The CAAF at a Crossroads: New Developments in Post-Trial Processing

Lieutenant Colonel James Kevin Lovejoy
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

"We are concerned with the large number of cases coming before us involving issues of new matter in post-trial addenda. The court below has noted that post-trial errors have accounted for 44% of the cases where they have granted relief as of October 1995." —*UNITED STATES V. CHATMAN* [1]

Post-trial errors continued to bedevil military appellate courts throughout the 1997 term. As noted above, close to half of the cases in which the Air Force Court of Criminal Appeals recently ordered relief involved post-trial mistakes.[2] The concern of the Court of Appeals for the Armed Forces (CAAF) over the steady volume of post-trial mistakes appears to have reached the point where the court is prepared to take affirmative steps to change the way post-trial errors are reviewed on appeal.

A New Rule?

In what may prove to be the CAAF's most significant post-trial opinion in several years, *United States v. Chatman*,[3] the CAAF fashioned a new rule that shifts the burden to the accused to show what he would have submitted to "deny, [to] counter, or [to] explain" new matter in the staff judge advocate's (SJA's) addendum.[4] This new burden imposed on the appellant represents a significant departure from the existing post-trial appellate review process, in which appellate courts generally refuse to "speculate on what the convening authority would have done if he had been presented with an accurate record."[5]

This is a significant change of direction for the CAAF. As justification for its new approach to reviewing post-trial addendum errors, the court cited Article 59(a) of the Uniform Code of Military Justice (UCMJ).[6] This is the provision of the UCMJ commonly cited to support findings of "harmless error." The majority of the CAAF has consistently resisted the application of the "harmless error" standard to post-trial errors. Judge Crawford, however, has long espoused this to be the appropriate standard in numerous dissenting opinions.[7] To the extent *Chatman* stands for the proposition that the CAAF will now apply a harmless error analysis to addenda with new matter that was not served on the defense, it appears that Judge Crawford's minority view is gathering steam among other members of the court.

Whether *Chatman* is a precursor of additional changes to appellate review of post-trial processing is far from certain. Though clearly placing a new burden on the defense to demonstrate prejudice, Judge Gierke's majority opinion establishes an extremely low standard for future appellants to satisfy. Judge Gierke wrote: "[w]e believe that the threshold should be low,

---

1. 46 M.J. 321, 323 (1997), *citing* United States v. Thompson, 43 M.J. 703, 707 (A.F. Ct. Crim. App. 1995).

2. These statistics were the product of an informal survey conducted by the Air Force Court of Criminal Appeals. This number is even more telling when one considers the number of post-trial mistakes typically held to be harmless.

3. 46 M.J. 321. In *Chatman*, the accused alleged ineffective assistance of counsel because his attorney never gave him the opportunity to explain the single remaining charged use of cocaine. In his addendum, the staff judge advocate responded that this was a "tactical decision" because the defense counsel was aware of a second positive urinalysis that the government could have used in rebuttal. The addendum was not served on the accused. The accused claimed that this information constituted "new matter" requiring service on the defense and an opportunity to respond. The CAAF reversed the conclusion of the Air Force Court of Criminal Appeals and held that this did not constitute "new matter." *Id*. at 324.

4. *Id.* at 323.

> For all cases in which a petition for review is filed after the date of this decision asserting that defense counsel have not been served with an addendum containing new matter, we will require appellant to demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the new matter.
>
> .

Id. The CAAF did not apply the new rule to the instant case. The court returned the record for a new post-trial recommendation and action. *Id.*

5. *Id.*, *citing* United States v. Leal, 44 M.J. 235, 237 (1996).

6. *See* UCMJ art. 59(a) (West 1995) (stating that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of an accused").

7. *See, e.g.*, *Leal*, 44 M.J. at 240 (Crawford, J., dissenting).

and if an appellant makes *some colorable showing of possible prejudice*, we will give that appellant the benefit of the doubt . . . ."[8] Just how far the CAAF's new standard, which requires "some colorable showing of possible prejudice," is from traditional notions of harmless error (errors that do not materially prejudice the substantial rights of an accused)[9] remains to be seen. Judge Crawford acknowledged this discrepancy by concurring only "insofar as the majority is willing to apply the harmless error test in the future to cases involving those numerous post-trial errors."[10] Judge Crawford's firm stance in support of the harmless error standard is based on her unflinching view that "Article 59(a) makes no exceptions as to application of the harmless error test" to the review of errors occurring during the post-trial process.[11]

Why Post-trial Errors Are Treated Differently from Other Trial Errors

Before proceeding further into recent developments, it may prove useful to take a step back to understand why military appellate courts have been reluctant to analyze post-trial errors under the same standard used to review errors committed at other stages of trial. The UCMJ and the *Manual for Courts-Martial* (*MCM*)[12] instituted an elaborate post-trial system designed to provide an accused with his "best chance" for sentence relief.[13] Post-trial practitioners are required to navigate their way through numerous rules under both the UCMJ and the *MCM* to ensure that an accused's post-trial rights are honored.[14] Due, in no small part, to the sheer number of post-trial rules there are to follow, numerous post-trial mistakes repeatedly occur.[15]

Unlike the courts' consistent treatment of other trial errors under the harmless error standard of Article 59(a), military appellate courts have applied an inconsistent methodology for reviewing post-trial errors. Time and again, military appellate courts confront the ultimate question of whether the alleged post-trial error affects a substantial right of the accused[16] or amounts to merely a harmless procedural error.[17]

Unique Nature of Military Justice Post-trial Practice

It is the unique nature and purpose of the military post-trial process that poses this conundrum for military appellate courts. The virtually limitless extra-record information that the government and defense can present for the convening authority's consideration during the post-trial process distinguishes the post-trial phase from the pretrial, trial, and sentencing phases of a court-martial. To accommodate these virtually unrestricted submissions from the government and defense, the UCMJ and the *MCM* provide convening authorities with broad discretion to consider matters outside the record prior to acting on a case. Since final action regarding findings and sentence is a matter within the convening authority's "sole discretion,"[18] convening authorities are permitted to consider any matters they "deem appropriate."[19] As noted in *United States v. Busch*,[20] a convening authority may grant clemency "for good reason, for no reason, or even for what an appellate court might consider to be a bad reason."[21]

In light of the convening authority's extreme latitude, the rules permit both the government and the defense to submit extra-record matters for the convening authority's consider-

---

8. *Chatman*, 46 M.J. at 323-24 (emphasis in original).

9. UCMJ art. 59(a).

10. *Chatman*, 46 M.J. at 324 (Crawford, J., concurring).

11. *Id.*

12. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995) [hereinafter MCM].

13. *See* United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

14. *See* MCM, *supra* note 12, R.C.M. 1101-1114.

15. *See Chatman*, 46 M.J. 321.

16. *See* UCMJ art. 59(a) (West 1995).

