agrees not to offer any such evidence."

19. *See generally* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 44 (1991).

> The Rule does not, however, define a civilian "conviction," leaving that to the law of the jurisdiction in which the conviction was adjudged. The fact that a state permits use of a civilian disposition not amounting to a "conviction" in that state's sentencing does not make it admissible at a court-martial.

Id.

20. 47 M.J. 139 (1997).

The CAAF noted in *White* the absence of any indication by the defense that, but for admission of the warrants offered by the prosecution, the accused would not have testified as to restitution.[27] The court held that the "appellant waived the right to challenge the evidence when she took the stand and testified about the warrants, and the record does not reflect any indication from the defense that she would not have testified about the warrants if not for their earlier admission into evidence."[28]

Absent change to the *Manual for Courts-Martial* setting forth specific evidence required to establish a civilian conviction, trial counsel should seek any available documentation which shows a charge and disposition. The defense, on the other hand, should demand the strictest proof of the conviction. In rebutting or explaining any such conviction, defense counsel should consider using the accused's testimony regarding the prior conviction only if the military judge allows the prosecution evidence of the civilian conviction—in whatever form the evidence might be.

R.C.M. 1001(b)(4): Evidence in Aggravation

Victim-impact evidence continues to provide trial counsel with ample opportunity to show the full effect of the accused's crimes. In *United States v. Wilson*,[29] the CAAF held such evidence proper, even when the offense was not committed in the presence of the victim, so long as the circumstances are "directly relating to or resulting from the offenses of which the accused has been found guilty."[30]

The accused in *Wilson* had been convicted at a previous court-martial of assault consummated by battery and unlawful entry.[31] In that trial, the prosecutor, who was the victim of the disrespect that resulted in the accused's second court-martial, cross-examined the accused and argued for a conviction and sentence.[32] When the accused made disparaging remarks[33] about the prosecution in his prior court-martial, the unit brought new charges for disrespect to a superior commissioned officer and for disorderly conduct.[34] The victim was not present when the accused made the disrespectful remarks, but she subsequently learned of them.[35] Even though the victim did not directly hear the remarks, she testified that she felt "a little bit of concern" as a result of the accused's disrespect and owing in part to her husband's frequent absences as a pilot.[36] She contacted an agent from the Office of Special Investigations[37] regarding threats against attorneys.

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21. *Id.* at 140.

> Neither appellant's plea of *nolo contendere* nor other special pleas and judgments that frequently appear at sentencing and provoke defense objection are addressed in the Rule. These include no contest pleas, juvenile convictions, expungements, and other such judgments, which are not denominated as convictions under state law but which may be the subject of litigation under the Rule. While the *Manual* cannot anticipate every future point of contention on this issue, admissibility of major categories of prior civilian judgments is a matter that readily could be clarified through an amendment to RCM 1001(b)(3).

Id. *See* MCM, *supra* note 1, R.C.M. 1001(b)(3).

22. In this guilty plea case, the accused was found guilty of two specifications each of larceny, forgery, and uttering forged checks, and one specification of wrongful appropriation, in violation of Uniform Code of Military Justice (UCMJ) Articles 121 and 123. *White*, 47 M.J. at 139. *See* UCMJ arts. 121, 123 (West 1995).

23. *White*, 47 M.J. at 139.

24. GA. CODE ANN. § 17-7-95 (1995). "Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilty or otherwise or for any purpose . . . ." *Id.*

25. *White*, 47 M.J. at 139.

26. *Id.*

27. *Id.* at 140.

28. *Id.*

29. 47 M.J. 152 (1997).

30. *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(4).

31. *Wilson*, 47 M.J. at 153.

32. *Id.* at 154.

33. *Id.* at 153. The accused commented to his squadron section commander, "Captain Power, that fucking bitch is out to get me." *Id*.

34. *Id.* at 152.

35. *Id.* at 153.

