Annual Review of Developments in Instructions—1997

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Introduction

This article reviews cases from the past sixteen months in which military appellate courts addressed issues involving courts-martial instructions. While the majority of the cases discussed in this article deal directly with instructional issues, counsel must recognize that any change in the law requires evaluation of the applicable instructions. This is especially true in the areas of crimes, defenses, and evidence. Early in their pretrial preparation, counsel should consult the *Military Judges' Benchbook*[1] (to include the recently published Change 1, dated 30 January 1998), as well as case law.

Crimes and Defenses

The Knowledge Requirement

In *United States v Maxwell*,[2] Colonel Maxwell was convicted, contrary to his pleas, of four specifications of violating Article 134 of the Uniform Code of Military Justice[3] (UCMJ). Specifically, he was convicted of two specifications of communicating indecent language; one specification of violating 18 U.S.C. § 1465[4] by knowingly transporting in interstate commerce, for purposes of distribution, obscene materials; and one specification of violating 18 U.S.C. § 2252[5] by knowingly transporting or receiving child pornography in interstate commerce.[6]

At trial, the military judge instructed the panel that, for the 18 U.S.C. § 2252 offense, they must find "[t]hat one or more of [the visual] depictions were of minors engaged in sexually

1. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) (C1, 30 Jan. 1998) [hereinafter BENCHBOOK]. The *Benchbook* is available in hard copy as well as in an MS Word computerized version, which may be downloaded from the Legal Automation Army-Wide Systems bulletin board service (BBS). *See* Lieutenant Colonel Lawrence M. Cuculic et al., *Annual Review of Developments in Instructions: 1996*, ARMY LAW., May 1997, at 52-53. The *Benchbook* is found in the Benchbook Download Library in the Files section on the BBS main menu. Changes are announced in the Benchbook Forum. Change 1, dated 30 January 1998, can be found in the Benchbook Library as file 27-9C1. An overview of the change and posting instructions can be found at file 27-9pgch. Both of these files are in Word 6.0 format. Counsel need to review and to post these changes immediately.

2. 45 M.J. 406 (1996).

3. UCMJ art. 134 (1994).

4. At the time of the offense (December 1991), the statute provided:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound, or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1465 (1988). In 1996, the statute was amended as follows: (1) "or an interactive computer service (as defined in § 230(e)(2) of the Communications Act of 1934) in or affecting such commerce" was added after "foreign commerce" the first place it appears; (2) "transports or travels in, or uses a facility or means of," was substituted for "transports in"; and (3) the provisions relating to travel and use of interstate commerce were struck out. *See* Pub. L. No. 104-104, § 507(b) (1996). The statute now provides:

> Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or *an interactive computer service* (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1465 (West Supp. 1997) (emphasis added). *See Maxwell*, 45 M.J. at 414 n.2. In *Maxwell*, the first granted issue was: Whether 18 U.S.C. § 1465 can be construed constitutionally to apply to the interstate distribution of allegedly obscene visual depictions transmitted via computer on-line services which use telephone lines. *Id*. The 1996 amendment to the statute settled this issue.

explicit conduct" and "[t]hat the receiving or transporting [of such depictions] was done knowingly: that is, that at the time the accused transported or received the visual depictions, he . . . . *knew or believed* that one or more of the persons depicted were minors."[7] Defense counsel had unsuccessfully objected to the "or believed" language at the pre-instruction Article 39(a)[8] session.

On appeal, Colonel Maxwell alleged that the military judge erred when he instructed the panel concerning the scienter element as to the age of the subjects depicted. The appellant argued that "a belief" concerning the minority of the individuals in the depictions was insufficient. Instead, he argued, "actual knowledge of the minority of the actors is an essential element of an offense under § 2252."[9]

The Court of Appeals for the Armed Forces[10] (CAAF) began its analysis by recognizing that the United States Supreme Court, in *United States v. X-Citement Video, Inc.*,[11] held that the knowledge requirement of 18 U.S.C. § 2252 extends to both the character of the material and the age of the individuals in the material.[12] Concerning the knowledge element for the age of those depicted, the CAAF held that Congress, when passing the statute, did not intend to require "that a recipient or a distributor of pornography must have knowledge of the actual age of the subject which could only be proved by ascertaining his identity and then getting a birth certificate or finding someone who knew him to testify as to his age."[13] Rather, the court held that "the crucial fact which the government had to prove was that the subjects were minors. That being the case . . . it then was only necessary to prove that [Colonel Maxwell] *believed* they were minors."[14]

Should military judges continue to include the term "belief" when instructing on the scienter requirement for the minority of the individuals depicted for alleged violations of 18 U.S.C. § 2252(a)(2)? Based on *Maxwell*, the answer appears to be yes; "belief" of minority appears sufficient. However, military judges should note that *Maxwell's* footnote seven indicates that different scienter standards have been used in § 2252(a)(2) prosecutions in federal courts.[15]

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5. 18 U.S.C. § 2252 provides:

> (a) Any person who—
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252

6. "Clause 3 offenses involve noncapital crimes or offenses which violate federal law, including law made applicable through the Federal Assimilative Crimes Act . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(1) (1995) [hereinafter MCM].

7. *Maxwell*, 45 M.J. at 424 (emphasis added).

8. UCMJ art. 39(a) (1994).

9. *Maxwell*, 45 M.J. at 424.

10. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), renamed the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

11. 513 U.S. 64 (1994).

12. *Id.* at 81.

13. *Maxwell*, 45 M.J. at 424.

14. *Id*. (emphasis added). *See* United States v. Russell, 47 M.J. 412 (1998) (judge instructed members that they must find that the appellant knew or believed that the pictures depicted persons under 18). *But see Maxwell*, 45 M.J. at 424-25 n.7 (detailing how the federal appellate courts have dealt with the requirement for actual knowledge versus belief).

Nonetheless, trial defense counsel should continue to object to inclusion of the word "belief" in this instruction. Preserving the issue for appeal is important,[16] especially because the appellate process is not yet complete in *Maxwell*.[17] Defense counsel should argue that it is impermissible to lessen the government's burden simply because that burden may be difficult.

With few exceptions, UCMJ provisions that have a knowledge element require actual knowledge and do not permit conviction with the less onerous scienter "belief."[18] The law allows the government to use permissible inferences and circumstantial evidence to prove knowledge.[19] While proving what an accused is "thinking" is difficult in any prosecution, defense counsel should argue that difficulty of proof does not justify lessening the government's burden in § 2252(a)(2) prosecutions.[20] There is admissible circumstantial evidence from which the finder of fact can determine what the accused "knew," such as the alleged depictions (and appropriate expert opinion testimony[21] concerning the ages of the participants), the language of relevant advertisements or catalogues, and the titles of or electronic locations of the material.

As for guilty plea cases, during the providence inquiry, military judges should require that the accused admit that he actually knew of the minority of the depicted children.[22] This avoids the "knowledge versus belief" issue altogether.