17. The issue can also be framed by asking whether an accused's right to clemency is a "substantial right" that has been materially prejudiced by a particular post-trial error. *See* United States v. Busch, 46 M.J. 562, 565 (N.M. Ct. Crim. App. 1997) (withdrawn from the bound volume at the request of the court).

18. MCM, *supra* note 12, R.C.M. 1107(b)(1).

19. *Id.* R.C.M. 1107(b)(3)(B)(iii). If the convening authority considers adverse matters outside of the record, the accused must be notified and given an opportunity to respond.

20. 46 M.J. 562.

21. *Id.* at 564.

ation. Rule for Courts-Martial (R.C.M.) 1106(b) enables an accused to submit "*any written matters which may reasonably tend to affect the convening authority's decision* whether to disapprove any findings of guilty or to approve the sentence." [22] The rules provide the SJA with similar discretion to include matters outside the record of trial in the post-trial review. "The recommendation of the staff judge advocate or legal officer may include . . . *any additional matters deemed appropriate* by the staff judge advocate or legal officer. Such matter may include *matters outside the record*."[23]

The unique problem posed by the boundless matters available for the convening authority's consideration is the absence of boundaries within which to assess the impact that erroneous or incomplete information may have had on the convening authority's exercise of his unfettered discretion. Since there are no limits on matters that the defense may elect to submit, appellate courts struggle to determine whether denial of an accused's right to submit matters may have affected the convening authority's decision to grant or to deny clemency. Consequently, courts are reluctant to speculate as to what a defense counsel would have submitted had she not been denied the opportunity to do so.[24] In similar fashion, the limitless reasons a convening authority may grant clemency (any reason, no reason, even a bad reason) make it an equally daunting task for appellate courts to ascertain the effect post-trial errors (for example, erroneous information provided by the government or denied opportunities to present matters by the defense) may have had on the convening authority's decision whether to grant clemency. Just as appellate courts are reluctant to speculate about what defense counsel would have done, these same courts are even more reluctant to speculate as to what the convening authority might have done had the error not occurred.[25]

Is Chatman a Turning Point?

Years from now, military justice practitioners may look back on C*hatman* as the seminal case in which a nearly unanimous CAAF[26] changed direction regarding appellate review of post-trial errors. It may represent the court's first of many steps toward reviewing post-trial errors under the same standard applied to other trial errors. Placing the burden on the accused to demonstrate prejudice, albeit under the very low standard of "some colorable showing of potential prejudice,"[27] represents a clear departure from the historical treatment of post-trial errors as a class of their own. Whether this new burden will be limited to instances of government failure to re-serve addenda containing new matter remains to be seen. It would not be surprising to see future arguments from the defense that an accused had suffered similar prejudice because either the government failed to serve the SJA post-trial recommendation (PTR) on the defense[28] or the record of trial did not include the SJA's PTR.[29] In both instances, the appellate courts will be left to speculate, first, as to what the defense counsel would have submitted if given notice and an opportunity to respond and, second, what the convening authority would have done had he considered these speculative matters.

Also left unresolved is whether the *Chatman* court's willingness to accept the appellant's affidavit concerning what he would have submitted to "deny, [to] counter, or [to] explain" the new matter will lead to acceptance of a convening authority's affidavit explaining what he would have done if he had been provided with accurate information. Will military appellate courts attempt to avoid the lengthy and unproductive process of returning cases to convening authorities for new reviews and actions by accepting affidavits that state what, if anything, the convening authority would have done differently? Allegations that the convening authority was misinformed of the

---

22. MCM, *supra* note 12, R.C.M. 1106(b) (emphasis added). The rule further provides:

> Such matters are not subject to the Military Rules of Evidence and may include:
> (1) Allegations of errors affecting the legality of the findings or sentence;
> (2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;
> (3) Matters in mitigation which were *not available for consideration at the court-martial*; and
> (4) Clemency recommendations by any member, the military judge, or *any other person*. The *defense may ask any person for such a recommendation*.

Id. (emphasis added).

23. *Id.* R.C.M. 1106(d)(5) (emphasis added).

24. *See, e.g.*, United States v. Leal, 44 M.J. 235 (1996).

25. *See, e.g.*, United States v. Chatman, 46 M.J. 321, 324 (1997).

26. Judge Sullivan concurred with the ultimate holding in *Chatman*, but he dissented with what he termed "judicial rulemaking" by the majority. *Id*. at 324 (Sullivan, J., concurring in part and dissenting in part).

27. *Id.* at 323, 324.

28. *See* MCM, *supra* note 12, R.C.M. 1106(f)(1) (requiring service of the SJA PTR on counsel for the accused).

29. *See* United States v. Mark, 47 M.J. 99 (1997).

accused's service record,[30] or failed to consider clemency matters submitted by the accused, are post-trial errors that could be resolved more efficiently through affidavits, as opposed to the time-consuming, labor-intensive process of ordering a new review and action. It is clear from the result in *Chatman* that the CAAF, at least with respect to post-trial addenda errors, has lost confidence "that returning cases for a new recommendation and action is a productive judicial exercise."[31] In light of the numerous post-trial errors reviewed by the courts over the years, it just may be that military appellate courts are now confident in their ability to speculate on what a defense counsel or convening authority would have done under certain circumstances.

The Slow Process of Change

Counsel should not be too quick to herald the arrival of a new standard for post-trial review. One week after publishing *Chatman*, the CAAF published *United States v. Buller.*[32] In that case, Buller asked the convening authority to reduce the adjudged sentence of total forfeitures to forfeiture of only $500.00 pay so that he could pay some "honorable" debts. In his addendum recommending against clemency, the SJA advised the convening authority that the accused had continued to receive "his pay of over $900 per month since his trial and confinement in January."[33] On appeal, Buller asserted that the SJA's comment regarding his continued full pay constituted "new matter" that required service on the defense and the opportunity to respond.[34]

Rather than resolve the issue through the traditional two-step process of first determining whether the information constituted "new matter" that required service on the defense and *then* testing for prejudice to the accused, the court skipped right to the question of prejudice. Noting the imprecise definition of "new matter" in R.C.M. 1106(f)(7), the CAAF concluded that it was not necessary to "attempt a more precise definition or to determine whether the material constituted 'new matter.'"[35] Instead, the CAAF assumed that it was new matter and decided the case on the much easier issue of finding that the accused was not prejudiced by the government's failure to serve the addendum.[36]

Though the shift of the burden of proof is not as clearly stated as in *Chatman*, the *Buller* court impliedly shifted the burden to the accused to show that the information contained in the SJA addendum was erroneous. Since the issue concerned the appellant's pay and financial situation, the court concluded that the accused was "in the best position to tell this [c]ourt whether the SJA's otherwise neutral comments were erroneous, inadequate, or misleading."[37] The CAAF observed that "[n]o such showing has been made" by the appellant.[38] The CAAF's concluding remarks that the essence of R.C.M. 1106(f)(7)[39] is "fair play" provides further evidence of the CAAF's apparent change in direction. Noting the court's history of presuming prejudice when the defense is not provided notice and an opportunity to respond to new matter, the *Buller* court reinforced its new view that it will not engage in "such a presumption [of prejudice] when the information is neutral or 'trivial.'"[40]

Had the CAAF concluded its opinion at this point, *Buller* and *Chatman* would have provided relatively clear, consistent

30. Pursuant to R.C.M. 1106(d)(3)(C), the SJA's PTR must include a summary of the accused's service record, to include length and character of service, awards and decorations received, and any record of non-judicial punishment and previous convictions. Inaccuracies and omissions of service records are frequently the subject of appellate litigation. *See, e.g.*, United States v. Demerse, 37 M.J. 488 (C.M.A. 1993).