The CAAF held that the victim's concern was directly related to the accused's disrespect and was thus proper evidence in aggravation.[38] In particular, the court identified several factors to support its conclusion:

> [O]ther circumstances including [the victim's] prosecution of the accused at court-martial, her isolated home-life situation, and appellant's history of physical confrontation, which reasonably justified her fear or anxiety over appellant's words. Finally, the record of trial establishes a temporal identity between [the victim's] knowledge of appellant's offense, his court-martial for that offense, and [the victim's] continuing state of concern.[39]

Although there is a broad range of admissible evidence in aggravation under R.C.M. 1001(b)(4), two cases illustrate limitations on such evidence. In *United States v. Skoog*,[40] the prosecution offered evidence of post-traumatic stress disorder suffered by the child-victim of indecent acts.[41] The trial counsel called an expert witness on post-traumatic stress disorder, after having had the expert review stipulations of expected testimony in the case.[42] The expert witness never interviewed the victim, and the victim did not testify at sentencing.[43] The expert never had an opportunity to observe the victim's demeanor or reaction in describing the acts that formed the basis of the charges of which the accused was convicted.[44]

The Army Court of Criminal Appeals held that the evidence from the expert "was not specifically related to the victim . . . and was only minimally based on the facts of the case."[45] In order for such testimony to be admissible, trial counsel must specifically relate the evidence to the victim in the case at bar. To do so, trial counsel should at least have the expert interview the victim prior to trial or observe the testimony of the victim at trial or in a pretrial proceeding.

Another example of improper evidence in aggravation under R.C.M. 1001(b)(4) occurred in *United States v. Powell*.[46] In *Powell*, the accused was found guilty of offenses relating to failure to report to work on time and travel and housing allowance fraud.[47] During the sentencing phase, the trial counsel elicited testimony that the accused, in addition to the offenses of which he was found guilty, had lost government property, was financially irresponsible, and had passed worthless checks.[48] On close examination, however, the Navy-Marine Corps Court of Criminal Appeals held that the particular acts of uncharged misconduct did not constitute "aggravating circumstances *directly* relating to or resulting from the appellant's crimes."[49] *Powell* is a reminder for trial and defense counsel that R.C.M. 1001(b)(4) determines the admissibility of uncharged misconduct at sentencing and that such evidence "is not admissible unless it directly relates to or results from the offense(s) of which the accused has been found guilty."[50]

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36. *Id.* at 154.

37. "The Air Force Office of Special Investigations (AFOSI) . . . performs as a federal law enforcement agency with responsibility for conducting criminal investigations . . . ." U.S. DEP'T. OF AIR FORCE, MISSION DIRECTIVE 39, § 1 (1 Nov. 1995).

38. *Wilson*, 47 M.J. at 153. Chief Judge Cox, concurring in the decision, noted a concern regarding the use of a judge advocate as a witness and commented that Rule 3.7(a) of the Rules of Professional Conduct specifically prohibits a lawyer from acting as an advocate when the attorney will be a witness at the court-martial. *Id.* at 156 (Cox, C.J., concurring). "There is such a close connection between the trial counsel, the chief of military justice, and the staff judge advocate, at least in the eyes of the military and civilian communities, that it is disingenuous to suggest that Rule 3.7(a) offers a place to hide." *Id*.

39. *Id.* at 155.

40. No. 9601723 (Army Ct. Crim. App. Aug. 5, 1997).

41. *Id*. slip op. at 1. The accused was convicted of indecent acts with a child under sixteen years of age, in violation of UCMJ Article 134. *Id. See* UCMJ art. 134 (West 1995). He was sentenced to a bad-conduct discharge, confinement for nine months, total forfeitures, and reduction to the grade of E-1. *Skoog*, No. 9601723, slip op. at 1.

42. *Skoog*, No. 9601723, slip op. at 1.

43. *Id.*

44. *Id.* slip op. at 2.

45. *Id.*

46. 45 M.J. 637 (N.M. Ct. Crim. App. 1997).

47. *Id.* at 638.

48. *Id.* at 639.

49. *Id.* at 640 (emphasis in original).

Skoog and *Powell* highlight the requirements of R.C.M. 1001(b)(4). Defense counsel must break the chain of causation—for example, by foundation (as in *Skoog*) or by type (as in *Powell*)—in order to exclude such sentencing evidence. Conversely, trial counsel must demonstrate the relationship between the accused's offenses and their impact on the victim, even though the accused and the victim may have been remote from one another.