Lawful Orders

In *United States v. Hill*,[23] the appellant had a long but tumultuous relationship with a fellow Air Force member, Staff Sergeant (SSgt) Spellman. Their "romance" included several alleged assaults that resulted from jealousy. Subsequent to one of the assaults, the appellant's chain of command and the security police became involved. A security police investigator, SSgt Lindley, gave the accused, a sergeant, an oral order "not to contact Spellman at her home or duty section or be within 100 feet of her."[24] Five nights later, the appellant was found in the dark at Spellman's back door "prowling in her backyard with a knife and an air pistol."[25] The convening authority later referred charges against the appellant, including a charge for willful disobedience of a noncommissioned officer's lawful order (SSgt Lindley's no contact order), in violation of Article 91.[26]

Prior to trial, the defense made a motion to dismiss the Article 91 charge because the order was allegedly unlawful. The defense argued that the order was unlawful because SSgt Lindley was not in the appellant's chain of command. The military judge denied the motion and held that the order was lawful. In an Article 39(a) session after the introduction of all of the evidence, the military judge informed the parties that he intended to instruct that the order, if given, was lawful.[27] When asked for

15. *Maxwell*, 45 M.J. at 424-25 n.7.

16. MCM, *supra* note 6, R.C.M. 920(f).

17. Colonel Maxwell's court-martial is not final under R.C.M. 1209. *See id.* R.C.M. 1209. The sentence rehearing has been held, and the case is once again at the Air Force Court of Criminal Appeals for review. Telephone Interview with Captain Mullen, Air Force Defense Appellate Division (Jan. 28, 1998).

18. *See, e.g.*, MCM, *supra* note 6, pt. IV, ¶ 11c(5) (providing that, for missing movement, the accused must have "actual knowledge" of the prospective movement missed); ¶¶ 13b(4), 14b(1)(c), and 14b(2)(c) (providing that, for disrespect, assault, or willfully disobeying a superior commissioned officer, the accused must know the victim's status as a superior commissioned officer); ¶ 37c(5). *See also* United States v. Mance, 26 M.J. 244 (C.M.A. 1988) (holding that, for possession, use, distribution, introduction, or manufacture of a controlled substance, the accused must know of the presence of the substance and its contraband nature). *But see* MCM, *supra* note 6, pt. IV, ¶ 16b(3)(b) (providing that, for dereliction in the performance of duties, the government need only prove that the accused "knew *or reasonably should have known* of the duties" (emphasis added)).

19. MCM, *supra* note 6, R.C.M. 918(c).

20. "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases, a youth is the prosecution's only eye witness. But '[t]his court cannot alter evidentiary rules because litigants might prefer different rules in a particular class of cases.'" Tome v. United States, 513 U.S. 150, 165-67 (1995), *quoting* United States v. Salerno, 505 U.S. 317, 322 (1992).

21. Examples of appropriate areas of expert testimony are: age, the corresponding physical development of children, and opinions that apply those principles to the depictions.

22. Military judges should discuss with the accused the available circumstantial evidence and then have the accused admit that he *knew* the ages of the depicted children.

23. 46 M.J. 567 (A.F. Ct. Crim. App. 1997).

24. *Id.* at 569.

25. *Id.* at 570.

26. UCMJ art. 91 (1994).

27. *Hill*, 46 M.J. at 571.

concurrence, the defense counsel responded "absolutely."[28] After findings instructions, the defense counsel stated that the defense had no objections to the instructions given. The panel found the accused guilty of violating SSgt Lindley's no-contact order.

The lawfulness of SSgt Lindley's order was one of the issues on appeal. As at trial, it was again alleged that this order was unlawful because SSgt Lindley was not in the accused's chain of command. Sitting en banc, the Air Force Court of Criminal Appeals held that "[t]here is simply no requirement in Article 91 that the NCO giving the order bear any particular relationship to the order's recipient, and no such relationship has ever been judicially grafted onto this offense." [29] Eight judges concurred in the opinion. Judge Dixon's dissent, however, contains lessons for counsel.

Judge Dixon wrote that the military judge erred when he held that the order was a legal order as a matter of law. Judge Dixon noted that, once the military judge determined that the order was lawful as a matter of law, "His precipitous ruling precluded the defense from contesting the lawfulness of the order before the members. Moreover, it relieved the government of its burden of proving beyond a reasonable doubt one of the essential elements of the offense, namely that appellant had a duty to obey the order."[30] Judge Dixon noted:

> Could reasonable men differ about the lawfulness of this order? You bet they could! This is clearly a situation in which the lawfulness of the order necessitates a factual determination. The factual issue is whether the order given by SSgt Lindley relates to a specific military duty and is one which he was authorized to give under the circumstances. There are no reported cases which address the authority of a security policeman or any other non-commissioned officer in the chain of command to issue a "no-contact" order. There is no precedent which holds this order lawful as a matter of law.[31]

Defense counsel should heed Judge Dixon's advice and consider the consequences of conceding that an order is lawful as a matter of law. Such a finding is tantamount to a directed verdict as to that element,[32] and the issue is taken from the factfinder. Defense counsel should carefully evaluate the lawfulness of any allegedly violated order and raise all challenges. Challenges that are not raised will ordinarily be waived (except for plain error).[33]

Resisting Apprehension

In *United States v. Poole*,[34] the accused was suspected of stealing stereo components. Military criminal investigators went to his room and lawfully began searching for the stolen stereos. As they were searching, the accused ran from the room. Three investigators chased after the accused. The accused ran to the parking lot, got into his car, and began backing out of the parking space. One of the investigators opened the passenger-side door and told the accused to stop. After the accused backed out, another investigator, SSgt Spanier, stood in front of the accused's car, put up his hands, and ordered the accused to stop. Resolute, the accused drove forward. The investigator jumped onto the hood of the car to avoid being struck. Seeing the investigator on the hood, the accused made a sharp right turn to throw the investigator off the hood.[35]

At trial, the accused testified that he did not hear anyone telling him to stop. Additionally, he testified that he did not see the investigator in front of the car until the investigator was already on the hood. He stated that he saw the investigator roll off the hood, but he did not stop at that point because he was afraid.[36]

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28. *Id.*

29. *Id.* at 570.

30. *Id.* at 579.

31. *Id.* at 581. Judge Dixon noted, "The law is clear that, without a valid military purpose, an order may not interfere with the recipient's personal rights and private affairs." *Id. See* MCM, *supra* note 6, pt. IV, ¶ 14c(2)(a)(iii). *See also* United States v. Stewart, 33 M.J. 519, 520 (A.F.C.M.R. 1991).

32. *See* BENCHBOOK, *supra* note 1, ¶ 3-15-2d n.1. Presumably, in most cases, the lawfulness of the alleged order will be an issue for the members to decide. It will therefore be correct to give the instruction that follows Note 3.

33. The majority opinion notes:

> Given the defense theory of the case at trial, the *only* issue for the members was whether the appellant understood the order's terms, and the appellant sought and received the pertinent jury instruction on that issue. There simply was no factual dispute for the members regarding the order's lawfulness, because the defense picked the ground for battle elsewhere—the order's source.

Hill, 46 M.J. at 571.