31. *Chatman*, 46 M.J. at 323. The court stated further: "We are no longer confident that returning cases for a new recommendation and action is a productive judicial exercise in the absence of some indication that the information presented to the convening authority on remand will be significantly different." *Id.*

32. 46 M.J. 467 (1997).

33. *Id.* at 468.

34. *Id. See* MCM, *supra* note 12, R.C.M. 1106(b)(3)(A).

35. *Buller*, 46 M.J. at 468.

36. *Id.* (stating that the "appellant was not prejudiced by the failure to do so"). The court concluded that there was no prejudice because the SJA's comments reflected the routine administration of the sentence under the law in effect at the time of trial. Although recognizing that even routine information could be used in such a manner that failure to serve the accused could prejudice the defense, the court concluded that this was not such a case. *Id*. Counsel should note that this case arose prior to the recent change to UCMJ Article 58b, which requires automatic forfeiture of pay within 14 days of the announcement of a sentence that includes forfeitures.

37. *Id.* at 469.

38. *Id.* at 469.

39. *See* MCM, *supra* note 12, R.C.M. 1106(f)(7). "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments." *Id*.

40. *Buller*, 46 M.J. at 469.

signals that the court was headed in the direction favoring a more streamlined review of post-trial processing. At the end of its opinion, however, the CAAF added a footnote to offer its thoughts regarding the continued existence of potential appellate litigation over "new matter."[41] Noting that problems of new matter are likely to continue to plague the court, the CAAF recommended that the Rules for Courts-Martial be amended to require "serving the addendum on the accused in all cases, regardless of whether it contains 'new matter'"[42]

In his concurring opinion in *Buller*, Judge Sullivan bemoaned, "[e]nough of this ex parte justice"[43] of providing additional information to the convening authority through the SJA's addendum. Judge Sullivan suggested that the rules be changed to provide convicted soldiers rights akin to those afforded to civilian criminals under Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 32(b)(6) to review, to comment upon, and to object to matters in federal presentence reports.[44]

Judge Sullivan's analogy to due process rights under Fed. R. Crim. P. 32(b)(6) and the majority's willingness to create additional post-trial procedural rules reveal the court's nagging reluctance to recognize or to distinguish concepts of due process from clemency. Pursuant to Fed. R. Crim. P. 32(b)(6), a civilian accused is afforded the *procedural due process right* to review and to comment on information presented during the sentencing phase of a federal criminal trial.[45] The UCMJ already provides soldiers who are convicted of crimes substantial procedural due process during the adversarial sentencing hearing.[46] Judge Sullivan's demand to end "this ex parte justice" during the clemency process is off the mark. Clemency, as opposed to determining an appropriate sentence for a convicted criminal, is not a matter of due process and justice. It is a matter of mercy.[47] By recommending that the President create an additional due process procedural requirement to serve the SJA's addendum in every case, the CAAF continues to merge concepts of mercy with concepts of procedural due process. The end result is an ever-expanding procedural due process entitlement to submit clemency matters.

Buller and *Chatman* provide perfect examples of the CAAF's ongoing struggle to develop a consistent approach to the review of post-trial errors. On one side of the struggle (*Buller*) is the court's unanimous recommendation for more post-trial procedural due process protection in the form of a new rule requiring mandatory service of the addendum. On the other side lies *Chatman*, where the CAAF de-emphasized post-trial procedural due process by creating a new rule that placed the burden on the accused to demonstrate prejudice when the government fails to serve addenda that contain new matter. The inability of the CAAF to settle on a consistent methodology for reviewing post-trial errors is apparent in several other cases decided during the 1997 term.

The Post-trial Addendum

In addition to *Chatman* and *Buller*, the CAAF reviewed two other cases that alleged failure to serve an addendum containing *new matter.* In both *United States v. Cook*[48] and *United States v. Catalani*,[49] the alleged *new matter* involved gratuitous praise for the military judges who presided over the courts-martial and the observation that the esteemed judges had considered the same clemency matters now before the convening authority.[50] In both cases, the CAAF had little trouble finding that such remarks constituted new matter and that the SJA's failure to serve the addendum was prejudicial.

In *Catalani*, the CAAF noted that the military judge had, in fact, not considered much of the clemency package and, more importantly, that the favorable comments regarding the military judge were simply an attempt to bolster the SJA's own recommendation.[51] The CAAF also criticized the SJA's failure to address "the more fundamental question . . . of the relationship

41. *Id.* at 469 n.4.

42. *Id.*

43. *Id.* at 471.

44. *Id.* at 469-71.

45. FED. R. CRIM. P. 32(b)(6).

46. *See* MCM, *supra* note 12, R.C.M. 1001(c) (permitting the defense to present evidence in extenuation and mitigation and to rebut government aggravation evidence).

47. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 206 (1973). Clemency is defined as "an act or instance of leniency." *Id.* It is synonymous with notions of mercy.

48. 46 M.J. 37 (1997).

49. 46 M.J. 325 (1997).

50. *See Cook*, 46 M.J. at 38. The SJA described the military judge as "the senior military judge in our circuit, one of the most experienced trial judges in the USAF, [who] considered most of the clemency matters now before you." *Id.* The SJA's addendum in *Catalani* offered similar praises for the military judge: "[a]ll of the matters submitted for your consideration in extenuation and mitigation were offered by the defense at trial; and *the* seniormost military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed." *Catalani*, 46 M.J. at 327 (emphasis added).

between the responsibilities of the military judge at trial and the responsibilities of the convening authority in the post-trial review."[52] Highlighting the clear distinction between these phases of the trial, the CAAF described the differences in the following manner:

> The sentencing authority at trial is required to adjudge an "appropriate sentence" . . . subject to the maximum punishment . . . and the rules governing evidence . . . . The convening authority, on the other hand, is not limited to considering evidence that is admissible at a court-martial . . . . The fact that the military judge has imposed a lawful sentence and appropriate sentence does not restrain the convening authority who "may for any or no reason disapprove a legal sentence in whole or in part" . . . . The convening authority is directed to "approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused."[53]

In stark differences of opinion, Judge Effron and Judge Crawford clashed over how to frame the central issue in the case. For Judge Effron, "the central issue . . . is not whether the sentence adjudged . . . was lawful, but whether *applicable procedural steps were followed* during post-trial proceedings involving exercise of the convening authority's broad discretion to modify an otherwise lawful sentence."[54] In her dissenting opinion, Judge Crawford framed the central issue in a different light: "[a]ssuming the staff judge advocate (SJA) did not inform the convening authority about the clemency matters and did interject new matter, *were these errors harmless?*"[55]

Catalani and *Chatman* were published on the same day.[56] Although Judge Effron concurred with the new rule announced in *Chatman*, his majority opinion in *Catalani*, characterizing the central issue as a matter of procedure rather than prejudice, is indicative of the majority's unwillingness to completely abandon the post-trial procedural due process approach to appellate review of post-trial errors in favor of Judge Crawford's harmless error approach.