R.C.M. 1001(b)(5): Evidence of Rehabilitative Potential

A long trail of appellate litigation[51] regarding evidence of an accused's rehabilitative potential ended with the 1995 amendment to the *Manual for Courts-Martial*. The amended version of R.C.M. 1001(b)(5)[52] implemented requirements for rehabilitative potential evidence which were formerly found only in case law and which relate to the foundation,[53] basis,[54] and scope[55] of such testimony. Several recent cases from the courts of criminal appeals reflect the need for continued scrutiny of rehabilitative potential evidence at sentencing and illustrate the precision with which trial counsel must offer such evidence.

When offered. Where the prosecution deems it appropriate to offer evidence of the rehabilitative potential of the accused at sentencing, there is no requirement that the prosecution wait for the defense to raise the issue first.[56]

Foundation. In order to testify as to an accused's rehabilitative potential, a witness:

> [M]ust possess sufficient information and knowledge about the accused to offer a rationally-based opinion . . . . Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.[57]

In *Powell*,[58] the trial counsel sought to lay a foundation for evidence of rehabilitative potential. In eliciting the foundation testimony, however, the trial counsel allowed the witnesses to make several references to specific conduct of the accused.[59] The Navy-Marine Corps court reminded practitioners that "inquiry by the trial counsel into specific examples of an accused's conduct establishing the reasons for the opinion is not permitted on direct examination."[60]

Opinion Testimony Relating to Rehabilitative Potential

Rule for Courts-Martial 1001(b)(5)(D) authorizes a witness to give his opinion as to whether the accused has rehabilitative potential. It is improper, however, for the witness to express an opinion as to retention or discharge of the soldier, either expressly or by euphemism.[61]

In *United States v. Hughes*,[62] the Army Court of Criminal Appeals held that a first sergeant's testimony which implied

50. *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(4).

51. *See generally* 2 GILLIGAN & LEDERER, *supra* note 19, at 51. "The government's ability to present evidence as to lack of rehabilitative potential has given rise to a significant degree of litigation." *Id. See, e.g.*, United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Wilson, 31 M.J. 91 (C.M.A. 1990); United States v. Cherry, 31 M.J. 1 (C.M.A. 1990); United States v. Kirk, 31 M.J. 84 (C.M.A. 1990); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); United States v. Horner, 22 M.J. 294 (C.M.A. 1986); United States v. Pompey, 32 M.J. 547 (A.F.C.M.R. 1990).

52. Prior to the 1995 amendment to R.C.M. 1001(b)(5), the section read as follows: "The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1984).

53. MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

54. *Id.* R.C.M. 1001(b)(5)(C).

55. *Id.* R.C.M. 1001(b)(5)(D).

56. *See* United States v. Phelps, No. 9601351 (Army Ct. Crim. App. May 29, 1997).

57. MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

58. United States v. Powell, 45 M.J. 637 (N.M. Ct. Crim. App. 1997).

59. *Id*. at 639. The specific instances referred to by the three prosecution witnesses included ineffective counseling sessions between the witness and the unreceptive accused; that the accused had financial problems and had been late for work; and that the accused had lost military property, was financially irresponsible, and may have passed worthless checks. *Id*.

60. *Id*. at 640. The court further noted that "[s]uch initial inquiry into specific examples of conduct of an accused is limited to cross-examination to test or [to] impeach the opinion testimony." *Id*. *See* MCM, *supra* note 1, R.C.M. 1001(b)(5) analysis, app. 21, at A21-71 ("Note that inquiry into specific instances of conduct is not permitted on direct examination, but may be made on cross-examination.").

that the accused should receive a punitive discharge violated R.C.M. 1001(b)(5)(D).[63] Although the accused also made allegations of unlawful command influence rising from the first sergeant's testimony,[64] the Army court was not persuaded since the senior enlisted witness testified in front of a panel of officer members.[65]

The Army court also held recently that a senior non-commissioned officer's testimony that an accused had no *military* rehabilitative potential did not constitute an impermissible euphemism suggesting imposition of a punitive discharge.[66] Though the witness focused on the accused's "*military* rehabilitative potential," the court noted that whether such testimony constitutes an impermissible euphemism depends on the context of the statement.[67] In this instance, the testimony was, according to the Army court, an "honest, realistic, and . . . rationally-based observation of an NCO supervisor. That opinion established that [the accused's] character and performance indicated that he could not, or would not, conform to Army standards."[68] Once again, the court rejected contentions of unlawful command influence since the witness was a senior non-commissioned officer testifying to an officer panel.[69]