34. 47 M.J. 17 (1997).

35. *Id.* at 18.

Defense counsel requested the following instruction:

> To resist apprehension, a person must actively resist the restraint attempted to be imposed by the person apprehending. This resistance may be accomplished by assaulting or striking the person attempting to apprehend. The government has alleged that the accused resisted apprehension from SSgt Spanier by fleeing. The defense has put on evidence that the accused was trying to flee from SSgt Spanier. If you believe that the accused was only trying to flee from SSgt Spanier you may not convict him of the offense of Charge II, Resisting Apprehension.[37]

The military judge only gave the first two sentences of the requested instruction. However, the military judge allowed the defense to argue that the accused was only running away and that just running away was not sufficient to constitute active resistance to attempted apprehension. The military judge instructed the members that aggravated assault was a lesser included offense of the charged resisting apprehension.[38] The members found the accused guilty of resisting apprehension.

On appeal, the defense argued that the military judge erred when he refused to instruct that "mere flight does not constitute the active resistance required to establish the offense of resisting apprehension."[39] The government argued that mere flight was not raised by the evidence and that the military judge properly instructed the members concerning the resistance required for the offense.

The CAAF began their analysis with a historical perspective of the mere flight "defense." The court noted that it first recognized the mere flight defense in *United States v. Harris*,[40] when the court held that an accused who merely flees from apprehension without striking or assaulting the apprehending official has not "resisted" apprehension.[41] Likewise, in *United States v. Burgess*,[42] the court held that an accused who ignores a law enforcement official's announcement that "you're under arrest" and drives away has not "resisted" apprehension.

The court used a two-pronged analysis. First, was this requested instruction a Rule for Courts-Martial (R.C.M.) 916[43] special defense that must have been included? Second, was it a proper denial of a requested instruction under the criteria of *United States v. Damatta-Olivera*?[44] Specifically, the *Damatta-Olivera* criteria are: (1) Was the requested instruction correct?; (2) Was it substantially covered in the main charge?; and (3) Was it on such a vital point that the failure to give it deprived the accused of a defense or seriously impaired an effective presentation?[45]

Recognizing that military judges are required to instruct on any special defense in issue, the CAAF noted that "mere flight" is not a special defense listed in R.C.M. 916 and does not negate an element of the offense.[46] "Mere flight" is simply "conduct

36. *Id.*

37. *Id.*

38. *Id.* There was no defense objection to this instruction, and it was not raised as error on appeal. While holding that the military judge properly instructed the members that an assault was required for "resistance," the CAAF somehow supports its reasoning by noting that the military judge "told the members that aggravated assault was a lesser-included offense." *Id.* at 19. Assault and assault consummated by a battery under Article 128 are possible lesser included offenses of resisting apprehension. *See* MCM, *supra* note 6, pt. IV, ¶ 19(d). What is less clear is whether aggravated assault can be a lesser included offense, because the maximum punishment for aggravated assault exceeds that for resisting apprehension. *Compare id.* ¶ 19e(1) (stating that the maximum punishment for resisting apprehension is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year) *with id.* ¶ 54e(8)(b) (stating that the maximum punishment for aggravated assault with a means or force likely to produce death or grievous bodily harm is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years). For aggravated assault to be a lesser included offense, the maximum punishment for the aggravated assault would be limited to the maximum punishment for resisting apprehension. *See id.* R.C.M. 603.

39. *Poole*, 47 M.J. at 18.

40. 29 M.J. 169 (C.M.A. 1989).

41. *Poole*, 47 M.J. at 18 (citing *Harris*, 29 M.J. at 172-73). After *Harris*, Congress amended Article 95 of the Uniform Code of Military Justice to criminalize "flight" from apprehension. Under the amendment, there is no requirement for active resistance, such as assaulting or striking a person who is lawfully authorized to apprehend. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1112(a), 110 Stat. 461 (1996) (codified at 10 U.S.C.A. § 895 (West 1998)).

42. 32 M.J. 446 (C.M.A. 1991).

43. *See* MCM, *supra* note 6, R.C.M. 916 (listing special defenses, which are those where the accused does not deny that he committed the crime but denies criminal responsibility).

44. 37 M.J. 474 (C.M.A. 1993).

45. *Id.* at 478, *quoting* United States v. Winborn, 34 C.M.R. 57, 62 (C.M.A. 1963).

that falls short of active resistance."[47] Because it is not a special defense, the court held that the accused was not entitled to the instruction as a special defense under R.C.M. 920(e).[48]

Applying the *Damatta-Olivera* criteria, the court held that the military judge did not err when he gave only the first two sentences of the instruction proposed by the defense.[49] First, the requested instruction was not correct. The requested instruction misstated the issue by representing that the government's theory concerning "resistance" was the accused's fleeing when, in fact, the government's theory was that the accused resisted apprehension when he attempted to run over SSgt Spanier with his car. Second, the court held that the military judge "substantially covered in the main charge"[50] the correct portions of the requested instruction. The military judge correctly instructed the members that the accused's resistance "must rise to the level of an assault to constitute active resistance."[51] The court noted that even the accused admitted that his action threw SSgt Spanier from the hood of the car, "a level of resistance well beyond 'mere flight.'"[52] Third, the military judge's ruling did not deprive the accused of a defense or impair the defense's presentation of evidence. He allowed the defense to present evidence and to argue to the factfinders that the accused was merely fleeing.

Poole is helpful to practitioners because it reminds counsel of the distinction between resisting and fleeing apprehension. The 1998 amendments to the *Manual for Courts-Martial* align the *Manual for Courts-Martial's* Part IV, paragraph 95, with the 1996 amendment to UCMJ Article 95, which created the offense of fleeing apprehension. Additionally, the case is helpful in that it reminds counsel of the framework and analysis that they should apply when requesting proposed instructions—the *Damatta-Olivera* criteria.

Maltreatment

In *United States v. Goddard*,[53] the Navy-Marine Corps Court of Criminal Appeals held that the appellant's consensual sexual relationship with a subordinate could constitute maltreatment.[54] The court held that the victim's pain or suffering is determined using an objective standard. The fact that a particular victim did not feel maltreated or consented to the activity is irrelevant.[55] On this rule of law, the Navy court is at odds with the Army and Air Force appellate courts, which have held that consensual sex with a subordinate does not amount to maltreatment.[56]

The Navy-Marine Corps court looked at the historical development of the maltreatment offense and noted that, early on, it had nothing to do with relationships between members of the opposite sex.[57] The crux of the issue has always been whether a person in authority can induce a person who is subject to his orders to commit an illegal act.[58] The Navy-Marine Corps court criticized the encroachment of a subjective element into maltreatment, stating that such a change was due in part to an expanded discussion of maltreatment and sexual harassment in the *Manual for Courts-Martial*.[59] As the Navy-Marine Corps court views the issue, the offense of maltreatment exists to protect the sanctity of the senior-subordinate relationship. The court concluded that the appellant's "adulterous indecent sexual

46. United States v. Poole, 47 M.J. 17, 19 (1997). *See* MCM, *supra* note 6, pt. IV, ¶ 19b(1).

47. *Poole*, 47 M.J. at 19.