United States v. Cook[57] was a much easier case for a unanimous CAAF. The court concluded that failure to serve the SJA's post-trial addendum prejudiced the accused. In addition to comments that the senior military judge in the circuit had considered the matters, the SJA also discussed the unlikelihood of the accused waiving an administrative separation hearing if the convening authority disapproved the bad-conduct discharge. The SJA also attempted to downplay the impact that a bad-conduct discharge would have had on the accused's future.[58]

Erroneous Advice Regarding the Convening Authority's Clemency Power

In *United States v. Hamilton*,[59] a unanimous CAAF explained the distinction between two types of erroneous SJA advice to the convening authority. If the SJA provides erroneous advice regarding the convening authority's duty to review legal errors, it is "less pivotal to an accused's ultimate interests" and can be subsequently corrected by appellate litigation over the claimed legal error. It is therefore appropriate for appellate courts to test such errors for prejudice.[60] If, however, the erroneous advice concerns the execution of the convening authority's clemency power, the mistake "is particularly serious because no subsequent authority adequately can fix that mistake."[61]

Hamilton's post-trial submission alleged several errors concerning the admissibility of evidence at trial. In his addendum,

---

51. *Catalani*, 46 M.J. at 328.

52. *Id.*

53. *Id.* (citations omitted).

54. *Id.* at 329 (emphasis added).

55. *Id.* at 330 (Crawford, J., dissenting) (emphasis added).

56. The opinions were both published on 18 August 1997.

57. 46 M.J. 37 (1997).

58. *Id.* at 40. The government conceded these errors, but challenged the Air Force court's remedial power, urging the court to order a new review and action. The Air Force court declined to do so, reassessed the sentence, and set aside the bad-conduct discharge. The government appealed the Air Force court's decision to the CAAF, and the CAAF subsequently affirmed the broad remedial powers of the service courts to fashion an appropriate remedy in each case brought before it. *Id.* at 39-40.

59. 47 M.J. 32 (1997).

60. *See id.* at 35-36.

61. *Id.* at 35.

the SJA incorrectly advised the convening authority that "[e]videntiary rulings do not fall under the province of the convening authority, but are matters properly brought before the [military judge], as was done in this case . . . . *Unfavorable rulings are issues for appeal rather than reasons for granting clemency.*"[62] The CAAF concluded that, even if this advice misled the convening authority, it involved legal issues, as opposed to clemency powers. Exercising its power to review legal issues, the CAAF ultimately found that the alleged legal errors lacked merit and that the accused was not prejudiced by the erroneous advice.[63]

Counsel must understand the critical distinction at issue in *Hamilton*.[64] The fact that the convening authority's clemency power is unique from his other post-trial powers reinforces the principle that errors affecting these unique clemency powers, as opposed to his other duties, are much more likely to result in findings of prejudice to an accused. There is simply no other mechanism (other than appellate court speculation) that can make up for this "lost opportunity" to obtain clemency from the convening authority. The fact that the CAAF characterized the issue in *Hamilton* as legal advice instead of clemency advice justified the court's ultimate conclusion.

The Air Force Court of Criminal Appeals addressed a similar issue of mistaken advice regarding the convening authority's power to reassess a sentence after certain charges were dismissed during post-trial review. In *United States v. Kerwin*,[65] the SJA advised the convening authority that one of several specifications was erroneously referred to trial. Based on the error and the accused's request for clemency, the SJA recommended that the convening authority dismiss the specification and reduce the period of forfeitures from twenty-four to eighteen months.[66] The Air Force court agreed with the defense that, in those instances when the SJA recommends relief for a legal error, the SJA must follow a two-step process in advising the convening authority before taking final action.[67] The first step is to advise the convening authority as to the sentence that would probably have been adjudged had the error not occurred (sentence reassessment).[68] The second step (assuming the accused requests clemency) is to advise the convening authority whether *clemency* is warranted in light of the newly reassessed sentence.[69]

> [T]he SJA's advice to the convening authority on what impact an error had on the adjudged sentence, if any, is totally separate from what sentence the convening authority should actually approve as a matter of command discretion, including clemency . . . . Here, the SJA failed to distinguished [sic] between the various sentencing concepts to appellant's prejudice . . . . Thus, the SJA erred in not discussing whether the dismissed offense had an impact on any aspect of appellant's sentence and in lumping sentencing relief for the legal error with clemency.[70]

In *United States v. Griffaw*,[71] the SJA's failure to appreciate the differences between clemency and relief for legal errors prompted the Air Force court to order a new review and action. Airman First Class Griffaw pleaded guilty to several offenses and was sentenced to a bad-conduct discharge, total forfeitures, reduction to E-1, and eighteen months confinement. His pretrial agreement limited confinement to twelve months. In response to the accused's clemency request for a further reduc-

62. *Id.* at 34 (emphasis added).

63. *Id.* at 36. The court concluded that even though the convening authority has the power to respond to claims of legal error, and is encouraged to act in the interests of fairness to the accused and efficiency of the system, "he is not required to do so." *Id*. at 36. Ultimately, the issue of prejudice to the accused will be tested during the normal course of appellate review. *Id.* at 35-36.

64. The majority noted that it is not easy to draw the distinction between the convening authority's clemency powers and the power to review legal errors. The court commented that the SJA "seemed to muddy the water" with his advice. *Id.* at 35. The SJA's advice to the convening authority (that legal errors are not reasons for granting clemency) was incorrect in that it implied that such matters are not of proper concern to the convening authority. Convening authorities are required to consider any matters submitted by the accused. MCM, *supra* note 12, R.C.M. 1107(b)(3)(A)(iii). The court, however, appears to have balanced this duty against the more controlling provision of R.C.M. 1107(b)(1), which states that "[t]he convening authority is not required to review the case for legal errors or factual sufficiency." *Hamilton*, 47 M.J. at 35, *quoting* MCM, *supra* note 12, R.C.M. 1107(b)(1).

65. 46 M.J. 588 (A.F. Ct. Crim. App. 1996). This case also involved erroneous advice in the SJA's addendum concerning the convening authority's options regarding a punitive discharge. *Id.* at 590-91.

66. *Id.* at 589.

67. *Id.* at 591.

68. *Id*. "Generally an accused is entitled to be placed in the position he would have occupied if an error had not occurred." *Id.* (citing United States v. Hill, 27 M.J. 293, 296 (C.M.A. 1988)).