In *United States v. Garcia*,[70] the accused was convicted of several offenses relating to marijuana. Following the conviction, trial counsel elicited the following testimony from the accused's first sergeant: "We need a zero defect for any type of drug transaction. There's no place for that in the United States Army."[71] This testimony is improper evidence of rehabilitative potential because it focuses not on the individual accused and his characteristics, but solely on the nature of the offense.[72]

These cases illustrate the effects of imprecise testimony in the area of rehabilitative potential. Trial counsel must ensure that witnesses avoid references to specific instances of conduct in laying a foundation for the testimony. In offering the testimony of a witness, trial counsel must avoid having the witness recommend discharge from the service for the accused, either expressly or by euphemism. Defense counsel must remain vigilant to protect against improper recommendations for discharge. When a witness—officer or enlisted, commander or supervisor—testifies in a manner which appears to suggest that the accused should no longer serve in the military, counsel should object to such testimony and argue that it is a euphemism for a punitive discharge. In the absence of defense objection at trial, the appellate courts will use the plain error standard to analyze the testimonial error regarding rehabilitative potential.[73] In addition, defense counsel must protect the accused against unlawful command influence in evidence of rehabilitative potential. Thus, defense counsel should closely scrutinize and object to testimony from the accused's chain of command that effectively says that they no longer want the accused in the unit.

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61. *See* United States v. Ohrt, 28 M.J. 301, 307 (C.M.A. 1989) (stating that "[a] witness . . . should not be allowed to express an opinion whether an accused should be punitively discharged . . . . The use of euphemisms . . . are just other ways of saying 'Give the accused a punitive discharge'"); United States v. Cherry, 31 M.J. 1, 5 (C.M.A. 1990) (stating that "[a] commander's opinion stopping short of expressly recommending a punitive discharge, but which impliedly advocate[s] separation from the service, [is] also prohibited at courts-martial").

62. No. 9501978 (Army Ct. Crim. App. May 5, 1997).

63. *Id.*, slip op. at 3. The court did not indicate the precise testimony of the witness, but noted, "The questionable testimony by the first sergeant was an expansive although nonresponsive answer to a proper question by trial counsel . . . . The comment by the first sergeant was not a clearly stated opinion that the accused should be punitively discharged." *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(5)(D).

64. *Hughes*, No. 9501978, slip op. at 4. *See Cherry*, 31 M.J. at 5. In *Cherry*, the court held that one basis for not allowing admission of a commander's opinion as to an appropriate punishment (for example, a punitive discharge) in a court-martial is that such an opinion "constituted unlawful command influence." *Id*.

65. *Hughes*, No. 9501978, slip op. at 4, *citing* United States v. Malone, 38 M.J. 707 (A.C.M.R. 1993).

66. *See* United States v. Yerich, 47 M.J. 615, 620 (Army Ct. Crim. App. 1997). The scope of the witness' opinion was as follows: "Q: And, have you formed an opinion as to his rehabilitative potential? A: I can form one as to his military rehabilitation. Q: What is that opinion, sir [sic]? A: For military, I don't think so." *Id*. at 617.

67. *Id.* at 619.

68. *Id*. at 620. The court signaled its dissatisfaction with the euphemism rule in resolving this issue against the appellant, since the witness' reference to *military* rehabilitative potential (and that the accused lacked such potential) came very close to suggesting that the accused be given a punitive discharge.

69. *Id*. at 619 n.5 (recommending abandonment of the concept of euphemisms in testimony regarding rehabilitative potential due to the subjective nature of such statements).

70. No. 9601482 (Army Ct. Crim. App. Nov. 12, 1997).

71. *Id.* slip op. at 2 n.1.

72. *See* MCM, *supra* note 1, R.C.M. 1001(b)(5)(C). "The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." *Id. See* United States v. Horner, 22 M.J. 294, 296 (C.M.A. 1986) (stating, "his testimony was plainly based not upon any assessment of appellant's character and potential, but upon the commander's view of the severity of the offense.").