48. *Id.* at 18. Rule for Courts-Martial 920 provides that "[i]nstructions on findings shall include . . . a description of any special defense under R.C.M. 916 in issue." MCM, *supra* note 6, R.C.M. 920(e)(3).

49. *Poole*, 47 M.J. at 18.

50. *Id.*

51. *Id.*

52. *Id.*

53. 47 M.J. 581 (N.M. Ct. Crim. App. 1997).

54. *Id*. at 584-85. The accused was convicted of maltreatment of one private and fraternization with another private, though he had consensual sex with both. *Id.* at 583.

55. *Id.* at 584 (citing United States v. Palmiter, 20 M.J. 90, 96 (C.M.A. 1985)).

56. *See, e.g.*, United States v. Johnson, 45 M.J. 543 (Army Ct. Crim. App. 1997); United States v. Harris, 41 M.J. 890 (Army Ct. Crim. App. 1995); United States v. Garcia, 43 M.J. 686 (A.F. Ct. Crim. App. 1995), *rev'd on other grounds*, 44 M.J. 496 (1996). *See also* BENCHBOOK, *supra* note 1, ¶ 3-17-1.

57. *Goddard*, 47 M.J. at 583-84.

58. *Id.* at 585.

59. The court's cynicism towards the "cause de jure" is obvious, and the court made it clear that not all maltreatment is of the sexual-harassment variety. *Id*.

activity with a subordinate, on duty, at least partially in uniform, on the floor of his unit's administrative office" was maltreatment and had nothing to do with lawful orders or official business.[60]

With the service courts heading in different directions regarding maltreatment of subordinates, an offense that frequently gives rise to highly visible cases, perhaps the CAAF will establish one rule of law. Differences among the services in the area of fraternization can be more easily understood with Article 134 fraternization's "custom of the *service*" element, but the differing views on maltreatment, an enumerated Article 93 offense, are more problematic.

The Justification Defense

In a case that received substantial media attention, the Army Court of Criminal Appeals recently issued an opinion involving instructions on defenses. *United States v. Rockwood*[61] involved an Army captain who was deployed to Haiti with the 10th Mountain Division in support of Operation Uphold Democracy. The accused was court-martialed for offenses relating to his investigation of, and attempt to publicize, possible human rights violations at the National Penitentiary. These offenses included failure to repair, leaving his place of duty, disrespect, willful disobedience of a superior commissioned officer, and conduct unbecoming an officer.[62]

At trial, the defense presented evidence that the accused was justified in his actions because he was carrying out the President's intent and because he had a duty under international law to investigate human rights violations.[63] The defense requested instructions on both the duress and justification defenses.[64] The judge refused to instruct on justification but instructed on duress.

In reviewing the judge's instructions, the Army court noted that, to avail oneself of the justification defense, the person must have performed some legal duty. The court then explored whether Captain Rockwood had a duty in this case. The court observed that the existence of a duty is a question of law to be determined by the judge.[65] Discussing whether the accused had a duty based on the President's comments in a 1994 speech to the nation, the court concluded that a soldier does not derive his duties from public comments, but from the lawful orders of his superiors.[66] The court also rejected the accused's claim that he had a duty under international law to remedy the conditions at the prison.[67] The court concluded that any duty the accused had in this regard "was discharged when he reported the prison conditions to his superiors."[68]

The court found that the judge properly refused to instruct on justification.[69] Further, although he was not required to do so, the judge permitted the defense to present evidence on justification, which contributed to the duress defense.[70] *Rockwood* illustrates that, although a judge may properly refuse a certain instruction, he will often be more liberal concerning the defense presentation of evidence.

Evidence

In *United States v. Knox*,[71] a child sexual abuse prosecution, a private practice social worker who testified for the government offered the following opinion concerning drawings made by the alleged child victims: "I consider them an expression of what the child is telling me. *I believe the child*."[72] The defense immediately objected to this inadmissible opinion and

60. *Id.* at 586.

61. 48 M.J. 501 (Army Ct. Crim. App. 1998).

62. UCMJ arts. 86, 89, 90, 133 (1994).

63. *Rockwood*, 48 M.J. at 504.

64. *See* MCM, *supra* note 6, R.C.M. 916(h) (providing that reasonable apprehension that the accused or another innocent person would be immediately killed or suffer serious injury is a defense to any offense except killing); *id*. R.C.M. 916(c) (death, injury, or other act done in proper performance of legal duty is justified).

65. *Rockwood*, 48 M.J. at 505.

66. *Id.* at 505-07. The court explained that televised presidential speeches are designed to explain to the American people why American soldiers are being sent to a dangerous area and to garner support for the President's action. *Id.*

67. The appellant argued that the United States was an "occupying power" and, therefore, had responsibility for the National Penitentiary. *Id*. at 507.

68. *Id.* at 509.

69. *Id.*

70. *Id.*

71. 46 M.J. 688 (N.M. Ct. Crim. App. 1997).

72. *Id.* at 691 (emphasis in original).

requested a mistrial. Denying the mistrial, the military judge instead provided the panel with a cautionary instruction that the members should disregard the social worker's opinion regarding the believability of the child. All of the members indicated that they understood the instruction and would follow it.[73]

On appeal, noting that the case was "a fully contested battle of credibility" with little or no corroborating evidence, the Navy-Marine Corps Court of Criminal Appeals held that the cautionary instruction could not overcome the prejudicial effect of this impermissible opinion.[74] The court held that it "will not indulge in '[t]he naive assumption that all prejudicial effects can be overcome by instructions to the jury . . . .'"[75]

Knox reminds counsel that they must prepare their witnesses carefully, especially "quasi-science"[76] experts. Witnesses may not offer opinions concerning the believability of witnesses, especially victims in child abuse and one-on-one credibility cases. *Knox* also warns practitioners that if counsel impermissibly wander down the vouching road, a cautionary instruction may not save the day. In *Knox*, four words—"I believe the child"—caused a mistrial.[77]

Procedural

Reasonable Doubt

Two cases decided last year by the Navy-Marine Corps Court of Criminal Appeals involved an instruction that is given in all contested cases: the reasonable doubt instruction. In the first case, *United States v. Jones*,[78] the military judge used language directly from the *Navy-Marine Corps Judiciary's Trial Guide*.[79] Concluding on reasonable doubt, he instructed the members that "[i]f . . . [they] think there is a real possibility the accused is not guilty," they must find him not guilty.[80] The appellant argued that the phrase "real possibility" improperly shifted the burden of proof to the appellant.[81] The appellant reasoned that such language implied that unless the appellant raised "a real possibility" of innocence, he should be convicted.