69. *Id.* at 591-92.

70. *Id.* at 591.

71. 46 M.J. 791 (A.F. Ct. Crim. App. 1997).

tion in confinement, the SJA advised the convening authority that "the accused had the benefit of a pretrial agreement in this case . . . . In my opinion, the accused has already received clemency in the form of six months off of the sentence adjudged by the [c]ourt."[72]

Senior Judge Pearson cogently explained the relationship between clemency and pretrial agreements. He observed that a convening authority does not exercise "any command prerogative in reducing a sentence to comply with a PTA [pretrial agreement] cap; rather, that officer merely abides by the agreement as required by law."[73] Clemency, on the other hand, is a matter of command prerogative, and the clemency review process begins at "the lower of either the adjudged sentence or the sentence cap."[74] The court concluded that the SJA's advice erroneously "insinuated" to the convening authority that he had already fulfilled his clemency duties by reducing confinement from eighteen to twelve months pursuant to the pretrial agreement. The court ordered a new review and action.[75]

In light of *Kerwin* and *Griffaw*, staff judge advocates must recognize and understand the convening authority's different post-trial responsibilities. They must be able to provide convening authorities with accurate advice regarding the proper exercise of these separate and distinct obligations. Allegations of erroneous post-trial advice regarding legal errors during the trial will be tested for prejudice and may survive appellate scrutiny. Cases involving erroneous clemency power advice, however, are often not suitable for the typical harmless error analysis[76] and may require a new review and action.

Erroneous Post-trial Recommendations

The military appellate courts reviewed several cases that alleged erroneous information in the SJA's post-trial recommendations (PTR). The common thread among these cases is the degree to which appellate courts rely on the PTR as the foundational document for the convening authority. In those cases where courts reinforce the importance of the PTR over information contained in other portions of the record (for example, pretrial advice, pretrial agreement, pretrial investigation report), errors in the PTR were held fatal. If the convening authority relies solely on the SJA's PTR for information relevant to clemency, the information contained therein must be accurate, because even the slightest error or omission might adversely affect the convening authority's decision to grant clemency. There are instances, however, when the appellate courts are willing to look beyond the PTR to support findings that erroneous or missing information was harmless, where the convening authority was apprised of the correct information through other sources. To the extent that appellate courts are willing to attribute information to the convening authority through sources other than the SJA's erroneous PTR, it is more likely that the error will be found harmless.

United States v. Busch[77] involved the all too common failure of the SJA to list the accused's awards and decorations accurately in the staff judge advocate recommendation (SJAR).[78] The Navy-Marine Corps Court of Criminal Appeals held that failure to list three Navy Good Conduct Medals in the SJAR rose to the level of plain error and justified a presumption of prejudice.[79] The court ordered a new review and action.[80]

The Navy court's opinion included a lengthy discourse on the importance of the SJAR and its relation to the convening authority's broad clemency powers. The SJAR is a "formal assessment of a case for the convening authority from his or her principal legal advisor."[81] Because of the convening authority's sweeping clemency powers, errors in the SJAR frequently

72. *Id.* at 792.

73. *Id.*

74. *Id.*

75. *Id.* at 793. Senior Judge Pearson also explained the rationale for entering into a pretrial agreement by comparing it to the reasons homeowners buy flood insurance on a house. "You buy flood insurance, not because you want your house flooded, but because you want to put a ceiling on your loss if disaster strikes." *Id.* at 792.

76. This is not an easy distinction to draw. *See* United States v. Hamilton, 47 M.J. 32 (1997); *see also supra* notes 59-64 and accompanying text. Although the CAAF concluded that the SJA's erroneous advice concerned legal errors (admissibility of evidence), one could argue that advising the convening authority that "[u]nfavorable rulings are issues for appeal rather than reasons for granting clemency" relates not only to legal errors, but also affects the convening authority's clemency power. *See Hamilton*, 47 M.J. at 34. This argument could be extended to practically any erroneous post-trial advice when one considers that the convening authority can grant clemency for any reason at all.

77. 46 M.J. 562 (N.M. Ct. Crim. App. 1997) (withdrawn from the bound volume at the request of the service court).

78. *See* MCM, *supra* note 12, R.C.M. 1106(d)(3)(C). The SJAR is the Air Force and Navy-Marine Corps equivalent of the Army post-trial recommendation (PTR).

79. *Busch*, 46 M.J. at 565. "Because of the unquestioned importance of the SJAR and its contents, the importance of military awards, particularly *three* consecutive Good Conduct Awards, and the unrestricted discretionary power of the convening authority to grant clemency, we will presume prejudice in this case." *Id.* (emphasis in original).

80. *Id.*

require a new SJAR and action. The Navy court justified this relatively severe remedy on the court's inability to substitute its judgment for the unfettered discretion of the convening authority. "An omitted award that may seem relatively unimportant to an appellate court may have significance to a particular convening authority."[82] Since an appellant is entitled to be placed in the position he should have been in had there been no error in the SJAR, the only remedy is to return the case for a new review and action.[83]

Critical to Busch's success was his initial ability to convince the Navy court that the convening authority was not otherwise aware of his three Good Conduct Awards. The Navy court cautioned, however, that "[h]ad we found in the record and accompanying documents that the convening authority had been otherwise aware of all of the appellant's awards prior to taking action, we would conclude that the appellant was not prejudiced by the SJAR deficiency, and deny relief, on that basis alone."[84] Most surprising is the fact that these medals were listed in the accused's service records, entered as Defense Exhibit A. Nevertheless, the court concluded that the convening authority "relied on the SJAR."[85]

In *United States v. Mark*,[86] the alleged error involved an SJAR that was not only defective but also completely missing from the record of trial. The Navy court applied a presumption of regularity to find that the SJAR had been prepared, served on the defense, and considered by the convening authority.[87] The CAAF reversed the Navy court, holding that no presumption of regularity can save a case where the SJAR is completely missing from the record of trial.[88]

The CAAF used *Mark* as an opportunity to reinforce the controlling nature of the SJAR to the post-trial process. "Although its scope has been narrowed, the significance of the SJA's recommendation and its contents has actually increased. This has occurred because the convening authority no longer is required to personally review the record of trial before taking action."[89] The government had urged the court to test for prejudice, as in previous cases involving erroneous SJARs and missing documents.[90] However, Judge Sullivan distinguished *Mark* from cases where the court had other court documents to consider to test for prejudice.[91]

In essence, *Mark* stands for the proposition that there is no substitute for the SJA's PTR (or SJAR). The irreplaceable nature of the PTR stems from the "permissible extra-record"[92] information an SJA may include in the PTR that he provides to the convening authority. Since there is virtually no limit on what the SJA may include in his PTR, it is extremely difficult for appellate courts to speculate as to what information the convening authority was aware of and how that information may have affected the clemency decision. Consequently, appellate courts have little choice in such circumstances but to return such records to the convening authority for a new review and action.