R.C.M. 1001(c): Matters to be Presented by the Defense

Among the many types of evidence which might constitute extenuation[74] or mitigation[75] for an accused, the most significant type recently addressed by the CAAF concerns loss of retirement benefits. Previously, the Court of Military Appeals held that a military judge properly denied an accused's proffer of evidence of loss of retirement benefits as irrelevant or so collateral as to risk confusing the members.[76] The accused in that case was over three years from retirement and would have had to reenlist in order to become retirement-eligible.[77] More recently, in *United States v. Sumrall*,[78] the CAAF recognized the appropriateness of such evidence for service members who *are retirement-eligible*. Recognition of the appropriateness of evidence of retirement benefits, however, did not resolve the issue of the relevance of such evidence.

Recently, the CAAF set aside the sentences in two courts-martial as it sought to clarify the circumstances in which potential loss of retirement benefits is relevant evidence. The accused in *United States v. Becker*[79] had served nineteen years and eight and one-half months at the time of his court-martial.[80] During sentencing, the defense sought to introduce evidence of the projected loss of retirement benefits if the court-martial adjudged a punitive discharge. The military judge refused the defense-proffered evidence, finding that since the accused was not retirement-eligible, evidence of loss of retirement benefits to which he was not yet entitled was irrelevant.[81]

The CAAF premised its decision to set aside the sentence in *Becker* on three points. First, "relevant evidence" under M.R.E. 401 is broad and concerns "any tendency" and "any fact."[82] The court also noted the broad mitigation rights of an accused to offer any evidence that might lessen his punishment and the military judge's discretion to relax the rules of evidence for an accused at sentencing.[83]

The result of this broad evidentiary view at sentencing for the accused is the second point relied upon by the CAAF. "[T]he relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."[84] Unlike in *Henderson*, the court noted, the accused in *Becker* was only three and one-half months from retirement and did not have to reenlist in order to be eligible to retire.[85] The court expressly avoided a per se rule for exclusion of evidence of loss of retirement benefits in favor of an ad hoc analysis.[86]

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73. *See Garcia*, No. 9601482, slip op. at 3 (citing United States v. Young, 470 U.S. 1, 17 n.14 (1985)). "To be plain, the error must be obvious, substantial, and have had a prejudicial impact on the sentencing authority's deliberative process." *Id*.

74. *See* MCM, *supra* note 1, R.C.M. 1001(c)(1)(A). "Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense." *Id*.

75. *See id.* R.C.M. 1001(c)(1)(B). "Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial." *Id*.

76. *See* United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989).

77. *Id.* "Retirement-eligible" refers to members of the armed services who meet the statutory entitlement to be eligible for retirement. *See* 10 U.S.C. § 3914 (1994) (providing that "[u]nder regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service computed under Section 3925 of this title may, upon his request, be retired").

78. 45 M.J. 207 (1996). In *Sumrall*, the court noted that "the potential loss of retirement benefits was a proper matter for consideration by factfinders at appellant's court-martial." *Id*. at 209. Captain Sumrall was found guilty of two specifications of indecent acts with a female under the age of 16 years, in violation of UCMJ Article 134 and was sentenced to a dismissal and confinement for four years. At the time of his court-martial, he had completed 21 years of active service and was retirement-eligible. At sentencing, he offered evidence of pay he would receive if allowed to retire and the total he would receive over his life expectancy. The CAAF held that the opportunity of the defense to present this mitigation evidence satisfied the meaningful-opportunity-to-be-heard concerns of the Due Process Clause. *Id*.

79. 46 M.J. 141 (1997). The accused was convicted of conspiracy to commit larceny, seven specifications of larceny, and eight specifications of wrongful appropriation and false swearing. *Id*. *See* UCMJ arts. 81, 121, 134 (West 1995). His sentence included a dishonorable discharge, total forfeitures, and reduction to the grade of E-1.

80. *Becker*, 46 M.J. at 142.

81. *Id.*

82. *Id*. *See* MCM, *supra* note 1, MIL. R. EVID. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*.

83. *Becker*, 46 M.J. at 143. *See* MCM, *supra* note 1, R.C.M. 1001(c)(3).

84. *Becker*, 46 M.J. at 143.