Before rejecting the appellant's argument, the Navy-Marine Corps court noted that although the government must prove the accused's guilt in a criminal trial beyond a reasonable doubt, the United States Supreme Court has not decreed any particular language for the instruction; rather, the instruction as a whole must correctly explain reasonable doubt.[82] Turning to the language used in this case, the Navy-Marine Corps court observed that the language came directly from the *Navy-Marine Corps Judiciary's Trial Guide*. The court further observed that the Court of Military Appeals recommended the use of such language in 1994 and that the language was drafted by the Federal Judicial Center.[83] The Navy-Marine Corps court cited other portions of the record where the judge also instructed on reasonable doubt and the burden of proof.[84] The court concluded that the instructions were proper and that the members understood the government's obligation to prove the accused guilty beyond a reasonable doubt.[85]

In the second case, *United States v. Wright*,[86] the appellant argued that the judge's use of the term "until" instead of "unless" in the phrase the "accused is presumed to be innocent 'until' his guilt is established beyond a reasonable doubt" was error. The Navy-Marine Corps court again turned to the *Navy-Marine Corps Judiciary's Trial Guide* and noted that the reasonable doubt instruction given substantially matched the version in the *Trial Guide*. The court then pointed out that even the statute which describes how the members should be instructed uses the word "until."[87]

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73. *Id.*

74. *Id.*

75. *Id.* (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

76. *Id.* at 696 (Wynne, J., concurring in result).

77. *Id.* at 691.

78. 46 M.J. 815 (N.M. Ct. Crim. App. 1997).

79. *Id.* at 818, *citing* U.S. DEP'T OF NAVY, NAVY-MARINE CORPS JUDICIARY'S TRIAL GUIDE 76 (1994).

80. *Jones*, 46 M.J. at 818. The full instruction was:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find the accused guilty. If, on the other hand, you think there is a real possibility the accused is not guilty, you must give the accused the benefit of the doubt and find the accused not guilty.

Id. at 817.

81. *Id.*

82. *Id.*, *quoting* Holland v. United States, 348 U.S. 121, 140 (1954).

The court once again relied on Supreme Court precedent to reject the appellant's argument. The court quoted *Coffin v. United States*,[88] in which the Supreme Court used both terms interchangeably.[89] The court also rejected the appellant's contention that the dictionary defines the terms differently. Acknowledging that the terms may have different meanings, the court nonetheless held that such distinctions would have been insignificant to the members in the context of all of the judge's instructions.[90] As it did in *Jones*,[91] the *Wright* court concluded by noting that the Supreme Court has never dictated what particular words must be used.[92] The only requirement is that a jury must be told that the defendant's guilt must be proven beyond a reasonable doubt before the jury can find him guilty.

Jury Nullification

In *United States v. Hardy*,[93] the CAAF addressed the interesting issue of jury nullification.[94] While recognizing that a court-martial panel, like a civilian jury, has the power to disregard the law and to acquit an accused, the court rejected the notion that the panel must be instructed on this power. The issue arose in a sexual assault case when the panel president, after several hours of deliberations, asked the judge whether the panel had to find the accused guilty if they found all of the elements present.[95] The judge answered the question by telling the members to consider all of his previous instructions. He then dis-

83. *Jones*, 46 M.J. at 818, *citing* United States v. Meeks, 41 M.J. 150, 157-58 n.2 (C.M.A. 1994). The judge's reasonable doubt instruction in *Jones* is nearly identical to the instruction that the Court of Military Appeals recommended for all of the services to use. The Federal Judicial Center is an agency within the federal court system that conducts research and continuing education. *About the Federal Judicial Center* (visited Mar. 10, 1998) <http://www.fjc.gov/AboutFJC.html>. *But see* BENCHBOOK, *supra* note 1, at 37, 52-53. The *Military Judges' Benchbook* provides:

> By reasonable doubt is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Id. at 52-53.

84. *Jones*, 46 M.J. at 818.

85. *Id.*

86. 47 M.J. 555 (N.M. Ct. Crim. App. 1997).

87. *Id*. at 559. The statute states that "the accused must be presumed to be innocent *until* his guilt is established beyond a reasonable doubt." 10 U.S.C. § 851(c)(1) (1994) (emphasis added). *See* BENCHBOOK, *supra* note 1, at 52 (stating that the "accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt").

88. 156 U.S. 432 (1895).

89. *Wright*, 47 M.J. at 559, *quoting Coffin*, 156 U.S. at 459. After using the term "unless he is proven guilty," the Supreme Court quickly pointed out that "presumption of innocence is an instrument of proof created by the law in favor of an accused, whereby his innocence is established until sufficient evidence is introduced." *Coffin*, 156 U.S. at 459.

90. *Wright*, 47 M.J. at 559.

91. *See supra* note 82 and accompanying text.

92. *Wright*, 47 M.J. at 560. The court also applied the doctrine of waiver because the appellant did not object when the instruction was given. *Id.*

93. 46 M.J. 67 (1997).

94. The court noted that it had not directly confronted this issue before. The court cited several other cases which addressed related issues. *See* United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1988) (holding that the judge could properly prevent defense counsel from questioning potential members about their opinions on the mandatory minimum life sentence for the offense of premeditated murder); United States v. Schroeder, 27 M.J. 87, 90 n.1 (C.M.A. 1988) (holding that jury nullification is not permitted in sentencing when punishment calls for a mandatory minimum); United States v. Jefferson, 22 M.J. 315, 329 (C.M.A. 1986) (prohibiting counsel from mentioning mandatory minimum in closing argument on findings); United States v. Mead, 16 M.J. 270, 275 (C.M.A. 1983) (questioning whether members need to be instructed on domestic law, including military regulations, because although panels and juries have the power to disregard instructions, they need not be informed of this power).

95. The panel had been instructed on the charged offenses (rape, forcible oral sodomy, and forcible anal sodomy), as well as the issues of consent, intoxication of the victim and the accused, and mistake of fact as to consent. *Hardy*, 46 M.J. at 68.

cussed an example in which the government failed to disprove an affirmative defense.[96] The judge then conducted an out-of-court session[97] at which the defense counsel requested that the judge instruct the panel on jury nullification.[98] The judge refused.

On appeal, the CAAF first noted that the power of nullification could exist either because the panel has the right to disregard the law or as a collateral consequence of other policies, such as the requirement for a general verdict, the absence of a directed guilty verdict, the ban on double jeopardy, and rules that protect the deliberative process of a court-martial.[99] The CAAF then conducted a thorough review of the state of the law in this area in the federal courts and examined the arguments for and against jury nullification.