In *United States v. Wiley*,[93] the CAAF took a much more liberal approach to assessing the convening authority's level of

81. *Id.* at 564.

82. *Id.* at 565.

83. *Id.*

84. *Id.* at 564.

85. *Id.* The court also explained how the "fundamental differences between the federal and military criminal justice systems, especially the unique clemency powers of the convening authority," justify a different approach to harmless error analysis from the seminal Supreme Court case *United States v. Olano*, 507 U.S. 725, 732-34 (1993). *Id.* "The *Olano* court was not interpreting FED. R. CRIM. P. 52(b) plain error in the context of post-trial error committed in the military system." *Id.* at 565-66. Overall, the Navy court appears to have adopted the most protective posture of the appellate courts with respect to the primacy of the SJA's post-trial responsibilities.

86. 47 M.J. 99 (1997).

87. *Id.* at 100 (citing the unpublished Navy court opinion). The Navy court applied the presumption of regularity based on its observation that the court would "not seriously entertain" the appellant's assigned error without an affirmative declaration that "neither he nor his trial defense counsel received a copy of the recommendation." *Id.* at 100.

88. *Id.* at 100-01. "We cannot join this parade of presumptions [(1) that the SJAR was submitted to the convening authority, (2) that it had been served on the defense, and (3) that a defense response was submitted and considered by the convening authority]." *Id.*

89. *Id.* at 101.

90. *Id.* at 102 (citing United States v. Hickock, 45 M.J. 142 (1996); United States v. Murray, 25 M.J. 445, 449 (C.M.A. 1988)).

91. *Id.* In *Hickock*, the court had the actual PTR to review when testing for prejudice arising from the failure to serve it on the defense. 45 M.J. 142. In *Murray*, the court turned to the evidence in the record of trial to determine whether the accused was prejudiced by the omission of the SJA's pretrial advice. 25 M.J. at 449.

92. *Mark*, 47 M.J. at 102.

knowledge. Senior Airman Wiley was originally charged with rape, sodomy, indecent acts, and taking indecent liberties on diverse occasions with his seven-year-old stepdaughter. At trial, he pleaded guilty to committing the indecent acts and liberties during a shorter time period. The rape and sodomy charges were withdrawn as part of the pretrial agreement.[94] In his PTR to the convening authority, the SJA erroneously summarized the evidence supporting the original charges, rather than those to which the accused pleaded guilty.[95] The defense failed to object to this erroneous information.

On appeal, the CAAF rejected Wiley's claim of ineffective assistance of counsel and found that he suffered no prejudice from counsel's failure to object to the erroneous information in the PTR.[96] One of the three justifications offered by the court was that the convening authority "was thus well aware of the evidence against appellant" because he had "referred the charges to trial, accepted appellant's pretrial agreement, and acted on the sentence."[97] The CAAF concluded that "[t]he SJA's erroneous recommendation merely told the convening authority what he already knew."[98]

Although it is difficult to contest the CAAF's practical approach of attributing more facts to the convening authority than those communicated solely through the PTR, it is a markedly different approach from that taken by the Navy court in *Busch*.[99] Aside from Judge Effron's dissent, the *Wiley* opinion fails to address the significance of the PTR as the principle means of communication between the SJA and the convening authority.

In his dissent, Judge Effron criticized all three justifications on which the majority relied. The sentence reduction, he reasoned, was not the result of post-trial action, but simply a matter of complying with the terms of the pretrial agreement.[100] He rejected as speculation the majority's conclusion that the convening authority was well aware of the evidence based on prior involvement in the case. Judge Effron emphasized the unique relationship between the SJA and the convening authority as follows:

> The primary duty of a convening authority is to command a military unit, not to serve as a judicial official. The statutory requirement for an SJA to prepare a formal written recommendation reflects recognition that *busy commanders need assistance in summarizing and focusing the issues* in cases presented to them for action. In this case, the summary was inaccurate and unfocused.[101]

Though acknowledging that convening authorities are permitted to consider additional misconduct, Judge Effron would not extend this concept to situations where the convening authority is misled to believe that such evidence was actually presented at trial.[102]

In *United States v. Ruiz*,[103] the Air Force Court of Criminal Appeals went to even greater lengths to attribute to the convening authority information that was not contained in the SJAR. In response to the initial SJAR, Captain Ruiz alleged several legal errors, challenged the severity of the sentence, and requested that the SJA and the convening authority be disqualified. The convening authority agreed, in part, and disqualified the SJA office. A new SJAR was prepared by a different SJA, and it was served on the defense. The defense failed to submit new matters, and the convening authority took action without considering the issues raised in the original defense submission. On appeal, the Air Force court refused to consider the original defense assertions of error on the basis of waiver.[104]

---

93. 47 M.J. 158 (1997).

94. *Id.* at 159.

95. *Id*. Counsel should note that the PTR need not include a summary of the evidence. With respect to the charges, the PTR need only state "[t]he findings and sentence adjudged by the court-martial." MCM, *supra* note 12, R.C.M. 1106(d)(3)(A). Staff judge advocates are no longer required to summarize the evidence supporting those findings. *See id*.

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

97. *Id.* at 160.

98. *Id.* The two other reasons relied upon by the court were the convening authority's authorization to consider additional misconduct in deciding whether to grant clemency and the fact that the accused received a substantial sentence reduction (eight years down to six) under his pretrial agreement. *Id*.

99. *See United States v. Busch*, 46 M.J. 562 (N.M. Ct. Crim. App. 1997); *see also supra* notes 77-85 and accompanying text.

100. *Wiley*, 47 M.J. at 161 (Effron, J., dissenting). *See* United States v. Griffaw, 46 M.J. 791 (A.F. Ct. Crim. App. 1997); *see also supra* notes 71-75 and accompanying text.

101. *Wiley*, 47 M.J. at 161 (emphasis added).

102. *Id.*

103. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

Captain Ruiz also alleged that the second SJAR's failure to accurately summarize his character of service rose to the level of plain error.[105] The Air Force court disagreed because the convening authority had access to this information through two other sources—the "personal data sheet" attached to the SJAR and, oddly enough, the original clemency submission.[106] The court concluded that the convening authority knew about the accused's good service record through the circular reasoning that the information was contained in the accused's original clemency submission. This was the same submission that the convening authority failed to consider after the second SJAR was prepared.[107] While the ultimate result in *Ruiz* is unremarkable, the roundabout steps the Air Force court was willing to take to attribute knowledge to the convening authority provides a stark contrast to the direct approach applied by appellate courts in *Busch* and *Mark*.