85. *Id.*

86. *Id.*

Third, the CAAF stressed the importance of this particular evidence and the need to have an informed sentencing authority. "[T]he value of retired pay should be recognized as the single most important consideration in determining whether to adjudge a punitive discharge . . . . The sentencing authority should not have to make that decision, however, while merely speculating about the significant impact of a punitive discharge."[87]

In *United States v. Greaves*,[88] which was decided on the same day as *Becker*, the CAAF emphasized the importance of evidence regarding loss of retirement benefits and the need for guidance to the sentencing authority. The accused in *Greaves* was just nine weeks from retirement-eligibility when he was convicted at court-martial of wrongful use of cocaine.[89] During deliberations on sentencing, the court members asked the military judge whether confinement or hard labor without confinement, plus a bad-conduct discharge, equaled loss of retirement benefits for the accused.[90] The military judge, finding that the accused had no vested retirement benefits at the time of his court-martial, refused to answer the panel's questions directly.[91]

The CAAF found prejudicial error in the military judge's refusal to instruct the members with answers to their questions.[92] Since the accused was only nine weeks shy of twenty years of service and did not have to reenlist to reach retirement-eligibility, "the members were left largely unguided in a critical sentencing area."[93] In determining whether to instruct the members, the CAAF held that "whether a collateral consequences instruction is appropriate in an individual case depends upon the particular facts and circumstances of that case."[94]

As a result of the decisions in *Becker* and *Greaves*, defense counsel should offer in mitigation evidence of potential loss of retirement benefits for an accused who is close to retirement and would not have to reenlist to be retirement-eligible. Though an accused who would not become retirement-eligible within his current enlistment would not fit within the holdings of *Becker* and *Greaves*, defense counsel should consider offering evidence of potential loss of other benefits for an accused who faces a punitive discharge.[95]

Punishments

Two recent developments—one judicial and one legislative—affect punishments authorized in the Uniform Code of Military Justice.

R.C.M. 1003(b)(2): Forfeiture of Pay and Allowances

Articles 57(a) and 58b of the Uniform Code of Military Justice impose mandatory automatic maximum forfeitures when courts-martial sentences meet specified triggers.[96] Forfeitures at courts-martial, whether automatic based on the sentence or adjudged by the court-martial, take effect fourteen days after sentence is adjudged or on action by the convening authority, whichever is earlier.[97] These changes, as promulgated, apply to all courts-martial *sentences adjudged* on or after 1 April 1996.

The CAAF addressed the effect of the Ex Post Facto clause of the Constitution[98] on these forfeiture provisions in *United States v. Gorski*.[99] The court categorized the timing and amount of the automatic forfeitures imposed by Articles 57(a) and 58b as "punishment" rather than mere "administrative" matters,[100] thus invoking the protections of the Ex Post Facto clause.[101] The court held that application of Articles 57(a) and 58b to

87. *Id.* at 144.

88. 46 M.J. 133 (1997). The accused's sentence for conviction of one specification of wrongful use of cocaine was a bad-conduct discharge, confinement for 90 days, and reduction in grade to E-4.

89. *Id.* at 134.

90. *Id.*

91. *Id.* at 135.

92. *Id*. at 137. The judge repeated certain of his earlier instructions regarding a punitive discharge and then added, "I am not trying to be evasive, but all I can tell the members is that there are certain effects that are collateral to your decision, and what those effects are, you shouldn't speculate." *Id*.

93. *Id.* at 138.

94. *Id.* at 139.

95. *See, e.g.*, United States v. Sumrall, 45 M.J. 207, 211 (1996). In *Sumrall*, Judge Sullivan refers to *United States v. Ives*, No. S29118 (Army Ct. Crim. App. July 2, 1996), noting the extreme loss to a soldier who is convicted of use of marijuana and, as a result of a punitive discharge, would lose early separation pay of over $200,000. *Id*. Similarly, an accused might qualify for other separation bonuses or early retirement, but lose such entitlements if he receives a punitive discharge at a court-martial. Judge Sullivan also recommended adoption of a new sentence option of discharge with no loss of retirement benefits. *Id.*

96. *See* UCMJ arts. 57(a), 58b (West Supp. 1997). By operation of UCMJ Article 58b, a sentence at a general court-martial that includes more than six months confinement, or any confinement plus a punitive discharge, results in total forfeiture of all pay and allowances while the accused is in confinement or on parole. *Id*. art. 58b. At a special court-martial, a sentence that includes any confinement plus a punitive discharge results in forfeiture of two-thirds pay while the accused is in confinement or on parole. *Id*.

offenses committed prior to 1 April 1996 violates the Ex Post Facto clause.[102]