The CAAF discussed in some detail cases from the U.S. Courts of Appeals for the Fourth and Sixth Circuits in which the courts rejected the idea that juries should be instructed on the power of jury nullification at the request of the defense.[100] The court then mentioned that the First, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have also rejected the idea.[101] The court noted that only two states recognize or encourage the power of jury nullification.[102]

One of the strongest arguments for jury nullification is that it provides a check against overzealous prosecutors.[103] It also allows citizens to limit lawmakers' discretion. In other words, it provides a way for the public in a democracy to register discontent with unpopular laws. The CAAF quickly dismissed these arguments, pointing out that existing rules already provide a means for limiting overzealous prosecutions. The theme throughout the opinion is that existing protective measures—such as the requirement for a general verdict, the prohibition against directing a guilty verdict, the protection against double jeopardy, and rules that protect the deliberative process of a court martial—are adequate.[104]

The court also pointed out the dangers of jury nullification. A jury which disregards the law could just as easily convict rather than acquit and could render a decision based on fear, prejudice, or mistake, in disregard of the judge's instructions. Dismissing the contention of some who insist that jury nullification exists to excuse crimes that involve "deeply held moral view[s]," the CAAF pointed out that it could also be exercised to excuse other conduct, such as sexual harassment, civil rights violations, and tax fraud.[105]

The court next turned to a comparison of the military and civilian legal systems. The court began its analysis by pointing out the similarities between the two systems.[106] In both systems, the judge and panel members or jurors have distinct roles. The judge decides interlocutory questions and questions of law and instructs the members or jurors. The members or jurors

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96. *Id*. The judge told the members that, even if the government had proven every element of an offense beyond a reasonable doubt but failed to carry its burden on mistake of fact, the government had not proven its case. In such a situation, the panel should find the accused not guilty. *Id.* at 75.

97. UCMJ art. 39(a) (1994).

98. The defense counsel did not object to the judge's instruction but argued that it did not go far enough in answering the panel's question. The defense argued that the judge should tell the panel that, even if all of the elements of an offense have been proven and the defenses have been rebutted, the panel can still find the accused not guilty because it is also reviewing the decision to take the case to trial.

The trial counsel also requested additional instructions. Trial counsel wanted the judge to tell the members that they *must* convict the accused if all of the elements had been proven and the defenses had been rebutted. The judge refused this request, responding that he had already instructed the panel accordingly. As the CAAF pointed out, the judge had not used those precise words, nor should he, since the correct instruction is that the panel *should* find the accused guilty in that situation. *Hardy*, 46 M.J. at 69 n.5. *See also* BENCHBOOK, *supra* note 1, at 53.

99. *Hardy*, 46 M.J. at 70.

100. *Id*. at 70-71. *See* United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). In *Krzyske*, a tax evasion case, the trial judge refused a defense request to instruct on jury nullification but allowed the defense to use the term in argument. When the jury interrupted their deliberations to ask about the term, the judge instructed them that there was "no such thing as valid jury nullification." *Krzyske*, 836 F.2d at 1020. The appellate court found no error and distinguished between the jury's right to reach a verdict and the court's duty to instruct on the correct law. *Id*. at 1021. In *Moylan*, the appellate court held that the power of nullification is a result of the requirement for a general verdict and the inability to inquire as to the reasons for the jury's findings. *Moylan*, 417 F.2d at 1006. The court rejected the contention that jurors must be advised of this power. *Id*.

101. *Hardy*, 46 M.J. at 71-72. *See* United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

102. *Hardy*, 46 M.J. at 72 (quoting Robert E. Korrock & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 139 (1993) (citing Maryland and Indiana as the only two states that recognize or encourage jury nullification)).

103. *Hardy*, 46 M.J. at 72.

104. *Id.*

105. *Id.*

determine guilt or innocence and a sentence, following the instructions of the judge. Jury deliberations, like those of a panel, are privileged to a great extent. In both systems, the judge cannot direct a guilty verdict, and the members or jurors must return with a general verdict. Finally, double jeopardy rules protect the military accused and the civilian defendant from a retrial once he has been acquitted. All of these protections allow a jury or panel to disregard the law. The court concluded, however, that the ability to disregard the law does not mean that the jury must be told of this power.[107]

The CAAF compared the military and civilian legal systems, stating that even if civilian juries had the power of jury nullification, such a right would be inappropriate for the military justice system.[108] The court pointed out that, unlike jurors, panel members are personally selected by the conveying authority. Allowing panel members to disregard the law would allow them to ignore unpopular laws, to violate the principle of civilian control over the military, to countermand discipline, and to foster a disrespect for the law.[109] For military members who are trained to uphold the law and to follow orders, an instruction on jury nullification would be heretical.

The court concluded that the ability of a court-martial panel to disregard the judge's instructions stems from the protective measures that limit overzealous prosecutions. There is no independent "right" to jury nullification, and the judge is not required to instruct on it. The court found no error in the trial judge's refusal of the defense request for a jury nullification instruction.[110]

A related issue in the case was the appellant's contention that the judge answered the panel's question incorrectly when part of his response included language that if the government failed to prove its case, the members "should vote not guilty."[111] The appellant contended that the proper language is "must" in place of "should." The court refused to isolate this one sentence and looked instead at the judge's instructions as a whole. Taken together, these instructions adequately covered the principles of reasonable doubt, the presumption of innocence, and the burden of proof.[112] In addition, the defense did not object at trial, suggesting that, in the overall context of the judge's instructions, there was nothing misleading or vague about them.[113]

Capital Courts-Martial

Capital courts-martial are different from other types of courts-martial.[114] One example of the difference is the requirement to mesh courts-martial rules used on a routine basis with those peculiar to death-penalty litigation. An example of what can go wrong with this integration is *United States v. Thomas*.[115]

In *Thomas*, the members found the accused guilty of the premeditated murder of his spouse. During sentencing instructions, the military judge instructed the members that they should vote as follows: first, they would vote on aggravating factors; second, if they unanimously found an aggravating factor, they would vote on death; and third, if they did not unanimously vote for death, they would propose lesser punishments, to include the mandatory confinement for life.[116]

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106. *Id*. at 72-73.

107. *Id.* at 74.

108. *Id.*

109. *Id.*

110. *Id.* at 75.

111. The judge said:

> You have to determine in your own mind whether you believe that the government has proved [sic] it's [sic] case, that the accused is guilty beyond a reasonable doubt. If you believe that the government has proven each and every element of an offense beyond a reasonable doubt, but, as an example, on mistake of fact, the government has failed to carry its burden on mistake of fact, then the government has failed to prove its case, and you should find—you should vote not guilty. But you have to look at the elements and apply the defenses to the elements and determine whether the accused is guilty or not guilty to a particular specification and charge, and it's a combination of elements and the defenses that apply to those particular specifications.

Id.

112. *Id.*

113. *Id.* at 75-76.

114. For example, *United States v. Curtis* involves six separate appellate decisions: 28 M.J. 1074 (N.M.C.M.R. 1989); 32 M.J. 252 (C.M.A. 1991); 33 M.J. 101 (C.M.A. 1991); 38 M.J. 530 (N.M.C.M.R. 1993); 44 M.J. 106 (1996); and 46 M.J. 129 (1997). The *Curtis* opinions total 159 pages. The opinion in *United States v. Loving* is 123 pages. 41 M.J. 213 (1994).

115. 46 M.J. 311 (1997).