In a slightly different context, the Coast Guard Court of Criminal Appeals expressed a similar willingness to rely on information outside of the PTR to impute knowledge to a convening authority. In *United States v. Acevedo*,[108] the record failed to include proof that the convening authority had considered the appellant's petition for clemency. In support of its argument that the Coast Guard court should apply a "presumption of regularity," the government submitted an affidavit from the SJA stating that the clemency matters were given to the convening authority together with the SJA's PTR. Based on the affidavit and the absence of any evidence to suggest that the convening authority failed to consider the matters (other than the fact that they were not initialed), the court concluded that the convening authority had considered the accused's clemency petition.[109]

Acevedo provides yet another example of the gradual movement toward greater application of Article 59(a)'s harmless error analysis and less concern over black-letter post-trial procedural requirements. If military appellate courts are willing to accept affidavits from SJAs, are affidavits from convening authorities soon to follow? Such affidavits would certainly improve the ability of appellate courts to expeditiously review cases that allege that the convening authority failed to consider clemency matters. The courts could also use affidavits from convening authorities to shortcut the lengthy procedure of ordering a new review and action in other contexts. Convening authorities could simply state via affidavit whether they would have made a different decision to grant clemency had they known, for example, that the accused was the recipient of three Good Conduct Medals.[110] Likewise, they could swear that they understood their responsibility to consider clemency only after they had reassessed the sentence adjudged at trial.[111]

This would be a drastic, but not unprecedented,[112] departure from traditional concepts that limit appellate review to matters contained in the record of trial. If efficiency and accuracy of the final result are the goals, strong arguments can be made favoring greater use of post-trial affidavits from SJAs, appellants, and convening authorities. Balanced against this interest is the interest in preserving the integrity of the elaborate post-trial process set forth in the *MCM*.

Other Recent Developments in Post-Trial Processing

Post-trial 39(a) Sessions

Post-trial Article 39(a) sessions are rarely requested by counsel.[113] Several recent cases demonstrate how attentive

104. *Id*. at 512. The appellant claimed that it was unfair for the convening authority not to consider legal issues raised in response to the first SJAR. The Air Force court disagreed. Since the second SJAR made no mention of the first SJAR, the defense was put on notice that the original matters were not being considered by the second SJA. *Id*. The Air Force court added that, even if the convening authority erred by not considering the original assertions of error, they would have found no prejudice. *Id*. In doing so, the Air Force court erroneously lumped together the alleged legal errors with the accused's request for clemency from the severe sentence. *See supra* notes 59-76 and accompanying text (discussing the difference between the convening authority's duties to review for legal errors and to consider clemency).

105. *Ruiz*, 46 M.J. at 512.

106. *Id*.

107. *Id*. at 512, 513. Despite the fact that the court concluded that the defense waived the errors raised in this original submission by failure to resubmit them to the convening authority after being served the second SJAR, the Air Force court nevertheless concluded that "[t]he convening authority's act of disqualifying his legal office convinces us he considered the submissions." *Id*.

108. 46 M.J. 830 (C.G. Ct. Crim. App. 1997).

109. *Id.* at 835.

110. *See* United States v. Busch, 46 M.J. 562, 564 (1997); *see also supra* notes 77-85 and accompanying text.

111. *See* United States v. Kerwin, 46 M.J. 588 (A.F. Ct. Crim. App. 1996); *see also supra* notes 65-70 and accompanying text.

112. Appellate courts frequently obtain post-trial affidavits from counsel to help resolve post-trial allegations of ineffective assistance of counsel.

113. *See* MCM, *supra* note 12, R.C.M. 1102(b)(2). Post-trial Article 39(a) sessions "may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id*.

counsel can utilize such sessions to resolve lingering trial and post-trial issues. In fact, counsel may find that failure to request a post-trial 39(a) session prevents their clients from obtaining appellate relief.

In *United States v. Miller*,[114] the accused alleged that he was subjected to illegal post-trial punishment because he was forced to work on Saturdays, the recognized Sabbath of Seventh Day Adventists. The CAAF denied Miller any relief, in part because he failed to exhaust his administrative remedies. The CAAF was most critical of the defense counsel's failure to seek relief from the military judge pending authentication of the record of trial.[115]

The facts in *United States v. McConnell*[116] provide counsel another example of how post-trial 39(a) sessions can be used to the benefit of the client. In McConnell's post-trial submissions, he alleged that the court-members considered during their deliberations erroneous[117] information regarding his eligibility to retire.[118] The Air Force court rejected McConnell's allegation and concluded that the alleged "inconsistencies and vague references to confusion are insufficient to raise an inference that the members even considered erroneous information."[119] The defense could have made a much stronger case had they demanded a post-trial 39(a) session to gather additional testimony regarding the matter.

When an accused demands a post-trial 39(a) session, the accused's right to defense counsel of choice should be honored by the military judge. In *United States v. Miller*,[120] a unanimous decision that reinforces the importance of post-trial hearings and an accused's right to an attorney, the CAAF concluded that the military judge abused his discretion by denying the accused's request to obtain civilian counsel to represent him at the post-trial article 39(a) session.[121]

Convening Authority Action

Two other cases involving a convening authority's post-trial powers were resolved during the 1997 term. In *United States v. Carter*,[122] the CAAF revisited the issue of sentence conversion. Master Sergeant Carter, a twenty-four year veteran, was sentenced to a bad-conduct discharge, partial forfeitures, reduction to the grade of E-1, and confinement for twelve months. In his clemency submission, Carter asked the convening authority to commute his bad-conduct discharge to additional confinement. Pursuant to the clemency request, the convening authority commuted the bad-conduct discharge to an additional twenty-four months confinement and twenty-four months of forfeitures. The accused alleged, on appeal, that the convening authority exceeded the lawful limits of the adjudged punishment by converting the bad-conduct discharge to an additional twenty-four months confinement and forfeiture of $400.00 per month for thirty-five months.[123]

The CAAF rejected the appellant's argument, noting that the accused requested conversion "without setting any conditions as to the length of confinement to be substituted."[124] The accused's own clemency submission, in which he detailed how

---

114. 46 M.J. 248 (1997).

115. *Id*. at 250. "During the critical period, the record of trial had not been authenticated, and the military judge could have been brought into the question of illegal post-trial confinement." *Id*.

116. 46 M.J. 501 (A.F. Ct. Crim. App. 1997) (opinion withdrawn from the bound volume because it was not for publication).

117. The Air Force court noted that both counsel inaccurately used the term *erroneous* information. Rules permitting impeachment of a jury verdict do not include consideration of merely *erroneous* information. The prohibition is against consideration of *extraneous* evidence during deliberations. *Id.* at 502-03.

118. *Id*. During sentencing, the government argued for one year of confinement. The members sentenced him to, inter alia, a bad-conduct discharge and three years confinement. Based on post-trial feedback, the defense alleged that the members mistakenly thought that if they sentenced the 17-year veteran to three years confinement, he would not lose his retirement pay. *Id*. at 501.

119. *Id.* at 502. The court distinguished this case from *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989), which was cited by the defense. In *Wallace*, one of the members reported alleged deliberation errors to the military judge, but the judge refused to call a post-trial 39a session to investigate the alleged deliberation errors. The Air Force court held that the military judge's refusal to call a post-trial 39a session cast doubt as to the integrity of the sentence in the case. *Wallace*, 28 M.J. at 642.