The CAAF upheld the validity and application of Articles 57(a) and 58b, but limited their application to offenses committed on or after 1 April 1996.[103] In an exercise of judicial economy, the CAAF chose not to address waiver for individual cases that applied Articles 57(a) and 58b to offenses committed prior to 1 April 1996, but simply determined the Ex Post Facto application.[104] The remedy for any accused who was sentenced on or after 1 April 1996 for offenses committed prior to that date is "recoupment of forfeitures taken in reliance on the provisions of 58b and 57(a)(1)."[105]

R.C.M. 1003((b)(8): Confinement

The National Defense Authorization Act for Fiscal Year 1998[106] contained an amendment to the Uniform Code of Military Justice that created a new punishment of life without eligibility for parole. The new punishment is applicable to offenses committed on or after 18 November 1997.[107] This sentencing option authorizes a court-martial to impose a sentence of confinement for life without eligibility for parole for any offense that authorizes a sentence of confinement for life.[108] A sentence of life without eligibility for parole is, however, still subject to modification by the convening authority, the appellate courts (including the United States Supreme Court), or executive par-

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97. *Id.* art. 57(a)(1).

> Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-marital takes effect on the earlier of—(A) the date that is 14 days after the date on which the sentence is adjudged; or (B) the date on which the sentence is approved by the convening authority.

Id.

98. U.S. CONST. art. I, § 9.

99. 47 M.J. 370 (1997).

100. *Id*. at 373.

101. *Id.* A law is *ex post facto* if the law "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Id*., *citing* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

102. *Gorski*, 47 M.J. at 374.

103. *Id*.

104. *Id.* at 375. "[W]e nevertheless elect not to consider whether . . . others . . . waived the claim . . . . It is simply neither reasonable nor cost effective to adjudicate each of the numerous pending cases." *Id*.

105. *Id*. Note, however, that the remedy extends only to *automatic* forfeitures, and not to *adjudged* forfeitures. Thus, an accused who was sentenced on or after 1 April 1996, for offenses committed prior to that date, and whose sentence included forfeitures of pay and allowances, would not be entitled to recoupment of the forfeited pay and allowances. If the forfeitures adjudged by the court were taken earlier due to application of Article 57(a) (forfeitures effective 14 days after sentence adjudged), the accused would be entitled to recoupment of forfeitures taken prior to approval of the adjudged forfeitures by the convening authority.

106. Pub. L. No. 105-85, § 581, 111 Stat. 1629 (1997).

107. *Id*. The Act provides:

> 856a. Art. 56a. Sentence of confinement for life without eligibility for parole
>
> (a) For any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement for life without eligibility for parole.
> (b) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—
> (1) the sentence is set aside or otherwise modified as a result of—
> (A) action taken by the convening authority, the Secretary concerned, or another person authorized to act under section 860 of this title (article 60); or
> (B) any other action taken during post-trial procedure and review under any other provision of subchapter IX;
> (2) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or
> (3) the accused is pardoned.

108. The following offenses under the UCMJ authorize a sentence of confinement for life: art. 94 (Mutiny & sedition); art. 99 (Misbehavior before the enemy); art. 100 (Subordinate compelling surrender); art. 101 (Improper use of countersign); art. 102 (Forcing safeguard); art. 103 (Looting, pillaging); art. 104 (Aiding the enemy); art. 105 (Misconduct as prisoner); art. 106a (Espionage); art. 110 (Willfully and wrongfully hazarding a vessel); art. 113 (Misbehavior of sentinel or lookout in time of war); art. 118(1-4) (Murder); art. 120 (Rape); art. 125 (forcible sodomy); art. 134 (Kidnapping).

don, in the course of approval and review of a court-martial sentence.[109]

Conclusion

The *Manual for Courts-Martial* provides an adversary system in the sentencing phase of courts-martial, and advocates for the prosecution and defense play important roles in providing information to the sentencing authority. Effective advocacy affects the scope of admissible evidence in the form of personnel records, prior convictions, aggravation, victim-impact, and rehabilitative potential. An important and fertile area for defense counsel to develop extenuation and mitigation evidence is the area of collateral consequences of a court-martial sentence. In addition to an accused's personal concern with such consequences, punishment provisions in forfeitures and confinement for life without parole put such matters before the sentencing authority. Recognizing this trend, the zealous advocate will begin to shape the emerging law.

109. Pub. L. No. 105-85, 111 Stat. 1629.