On appeal, the CAAF held that these procedural sentencing instructions were plain error. Reviewing the rules that apply at all courts-martial, the court noted that R.C.M. 1006(c) provides that any member may propose a sentence and that R.C.M. 1006(d)(3)(A) states that "All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing as necessary, with the next least severe . . . ." Noting that these rules apply to capital as well as non-capital courts-martial, the CAAF held that the members, who sentenced the accused to death, were never afforded an opportunity to propose lesser sentences and to vote on those lesser sentences. As a result, R.C.M. 1006 was violated, creating an intolerable risk that this ultimate sanction was erroneously imposed.[117]

The section on capital cases in the *Military Judges' Benchbook*[118] is being rewritten. Counsel who are detailed to a capital case should obtain a copy of the draft instructions from the detailed military judge. All participants in a capital case need to remember that these cases require special attention, because unfamiliar rules are integrated into the more routine instructions.

In the capital case *United States v. Simoy*,[119] the military judge incorrectly instructed the members concerning procedural sentencing instructions. The military judge instructed the members to begin voting first on proposed sentences, which included death if they unanimously found that an aggravating factor existed beyond a reasonable doubt.[120] The defense did not object. The Air Force Court of Criminal Appeals held that the instruction was error, but not plain error.[121] Because it was decided before *Thomas*, *Simoy* has a doubtful future.

Also in *Simoy*, the military judge instructed the panel members that they could not impose death unless they unanimously found beyond a reasonable doubt that at least one aggravating *factor* existed.[122] The military judge then instructed the members that, even if they found that one aggravating *factor* existed, they could not impose death unless they found that any and all extenuating or mitigating circumstances were substantially outweighed by any aggravating *circumstances*, including the aggravating *factors* that they had earlier considered.[123] On appeal, the accused argued that the military judge improperly mixed aggravating factors and aggravating circumstances. The accused argued that this mixing amounted to a constitutionally prohibited "double counting" of aggravators.[124]

The Air Force court held that the military judge had instructed the members properly. The court held that R.C.M. 1004(c) identifies "the class of murders eligible for the death penalty in courts-martial."[125] The members must unanimously find that the accused fits within that class of persons who are eligible for death by finding at least one aggravating factor. Once the members determine that the accused fits within the

116. The military judge instructed:

> In regard to the sentence that would include life imprisonment, again, should you not unanimously agree on the aggravating circumstances and should you not agree on a unanimous verdict of death, then the members may propose types of punishments as I have delineated, and you will vote on those types of punishments.

Id. at 314.

117. *Id.* at 316.

118. BENCHBOOK, *supra* note 1, at 134-39.

119. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

120. *Id*. at 614.

121. *Id*.

122. The military judge instructed the members that there were two possible aggravating factors: that the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered (R.C.M. 1004(c)(4)); and that only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the robbery was major and who manifested a reckless indifference for human life (R.C.M. 1004(c)(8)). See MCM, *supra* note 6, R.C.M. 1004(c)(4), 1004(c)(8).

123. The military judge instructed the members that, as for specific aggravating circumstances, they could consider:

> (1) the violent nature of the crimes; that is, the type of weapons used, such as the pipe on Sergeant LeVay, the knife on Sergeant Marquardt, a second pipe, and an assault rifle; (2) that Sergeant LeVay was beaten repeatedly after being knocked unconscious; (3) that Sergeant Marquardt continued to suffer physical injuries requiring medical treatment and cosmetic surgery, and suffered enduring psychological effects; (4) that Ms. Armour also suffered psychological effects; and (5) the LeVay family's grief.

Simoy, 46 M.J. at 613.

124. *Id*. *See* United States v. Curtis, 33 M.J. 101, 108 (C.M.A. 1991).

125. *Simoy*, 46 M.J. at 613. *See* MCM, *supra* note 6, R.C.M. 1004(c) (listing the aggravating factors that can warrant the death penalty).

class eligible for the death penalty, they may also constitutionally consider all aggravating *circumstances* of the case under R.C.M. 1001(b)(4)[126] when weighing the aggravation against mitigation and extenuation.

The Air Force court's ruling is consistent with R.C.M. 1004(b)(4)(C)[127] and the current version of the *Military Judges' Benchbook*. Additionally, it is logical that the members be allowed to consider all of the circumstances surrounding the offenses when determining if death should be adjudged. Nonetheless, there is a lesson to be learned—capital cases are different.

Sentencing

During the past year, there were several important non-capital cases that focused on sentencing instructions. In *United States v. Greaves*,[128] the CAAF revisited the subject of retirement benefits for an accused—in this case, a service member who was close to retirement eligibility. Like many of the instructions cases this year, the issue arose when the members interrupted their sentencing deliberations to ask questions. The members asked whether a bad-conduct discharge would result in loss of retirement benefits for the accused, who had nineteen years and ten months of active duty at the time of his trial.[129] The judge appropriately convened an Article 39(a) session to solicit counsel's views on a proper response. Defense counsel suggested that the judge simply answer in the affirmative. The judge disagreed, contending that such a response would be tantamount to telling the members not to consider a bad-conduct discharge. Trial counsel objected to anything other than the judge merely rereading the bad-conduct discharge instruction.[130]

After the parties discussed case law in the area,[131] the defense requested that the judge at least point out to the members that the accused's retirement benefits had not yet vested. The judge did not answer the members' questions directly but did tell them that the accused's retirement benefits had not vested. He also reread the punitive discharge instruction.[132]

In finding that the judge committed prejudicial error in the case, the CAAF first noted that, to the extent that the instructions suggested that a punitive discharge would not affect entitlement to retirement benefits, they were legally erroneous.[133] Further, the instructions were incomplete and non-responsive to the questions. Writing for the majority, Judge Sullivan distinguished *United States v. Henderson*,[134] where the judge refused to allow evidence on the potential loss of retirement benefits and declined to instruct the panel as to the effect a punitive discharge would have on retirement benefits. The CAAF pointed out that, in *Henderson*, the accused was still three years and at least one reenlistment away from retirement, whereas in the instant case, the accused was only nine weeks away from retirement and did not have to reenlist to reach retirement eligibility. The CAAF also pointed out that the defense in *Henderson* did not object to the proposed instruction.[135]

126. MCM, *supra* note 6, R.C.M. 1001(b)(4). Matters that can be presented by the prosecution during presentencing can include aggravating circumstances directly relating to or resulting from the offenses of which the accused has been convicted. *Id*.

127. *Id.* R.C.M. 1004(b)(4)(C) (providing that death may not be adjudged unless "[a]ll members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule").

128. 46 M.J. 133 (1997).

129. The precise questions asked were: "First, does confinement, plus a BCD, equal loss of retirement benefits?" and "Second, does hard labor without confinement, plus a BCD, equal loss of retirement benefits?" *Id.* at 134.

130. The civilian defense counsel first expressed surprise that such an experienced panel would ask such questions. He proposed that the judge answer both questions with a simple yes. He opined that trial counsel's solution would not answer the members' questions. *Id.* at 135. The defense counsel then suggested that counsel be allowed to reopen their sentencing arguments, and the judge dismissed that approach outright. *Id.*

131. The parties identified the cases on point, but interpreted them differently. *Id. See* United States v. Henderson, 29 M.J. 221 (C.M.A. 1991); United States v. Griffin, 25 M.J. 423 (C.M.A. 1988). Trial counsel cited *Henderson* for the proposition that retirement benefits are collateral and should not be considered during sentencing. Trial counsel read *Griffin* as giving the judge discretion in instructing the panel concerning the impact of a punitive discharge on retirement. Defense counsel distinguished both cases on the grounds that the defense counsel did not object to the instructions given. The judge understood both cases to address the issue of when a military member's retirement vests. The judge concluded that it does so at twenty years. *Greaves*, 46 M.J. at 136. *See* United States v. Becker, 46 M.J. 141 (1997) (holding that the judge erred in excluding evidence of loss of retirement benefits for the accused, who was four months short of 20 years and did not have to reenlist before retirement).