120. 47 M.J. 352 (1997).

121. *Id.* Miller was initially advised on 1 March 1994 that the post-trial session would convene during the first week in April. On 2 March, he was advised that the hearing would be held on 4 March. The accused was unable to contact his civilian counsel until the night before the hearing. His detailed military counsel for post-trial matters had not represented him at trial and did not meet the accused or review the record of trial until the night before the hearing. The military judge justified his refusal to grant a continuance as a matter of convenience and savings to the government. *Id*. The judge's decision was based on the fact that one of the members was called out of retirement, one was present on temporary duty, and the circuit military judge had specifically remained on post to conduct the post-trial session.

122. 45 M.J. 168 (1996).

123. *Id*. at 168-69.

124. *Id.* at 170.

he stood to "lose approximately $750,000" in retirement benefits, supported the CAAF's conclusion that an additional two years confinement can "rationally be considered 'less severe.'"[125]

The CAAF introduced its opinion by cautioning counsel to be mindful of the old adage, "[w]atch what you ask for, you may get it."[126] At one time, there may have existed unspoken perceptions of sentence conversions that a bad-conduct discharge was worth six months confinement and a dishonorable discharge worth twelve. This was certainly not the case in *Carter*, and rightly so considering the potential financial impact on Carter. The lesson for counsel to take from *Carter* is that appellate courts will review each sentence conversion on an individual basis. Counsel would be wise to consider putting limitations on future requests for sentence conversion.

In *United States v. Clemente*,[127] the Air Force court addressed the issue of whether the convening authority must explain his reasons for denying an accused's request to waive the automatic forfeiture provisions under Article 58b of the UCMJ.[128] Clemente urged the Air Force court to treat the request to defer automatic forfeitures like a request for deferment of confinement, which requires the convening authority to explain his denial in writing.[129] The CAAF declined to do so, opting to treat the request to defer automatic forfeitures like any other clemency requests that are not reviewable by the appellate courts.[130]

Post-Trial Processing Delays

Allegations of errors related to post-trial processing delays is one aspect of post-trial litigation where military appellate courts consistently apply the harmless error standard. In a series of cases involving "outrageously" lengthy post-trial processing delays, military appellate courts remained committed to requiring the accused to demonstrate specific prejudice.

In *United States v. Hudson*,[131] the government took 839 days to prepare the record of trial for final action. Although critical of such "outrageous" delays, the CAAF rejected the accused's alleged claim of prejudice. Hudson alleged that the delay prevented him from becoming eligible for parole and clemency consideration. Noting that the accused had thrice been considered for, and denied, parole since arriving at the Disciplinary Barracks in Fort Leavenworth, Kansas, the CAAF concluded that his assertions of prejudice were "speculative, if not wishful thinking."[132] The court also rejected the appellant's suggestion that the court return to a bright line ninety-day rule and his appeal to the court to exercise its "supervisory jurisdiction" to award relief.[133]

In *United States v. Nelson*,[134] the accused was unable to convince the Air Force Court of Criminal Appeals that he was prejudiced when the government took 146 days to transcribe an eighty-one-page record of trial and 171 days to take final action. Although the court held that such a delay was "unreasonable," particularly when records of routine administrative separation boards were transcribed ahead of the appellant's court-martial, the Air Force court refused to grant the accused any relief.

In *United States v. Santoro*,[135] the CAAF finally was convinced that a seven-year delay in forwarding the record of trial for review warranted some relief. In 1988, Yeoman Seaman Apprentice Santoro pleaded guilty to larceny (shoplifting

125. *Id.* at 170-71. The CAAF noted that "to commute a sentence means 'a reduction of penalty,' not 'merely a substitution.'" *Id.* Consequently, commutation of a sentence will be lawful only if the overall sentence is less severe than that originally adjudged by the court. *Id*.

126. *Id*. at 168.

127. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

128. Article 58b of the UCMJ provides for automatic forfeiture of all pay and allowances in a general court-martial when an accused receives a sentence which includes confinement for more than six months or death, or confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal. *See* UCMJ art. 58b (West Supp. 1997).

129. *See id*. art. 57(d); MCM, *supra* note 12, R.C.M. 1101(c).

130. *Clemente*, 46 M.J. at 720-21. Convening authorities are not required to explain or to justify the decisions they make on clemency, and their decisions are not subject to appellate review. *See* UCMJ art. 60(c)(2); MCM, *supra* note 12, R.C.M. 1107(b)(1). The *Clemente* court reasoned that the lack of detailed requirements in the statute supported the conclusion that it was intended to give the convening authority broad discretion to grant or to deny such requests without explanation. *Clemente*, 46 M.J. at 720-21.

131. 46 M.J. 226 (1997).

132. *Id.* at 227.

133. *Id*. at 227-28. Nevertheless, Judge Sullivan warned that "in the future, our court system may devise a more perfect system of accountability and responsibility which seldom has to lean on the twin crutches of 'no prejudice' and 'waiver' to achieve just results." *Id*. (Sullivan, J., concurring).

134. 46 M.J. 764 (A.F. Ct. Crim. App. 1997).

135. 46 M.J. 344 (1997).

$183.46) and resisting apprehension. He was sentenced to a bad-conduct discharge, confinement for ninety days, partial forfeitures, and reduction to the grade of E-1.[136] The convening authority approved the sentence. Seven years later, the Navy discovered that the record of trial had never been forwarded for appellate review.[137]

Although the original record was lost, the government found the audio tapes and copies of the convening authority's action and promulgating order. The government recreated the record as best it could and forwarded it to the Navy court for review. Based on the missing charge sheet, convening order, SJAR, and all fourteen government and eighteen defense exhibits, the Navy court set aside the conviction for resisting apprehension, affirmed the accused's guilty plea to larceny, and approved a sentence of "no punishment."[138]

The CAAF was likewise satisfied that the retranscribed record of trial provided a substantial basis to corroborate the regularity of Santoro's guilty plea to the charge of larceny.[139] Noting that the accused was in the best position to demonstrate prejudice, his failure to do so convinced the CAAF to affirm the decision of the Navy court. Like the Air Force court in *Nelson*, the CAAF refused to exercise its "supervisory jurisdiction" to "send a message" that such gross delays will not be tolerated.[140]

Conclusion

1997 was truly a remarkable year in post-trial. The new rule pronounced in *Chatman* may prove to be the turning point for the CAAF's approach to reviewing post-trial errors. At the very least, it manifests the court's increasing frustration with the existing remedy of ordering new reviews and actions. The significance of *Chatman*, however, is somewhat tempered by the majority's footnote in *Buller*, which calls for greater procedural due process in the form of mandatory service of the SJA's addendum. The principles that these two opinions support are difficult to reconcile—one represents greater emphasis on the procedural process and the other on practical, prejudicial impact. Which approach will ultimately prevail, if either, waits to be seen.

136. *Id*. at 345.

137. *Id*.

138. *Id.* at 345.

139. *Id.* at 346.

140. *Id*. at 348.