132. After he finished this instruction, the judge asked the members whether they had any other questions and commented: "Okay. 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." *Greaves*, 46 M.J. at 137.

133. *Id.* The court observed that a punitive discharge terminates entitlement to retirement benefits. *Id.* (citing United States v. Sumrall, 45 M.J. 207, 208-09 (1996); Hooper v. United States, 326 F.2d 982, 988 (Ct. Cl. 1964)).

134. 29 M.J. 221 (C.M.A. 1989).

While recognizing that a judge is not required by statute to instruct on sentencing, Judge Sullivan nevertheless observed that both the *Manual for Courts-Martial* and the CAAF have mandated appropriate sentencing instructions.[136] The court concluded that the judge abused his discretion in failing to tailor an instruction concerning the collateral consequences of a punitive discharge in a case where the accused was close to retirement and the members posed the question. The court set aside the sentence and returned the case to the Judge Advocate General of the Air Force.[137]

In response to this issue, the *Military Judges' Benchbook* has been amended to include the following discretionary language that can be given at the conclusion of the punitive discharge instruction: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits."[138] The facts determine whether or not this instruction is appropriate.[139]

United States v. Hall[140] is another case that involved a question from the members during sentencing deliberations and the judge's instruction in response to that question. The accused, an Air Force captain who was married to a retired military member, was convicted of wrongful use of drugs.[141] During deliberations on the sentence, the members asked what benefits the accused would receive as a dependent if she was dismissed from the Air Force. The judge told the members that a dismissal would have no effect on her entitlements as a dependent.[142] He then asked whether counsel had any objections to that instruction. They did not.

The appellant contended that the judge misapplied the court's directions in *United States v. Griffin*[143] by failing to secure the defense's agreement before answering the question about collateral consequences.[144] The *Hall* court, in an opinion authored by Chief Judge Cox, began by observing that courts-martial should avoid discussing the collateral consequences of a court-martial conviction. However, the court stated that "it is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral."[145] The court held that the accused waived any objection by failing to raise it at trial or to request a curative instruction.[146]

In *United States v. Eatmon*,[147] an Air Force judge's instruction that military confinement is corrective rather than punitive was the subject of appellate litigation.[148] Defense counsel objected to the language during the discussion of sentencing instructions in an Article 39(a) session. The defense counsel contended that the instruction was misleading and that it inaccurately represented the true nature of confinement in the military.[149]

The Air Force Court of Criminal Appeals first found that objecting during the Article 39(a) session was sufficient to preserve the issue for appeal and rejected the government's conten-

135. *Greaves*, 46 M.J. at 138.

136. *Id*. (quoting United States v. Rake, 28 C.M.R. 383 (C.M.A.1960) (holding that a judge has an obligation to give sentencing instructions); MCM, *supra* note 6, R.C.M. 1005(a) (providing that a military judge is required to give appropriate sentencing instructions)).

137. *Greaves*, 46 M.J. at 140. The CAAF also recommended that the *Military Judges' Benchbook* instruction on punitive discharges be amended to clarify that a punitive discharge forecloses entitlement to retirement benefits. *Id.* at 139 n.2 (citing *Sumrall*, 45 M.J. 207; United States v. Griffin, 25 M.J. 423 (C.M.A. 1988)).

138. BENCHBOOK, *supra* note 1, at 97-98 (C1, 30 Jan. 1998).

139. *Id*. at 98.

140. 46 M.J. 145 (1997).

141. *Id.* at 146. In her unsworn statement, Captain Hall told the members that she was married to an Air Force retiree and that she would be eligible to retire in four months. She asked the court to punish her and not her family. *Id.*

142. The judge said:

> The response to that is, her conviction by this court or any sentence imposed by this court, including a dismissal, would not affect any benefits she would be entitled to as a dependent of a retired military person. In other words, those might be use of commissary, use of BX, medical benefits, as any other dependent of a retired military person.

Id. at 145.

143. 25 M.J. 423 (C.M.A. 1988).

144. *Hall*, 46 M.J. at 146 (citing *Griffin*, 25 M.J. at 424).

145. *Id.* at 146.

146. *Id*. at 147. In affirming the case, the CAAF also concluded that the appellant failed to show plain error. *Id.*

147. 47 M.J. 534 (A.F. Ct. Crim. App. 1997).

tion that the defense waived the issue by not objecting during the instructions themselves or when the judge asked if there were any objections to the instructions given.[150] Although some may disagree with the court's reasoning that such action would have been "discourteous" or "unprofessional," the court is correct in concluding that such action was not necessary to preserve the issue.

The court then addressed the propriety of the instruction itself. Although the court acknowledged that the instruction was not part of the standard script in the *Military Judges' Benchbook*,[151] the court found it fair to both sides and essentially accurate.[152] The court rejected the contention that such an instruction misled the members into believing that confinement in the military is "like summer camp."[153] The court noted that judges should not be chained to a script.

Conclusion

While the *Military Judges' Benchbook* is an invaluable tool, military justice practitioners should recognize that issues will arise that are not addressed in the *Military Judges' Benchbook*. The law is not fixed in time. It continuously changes. Members, trying their best to do their duty, may ask questions that cannot be answered by simply rereading portions of prepared instructions. Counsel need to know the law and use common sense in proposing answers to those questions. If counsel disagree with proposed instructions, they should object on the record, whether during an Article 39(a) session or, if necessary, after an instruction is given. Counsel share responsibility for instructions with the military judge.

148. During the sentencing phase, the judge instructed the members as follows:

> A sentence to confinement is governed and served under the Department of Defense Corrections Program. Military confinement is corrective rather than punitive. Prisoners perform only those types of productive work which may be required of duty airmen. The confinement and correction program is intended to help individuals [to] solve their problems, [to] correct their behavior, and [to] improve their attitude toward themselves, the military, and society.

Id. at 538.

149. *Id.* The defense counsel requested that the judge instruct the members that military confinement is "designed as punishment." The Air Force court pointed out that the requested language was found in the Air Force manual, which has now been superseded by the *Military Judges' Benchbook.*

150. *Id.*

151. *See* BENCHBOOK, *supra* note 1, at 93-94.

152. *Eatmon*, 47 M.J. at 538. Earlier in the opinion, the court noted that the instruction was largely based on a Department of Defense directive. *Id.* at 538, *citing* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988).

153. *Eatmon*, 47 M.J. at 539. The court pointed out that the members must have certainly understood the seriousness of confinement because they "are neither children nor dullards." *Id*.